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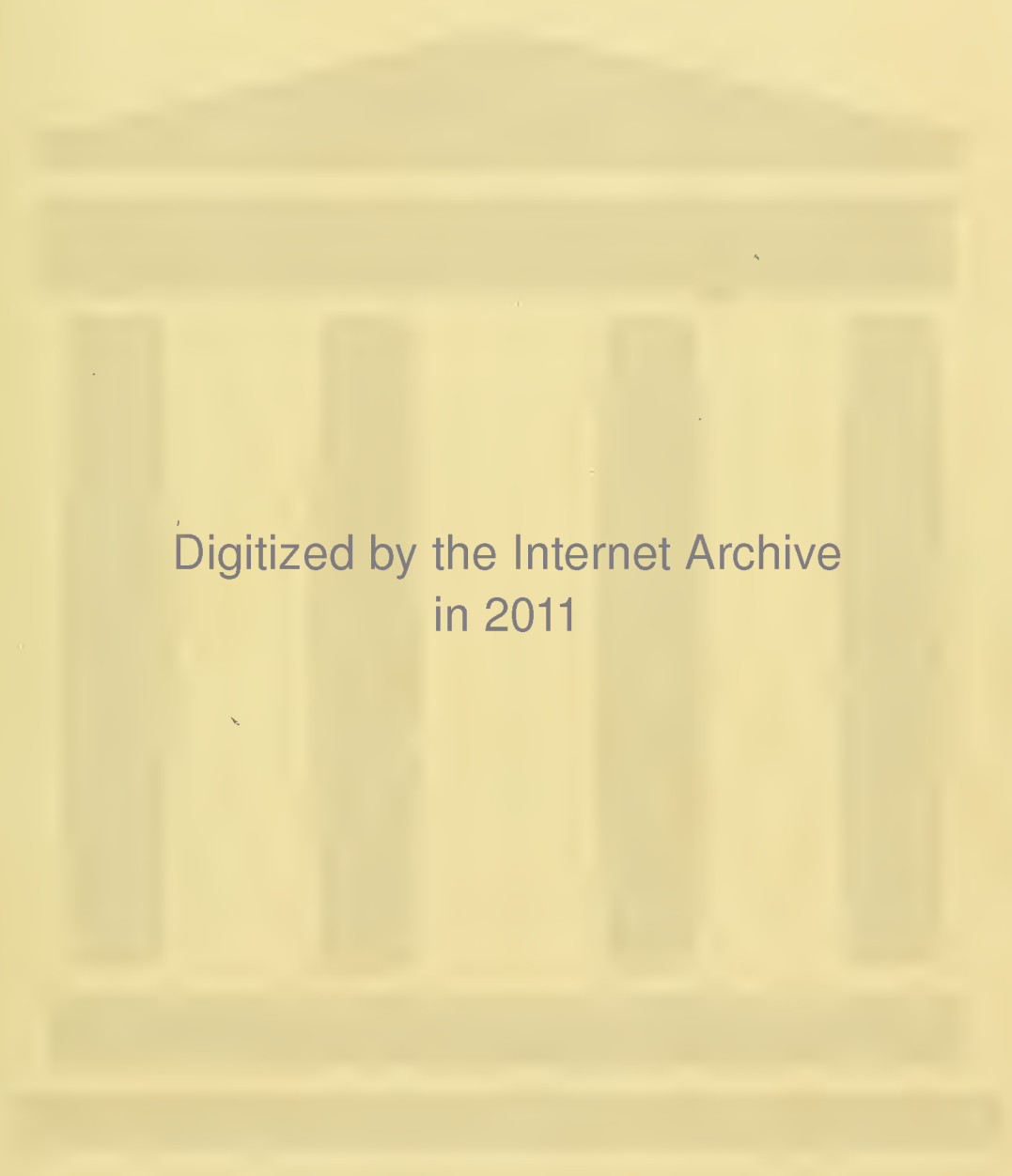
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THE
R I G H T S
O F
W A R
A N D
HUGO GROTIUS,
O N
WAR and PEACE.

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THE
RIGHTS
OF
WAR
AND
PEACE,
IN THREE BOOKS.

Wherein are explained,

The LAW of NATURE and NATIONS,

AND

The Principal POINTS relating to GOVERNMENT.

Written in *L A T I N* by the Learned

H U G O G R O T I U S,

And Translated into *E N G L I S H*.

To which are added,

All the large NOTES of Mr. *J. BARBEYRAC*,

PROFESSOR of LAW at *Groningen*,

And MEMBER of the ROYAL ACADEMY OF SCIENCES at *Berlin*.

L O N D O N:

Printed for W. INNYS and R. MANBY, J. and P. KNAPTON,
D. BROWN, T. OSBORN, and E. WICKSTEED.

MDCCXXXVIII.

ADAMS Pl. 4

T H E

L I F E

O F

H U G O G R O T I U S.

TO look into the Manners of *Antiquity*, and recover the Memory of *preceding* Ages, is an Entertainment of the highest Pleasure and Advantage to the Mind, it establishes very lasting Impressions of *Virtue* in us, *enlarges* the Soul, and moves our Emulation to follow and excel the *leading* Characters before us; when we are tracing the Exploits of some *Worthy* of *Old*, with what *Delight* do we pursue him in every Circumstance of Action, we admire the *Example*, and transmit the *Beauties* of his Life into our own Conduct by *Præctice* and *Imitation*; for the *Mind* of Man is of a *searching* Nature, very *wide* and *extensive* in her Speculations; and as she is *blind* to the Transactions of *Futurity*, so she receives a greater Lustre from the *Reflection* of Instances that are *past*, than from the *Rules* of *Wisdom*, or the *Determination* of the *Schools*: φιλοσοφία ἐκ παραδεισμάτων, *Philosophy* from *Example*, in the Opinion of the *Historian*, advances human Life beyond the Power of *Precept*, or the *Distinctions* of *Morality*, it opens a large Scene for *Observation*, it displays all the *Occurrences* and *Revolutions* of *Providence*, how far *Application* and *Industry* improve the *Abilities* of the Soul, and offer us to the *Notice* of *Mankind*, and the *Wonder* of *Posterity*. *Thucydides.*

This *LIFE* of *GROTIUS* is not writ with a Design to enlarge upon his *Merit*, or to *adorn* his Character, who has left such *Illustrious* Testimonies of his *Learning*, *Zeal*, and *Piety*, that the Letter'd World submits to his *Authority*, and *reveres* his *Judgment* so much,

a that

that his *Name* will be venerable to *latest* Ages: Our present Aim is only to reduce the *Circumstances* of his *Life* into such a Method as will shew us by what *Steps* and *Degrees* he attained to so *high* an Esteem, as to derive an *Honour* upon the *Century* he lived in, and to recommend him as a *Pattern* to succeeding Ages.

HUGO GROTIUS, in *Dutch*, *de Groot*, one of the greatest Men in *Europe*, was born at *Delft* the 10th of *April*, 1583; where his *Family* had been *Illustrious* between *Four* and *Five Hundred* Years. He made so early a Progress in his *Studies*, that he writ some *Verses* before he was *nine* Years of Age; and at *Fifteen* he had a great Understanding in *Philosophy*, *Divinity* and the *Civil Law*; but he was still better skill'd in *Philology*, as he made it appear by the Commentary he writ at *that* Age upon *Martianus Capella*, a very difficult Author. So prodigious was his *Memory*, that being present at the *Must* of some Regiments, he remembered the Names of every Soldier there. In the Year 1598 he accompanied the *Dutch* Embassador, the famous *Barnevelt*, into *France*, where *Henry IV* gave him several Marks of his *Esteem*; he took there his Degree of *Doctor of Law*, and being returned into his Country, he applied himself to the *Bar*, and pleaded before he was *Seventeen* Years of Age; he was not *Twenty four* Years old when he was made *Advocate-General*; he settled at *Rotterdam* in 1613, and was *Pensionary* of that Town; he would not accept of that Employment, but upon Condition that he should not be deprived of it; for he foresaw that the Quarrels of *Divines* about the Doctrine of *Grace*, which formed already a thousand *Factions* in the *State*, would occasion many *Revolutions* in the chief Towns; he was sent into *England* in the same Year, by reason of the Misunderstanding between the *Merchants* of both Nations; he wrote a Treatise upon that Subject, and called it *Mare Liberum*, or a Treatise shewing the Right the *Dutch* have to the *Indian Trade*. He found himself so far engaged in the Affairs which undid *Barnevelt*, that he was arrested in *August* 1618, and condemned to *perpetual Imprisonment* the 18th Day of *May* 1619, and to *forfeit* his *Estate*; he was confined to the Castle of *Louvestein* the 6th of *June* in the same Year, where he was severely used for above 18 Months; from whence, by the Contrivance of *Mary de Regelsberg* his *Wife*, he made his Escape, who having observed that the *Guards*, being weary of searching a large *Trunk* full of Books and Linnen to be washed at *Gorcum*, a neighbouring Town, let it go without opening it as they used to do, advised her Husband to put himself into it, having made some Holes with a Wimble in the Place where the fore-part of his *Head* was, that he might not be stifled. He followed her Advice, and was in that manner carried to a *Friend* of his at *Gorcum*; from whence he went to *Antwerp* in the usual Waggon, after he had crossed the publick Place in the Disguise of a *Joyner*, with a Ruler in his Hand. That good *Woman* pretended all the while that her *Husband* was

very Sick, to give him time to make his Escape into a *Foreign Country*: But when she thought he was safe, she told the *Guards*, laughing at them, that the *Birds were fled*. At first there was a Design to *Prosecute* her, and some *Judges* were of Opinion she should be kept in Prison instead of her *Husband*; but by a Majority of Votes she was released, and praised by every Body, for having by her Wit procured her Husband's *Liberty*. Such a Wife deserved not only to have a *Statue* erected to her in the *Commonwealth of Learning*, but also to be *canoniz'd*; for we are indebted to her for so many excellent Works published by her Husband, which had never come out of the Darknes of *Louvestein*, if he had remained there all his Life-time, as some *Judges* appointed by his Enemies designed it.

He retir'd into *France*, where he met with a kind Reception at *Court*, and had a *Pension* assigned him; the *Dutch* Embassadors endeavoured to prepossess the *King* against him, but that Prince did not regard their *Artifices*, and gave a glorious Testimony to the Virtue of that *Illustrious Refugee*, and admired the Virtue of the *Man*, who being so ill used in his Country, never omitted an Opportunity to advance its Interest, and encrease its Grandeur. He applied himself very closely to *Study*, and to compose *Books*. The first he published after he settled in *France*, was *An Apology for the Magistrates of Holland*, who had been turned out of their Places. The contrary Party was very much displeased with this *Treatise*, they thought *GROTIUS* made it appear that they had acted against the Laws, and therefore they endeavoured again to ruin and defame him, but the Protection of the *French Court* secured him against their Attempts.

He left *France* after he had been there *Eleven Years*, and returned into *Holland* full of Hopes, by reason of a kind Letter he received from Prince *Frederick Henry*, who succeeded his Brother in that *Republick*; but his Enemies prevented the good Effects of that Letter, and therefore he was forced once more to leave his Country; he resolved to go to *Hamburg*, where he stayed till he accepted the Offers he received from the Crown of *Sweden*, in the Year 1634. Queen *Christina* made him one of her *Counsellors*, and sent him *Embassador* to *Lewis XIII*. Having discharged the Duties of that Employment about *Eleven Years*, he set out from *France* to give an Account of his Embassy to the Queen of *Sweden*; he went through *Holland*, and received many Honours at *Amsterdam*; he saw Queen *Christina* at *Stockholm*, and after he had discoursed with her about the Affairs he had been entrusted with, he most humbly begged of her, that she would grant him his Dismission. The *Queen* gave him no positive Answer when he asked leave to retire, which displeased some great Men, who were afraid that she would keep him in her *Council*: He perceived their Discontent, and was so pressing to obtain his Dismission, that it

was

was granted him at last. The *Queen*, upon his Departure, gave him several Marks of her great Esteem for him. The *Ship* on Board which he embarked was violently tost by a Storm on the Coasts of *Pomerania*; *GROTIUS* being sick, and uneasy in Mind, continued to travel by Land, but his Illness forced him to stop at *Rostock*, where he died in a few Days, on the 28th of *August* 1645. His Body was carried to *Delft* to be buried among his Ancestors; he left behind him three *Sons*, and one *Daughter*. The *Daughter* was married to a *French* Gentleman called *Mombas*, who was very much talk'd of, on Occasion of a Trouble he was brought into soon after the *French* had passed the *Rhine* in the Year 1672. The eldest Son and the youngest pitched upon a *Military* Life, and died without being married. The second, whose Name was *Peter de Groot*, made himself illustrious by his *Embassies*. The Elector *Palatine* being restored to his Dominions by the Treaty of *Munster*, appointed him his *Resident* in *Holland*: He was made *Pensionary* of the City of *Amsterdam* in 1660, and discharged the Duties of that Place with great Ability for the Space of *Seven Years*. He was sent *Embassador* to the *Northern* Crowns in the Year 1668. At a Year's End he went into *France* with the same Character, and acquitted himself in that Employment with great Dexterity and Wisdom. When the *War* was kindled 1672, he returned into his Country, and was deprived of his Office of *Pensionary* at *Rotterdam*, which he had enjoyed ever since his Return from his Embassy into *Sweden*: He was deprived of it during the *Popular Tumults*, which occasioned so many Alterations in the Towns of *Holland*. He retired to *Antwerp*, and then to *Cologne*, whilst the Peace was treating there, and acted for the *Good* of his *Country* as much as ever he could; and yet when he returned into *Holland* he was accused of a *State Crime*; the Cause was tried and he was acquitted: He retired into a *Country-House*, where he died at 70 Years of Age.

The Calumnies, maliciously dispersed by the *Enemies* of *GROTIUS*, about his *Death*, are irrefragably confuted by the Relation of the *Minister* who attended upon him when he was dying. The *Minister*, called *John Quistorpius*, was *Professor of Divinity* at *Rostock*. His Relation imports, " That he went to *GROTIUS* who
 " had sent for him, and found him almost dying; that he exhorted
 " him to prepare for *Death*, in order to enjoy a more happy *Life*,
 " to acknowledge his *Sins*, and to repent of them; that having men-
 " tioned to him the *Publican*, who confessed himself a *Sinner*, and
 " begged *God's* Mercy, the sick Man answered, *I am that Pub-*
 " *lican*; that he went on and told him he should have Recourse
 " to *Jesus Christ*, without whom there is no Salvation, and that
 " *GROTIUS* replied, *I place all my Hopes in Jesus Christ a-*
 " *lone*; that he repeated in a loud Voice a *Prayer* in *High-Dutch*,
 " and that the sick Man said it softly after him with his Hands
 " joined; that having ended, he asked him whether he understood
 " him,

“ him, and his Answer was, *I understood you very well*; that he continued to repeat to him some Passages of the *Word of God*, which
 “ *dying People* are usually put in Mind of, and to ask him, *Do you*
 “ *understand me?* and that GROTIUS answered, *I hear your*
 “ *Voice, but I do not understand every thing that you say*; that with
 “ this Answer the sick Man lost his *Speech*, and *expired* soon after.”
 It were an absurd thing to call in Question the *Sincerity* of Quistorpius, nothing could move him to be false in his Account, and it is certain that the *Lutheran* Ministers were no less displeased than the *Calvinists* with the particular Opinions of GROTIUS, and therefore the Testimony of the Professor of *Rostock* is an authentick Proof; and if such Evidence is not sufficient in Matters of Fact, we make way for *Scepticism*, and it will be difficult to *prove* any thing. It is therefore an *undeniable* Case that GROTIUS being a dying, was affected like the Publican mentioned in the *Gospel*, he *confess'd* his Faults, he was *sorry* for them, and *implor'd* the Mercy of his *heavenly Father*; that he placed all his *Hopes* in *Jesus Christ* alone; that his *last* Thoughts were those that are contained in the *Prayer* of *dying People*, according to the *Liturgy* of the *Lutheran Churches*. The Result of which is, that those who say *he died a Socinian*, would be too gently used if they were only told, that they are guilty of a rash Judgment; they are Persons *prejudiced* against the Character of this *Great Man*, and therefore very unworthy of our Belief. Several People have wondered that his *Grand-Children* did not ask Satisfaction for this *Injury* done to his *Memory*, and that they appeared less sensible in this Point, than *Jansenius's* Relations upon slighter Calumnies; but some Persons highly approve their waving all *Juridical* Proceedings. There is a solid Answer to that *Reflection* upon our Author made by a Book entitled *l'Esprit de Mr. Arnauld*; and since the *Accuser* made no *Reply* to it, it is a plain Sign he has been convicted of Calumny. The *Apologist* for the Character of GROTIUS begins thus, “ *But, Sir, what that Author and Father Si-*
 “ *mon say of GROTIUS, is nothing, if compared to what the*
 “ *nameless Author of the scandalous Libel intituled l'Esprit de Mr.*
 “ *Arnauld says of him; it is true, he slanders every Body in that*
 “ *Book, and the manifest Lies that are in it, ought to make one dis-*
 “ *believe every thing else; but because some are so weak, as to be im-*
 “ *posed upon by his bold way of speaking, because some of those to*
 “ *whom you shew my Letters, entertain an ill Opinion of GROTIUS*
 “ *upon that Account, you will give me leave to undeceive them. Per-*
 “ *haps they will not be displeased to find an Author, for whom they*
 “ *have so great an Esteem, guilty of the most horrid Calumny that*
 “ *ever was; this will teach them, that one ought to suspect those who*
 “ *appear so zealous for Truth, and that sometimes a prodigious Ma-*
 “ *lice and Detraction are concealed under the zealous Pretence of*
 “ *defending the Church of God. Afterwards the Apologist examines*
 “ *the four Accusations one after another; I shall not dwell on what*
 “ *he*

“ *he says upon the first Head, viz. That GROTIUS was a violent*
 “ *Arminian. GROTIUS, says our Author, in the second Place,*
 “ *was a Socinian, as appears from his enervating the Proofs of*
 “ *Christ's Divinity. Sir, desire your Friends to read GROTIUS's*
 “ *Annotations upon the Passages of St. Mark and St. John which I*
 “ *have mentioned to you, and if they do not say that it is an abomi-*
 “ *nable Calumny, I am willing to be accounted a most wicked Ca-*
 “ *lumniator. See also the DXLVIIIth Letter among the Literæ Ec-*
 “ *clesiasticæ & Theologicæ.” I should be too long should I mention*
 “ *what he says upon the third Head, I shall only set down this Passage*
 “ *out of it, “ When Mr. Arnauld says something that is injurious to*
 “ *the Reformed, the Author of the Libel exclaims violently against*
 “ *him, and Mr. Arnauld is then an unsincere Man, an unfair Ac-*
 “ *cuser, an Infamous Calumniator ; but when he says something that*
 “ *may serve this Satyrical Writer to inveigh against those whom he*
 “ *hates, every thing is then right, it serves him to fill up his Page,*
 “ *and to prevent his being placed among the little Authors.”*

I must not forget that Mr. Arnauld blames the Lutheran Minister for not asking GROTIUS in what Communion he would die, this is a material Thing, says Mr. Arnauld, “ with respect to a Man
 “ who was known to have had no Communion a long time with any
 “ Protestant Church, and to have confuted in his last Books most of
 “ the Doctrines that are common to them. Whereupon the Apo-
 “ logist says, that Mr. Arnauld and the Author of the Libel do
 “ wrongly fancy, that a Man has no Religion when he joins with
 “ none of the Factions that condemn Mankind, and each of which
 “ pretends to be the only Church of Christ. GROTIUS abstain-
 “ ed from communicating with the Protestants, as well as with the
 “ Papists, because the Communion, which was appointed by Christ
 “ as a Symbol of Peace and Concord among his Disciples, is ac-
 “ counted in those Societies a Sign of Discord and Division.” —
 Quistorpius acted the Part of a wise Man in not asking him what
 Communion he would die in, since he saw him dying in the Com-
 munion of Jesus Christ, by Virtue of which we are saved, and not
 by Virtue of that of the Bishop of Rome, or of the several Protestant
 Societies.

Without enquiring whether Quistorpius was in the Right or the
 Wrong for not asking such a Question, we observe, that a Man who
 believes the Fundamental Doctrines of Christianity, but forbears re-
 ceiving the Communion, because he looks upon that Action as a Sign
 that one damns the other Christian Sects, cannot be accounted an
 Atheist, but by one who has forgot the Notions of Things or Defini-
 tions of Words ; nay, we go farther, and maintain it cannot be de-
 nied that such a Man is a Christian ; we allow you to say, that his
 believing all the Sects that receive the Gospel to be in the way to Sal-
 vation is an Heresy ; we allow you to assert, that it is a pernicious
 and dangerous Doctrine ; notwithstanding which, can it be said that
 those

those who believe that *Jesus Christ is the Eternal Son of God, coessential and consubstantial with the Father, that he died for us, that he sits at the right Hand of God his Father; that Men are saved by Faith in his Death and Intercession; that one ought to obey his Precepts, and repent of one's Sins, &c.* we say, can it be affirmed that such People are not *Christians*? No Man of Sense can affirm it; but none would be more unreasonable in asserting such a thing than the Author of *l'Esprit de Mr. Arnauld*, since he published another Book, wherein he shews that *all those who believe the Fundamental Points, belong to the true Church, whatever Sect they may be of.* We omit several other *Maxims* advanced by him, whereby it appears, that *one may be saved in all Religions*; we only mention such Doctrines as he cannot deny, and according to which he ought to acknowledge, that *GROTIUS*, who believed the *Fundamental Doctrines*, without approving *Calvinism* or *Popery*, &c. in every thing, was a *Member of the true Church.*

We suppose that what has been delivered may be of sufficient Force to overthrow the *Calumnies* that have been raised against our *Author*, in respect to his *Principles in Religion*; we shall now take a short Survey of the most eminent *Books* that were *published* from him.

During his Stay at *Paris*, before he was *Embassador of Sweden*, “ he translated into *Latin Prose* his Book concerning the *Truth of the Christian Religion*, which he had writ in *Dutch Verse*, for the “ Use of the *Seamen* who travelled into the *Indies*, that they might “ have some *Diversiſion* in singing such a pious Poem.” Thus *du Maurier* speaks of it; but he is very much to blame for giving such a mean Notion of the *Author's* Design, for *GROTIUS* aimed at a nobler End; he had a Mind to enable the *Dutch*, who travel to the *Indies*, to promote the *Conversion* of the *Infidels*; this is the Character he gives of it himself, *My Resolution was to do something of Advantage to all my Countrymen, but especially for Seamen, that in all their Leisure they have Aboard, they may use their Time with Profit to themselves, and not loiter away their Hours as some do. And therefore beginning with a Panegyrick upon my own Nation, which infinitely excels all others in this Art; I encouraged them, that they would improve their Art, not only for their Benefit and Gain, but that they would regard it as the Mercy of Heaven, and use it for the propagating of the Christian Religion.* It is an Excellent Work, and the Notes upon it are very learned. It was translated into *English, French, Dutch, German, Greek, Persian, and Arabick*; but we do not know whether all those Translations have been published; the *Greek* was not printed in the Year 1637. In the Year following *GROTIUS* mentions the *Persian* Translation only, as a Book which the *Pope's* *Missionaries* had a Mind to publish. *My Book*, says he, *concerning the Truth of the Christian Religion, that is accounted Socinian by some, is so far from having that Character here, that it is to be turned by the Pope's Missionaries into the Persian Tongue,*

Tongue, to convert, by the Favour of God, the Mahometans who are in that Kingdom. In the Year 1641, an *Englishman*, who had translated that Book into *Arabick*, was desirous his Translation should be printed in *England*. There came a very learned *Englishman* to me within these few Days, says he, who lived a long time in the *Turkish* Dominions, and translated my Book of the Truth of the *Christian Religion* into *Arabick*, and will endeavour, if he can, to have it published in *England*: He thinks no Book more profitable, either to instruct the *Christians* of those Parts, or to convert the *Mahometans* that are in the *Turkish, Persian, Tartarian, Punic, or Indian* Empire. That Translation made by the famous Dr. *Edward Pocock*, was printed at *London* in the Year 1660. There are three *German* Translations of that Work, two in Prose, and one in Verse, and two *French* Translations in Prose.

GROTIUS writ an *History* of the *Low-Countries*; it contains an Account of what happened in the *Netherlands* from the Departure of *Philip II.* It is divided into *Annals* and *History*, the *Annals* comprehend five Books; the *History* contains eighteen, and begins in the Year 1588. *Casaubon*, who had read something of it in the Year 1613, speaks well of it in a Letter written from *London* to *Thuanus*. The Judgment of the Author of the *Parrhasiana* runs thus, “ We may add to Polybius, a famous Historian among
“ the Moderns, who though he had been a Sufferer by the Injustice
“ of a great Prince, relates his noble Actions as carefully as any
“ other Historian, and speaks of him according to his Merit, without
“ saying any thing, whereby it may appear that he had Reason to
“ complain of him; I mean the incomparable HUGO GROTIUS,
“ who speaks in his History of the Netherlands of Prince Maurice
“ de Nassau, as if he had never been ill treated by him; this is a
“ remarkable Instance of Impartiality, which shews that it is not
“ impossible to overcome one’s Passion, and speak well of one’s Enemies,
“ as several People fancy, who judge of others by themselves.” The Author who observes this fine Passage in GROTIUS’s History, did it not out of Flattery, for he blames him afterwards for a thing that deserves to be blamed; he does not approve GROTIUS’s Style, and shews thereby that he is a Man of a good Taste. “ None,
“ says he, of those who spoke well at Athens, and at Rome, expressed himself so obscurely in Conversation, as Thucydides and Tacitus did in their Histories; doubtless they had a Mind to raise
“ themselves above common Use, and thereby they fell into that
“ Obscurity for which they are justly reprov’d. It cannot be denied they have an affected Style, and that they hoped to recommend their Histories as it were by a manly Eloquence, whereby
“ it seems that many things are expressed in few Words, and raised
“ above the Capacity of the Vulgar; I cannot apprehend why some
“ learned Men undertook to imitate them, as HUGO GROTIUS,
“ and Dionysius Vossius in his Translation of Rbeide’s History, and
“ how

“ how they could relish such a Style ; for certainly good Thoughts
 “ need not be obscure to be approved by good Judges ; and when
 “ a Reader is obliged to stop continually, in order to look for the
 “ Sense, he does not think himself in the least obliged to an Histo-
 “ rian who gives him the Trouble ; this is the Reason why some
 “ Histories, though excellent as to the Matter, are read by few
 “ People ; whereas if those Historians designed to write for the Instruc-
 “ tion of those who have a sufficient Knowledge of the *Latin*
 “ Tongue to read a History with Pleasure, they should endeavour
 “ to make themselves easily understood, and useful to as many Peo-
 “ ple as ever they could. The more a History deserves to be read
 “ by reason of the Events contained in it, the more it deserves to be
 “ of a general Use ; the Authority of the Ancients who neglected
 “ the Clearness of the Style, cannot justify the Moderns, who have
 “ imitated them contrary to the Reasons I have mentioned, or rather
 “ contrary to good Sense. There is nothing in *Tacitus* that less de-
 “ serves to be imitated, than his too concise, and consequently ob-
 “ scure Style ; I am sorry *GROTIUS* was one of those who did
 “ not avoid it, it makes the Translation of his Writings more diffi-
 “ cult, and his Thoughts more obscure.”

But his Book *Of the Rights of War and Peace* was the *Master-piece* of his Works, and therefore deserves a more particular Account ; it was printed at *Paris* in 1625, and dedicated to *Lewis XIII.* “ King
 “ *Gustavus* of *Sweden* having read and admired it, resolved to make
 “ use of the Author, whom he took to be a great *Politician* by rea-
 “ son of that Work ; but that Prince having been killed at the
 “ Battle of *Lutzen* in the Year 1632, Chancellor *Oxenstern*, accord-
 “ ing to his own Inclination, and the Design of the late King *Gus-*
 “ *tavus*, nominated him to be sent Ambassador into *France*” *Co-*
 “ *lomes* says, “ It is believed that *GROTIUS* exhausted his Parts
 “ upon that Book, and that he might have said of it what *Casaubon*
 “ said of his Commentary upon *Perseus*, in a Letter to Mr. *Perillan*
 “ his Kinsman, which is not printed, in *Perseo omnem ingenii cona-*
 “ *tum effudimus* ; and indeed that Work of *GROTIUS* is an ex-
 “ cellent Piece, and I do not wonder that it has been explained in
 “ some *German* Universities.” — Here follows the Judgment which
M. Bignon, that unblamable Magistrate, makes of that Book in a
 Letter to *GROTIUS*, dated the 5th of *March*, 1633. “ I had
 “ almost forgot, says he, to thank you for your Treatise *De Jure Belli*,
 “ which is as well printed as the Subject deserves it ; I have been
 “ told that a great King had it always in his Hands, and I believe it
 “ is true, because a very great Advantage must accrue from it, since
 “ that Book shews, that there is Reason and Justice in a Subject,
 “ which is thought to consist only in Confusion and Injustice ; those
 “ who read it will learn the true Maxims of the *Christian* Policy,
 “ which are the solid Foundations of all Governments ; I have read
 “ it again with a wonderful Pleasure.” They did not make the

same Judgment of it at *Rome*, where it was placed among prohibited Books the 4th of *February* 1672. *M. Chauvin's* Memorial concerning the Fate and Importance of that Work is so curious, that we cannot forbear transcribing some things out of it. It informs us that *GROTIUS* undertook to write that Book at the Solicitation of the famous *Peireskius*. *He himself says so, in a Letter he writ to him, when he presented him with the Copy of that Work.* “ The Subject of it was thought to be so important and useful, that it gave Occasion to make a particular Science of it ; for the Explication of which, some Professors have been appointed on purpose in the Universities. *Charles Lewis, Elector Palatine*, did so highly value that Book, that he thought fit it should serve as a Text to the Doctrine concerning the Right of Nature, and the Law of Nations, and in order to teach it he appointed *M. de Puffendorf* in the University of *Heidelberg* ; and in Imitation of that Prince, the like Settlements have been made in other Universities. It does not appear that any Body criticized upon this Work of *GROTIUS* during his Life-time ;” but when he was dead it occasioned many Disputes, and was published over all the World of Letters, and commented upon by the most learned of all Nations. It came out at last, *cum Notis Variorum*, by which means *our Author*, within 50 Years after his Death, obtained an Honour, which was not bestowed upon the *Ancients* till after many Ages.

Thus have we given the *History* of this great Man, taken from the best Accounts that have contributed to derive his Memory to our Times ; but as an *Improvement* of his Character receive the Testimony of *Salmasius*, one of his Enemies, in a Letter to him, *You have laid but a small Obligation upon the Cardinals, and upon myself likewise, by bestowing a Title upon me, which is peculiar to the most eminent GROTIUS ; for why should I not call him so, whom I had rather resemble, than enjoy the Wealth, the Purple, and Grandeur of the Sacred College ?*

H. G R O T I U S

T O

HIS MOST CHRISTIAN MAJESTY

L E W I S XIII.

King of FRANCE and NAVARRE.

THIS Book presumes, most illustrious Prince, to intitle itself to Your great Name, from a Confidence, not of itself, or its Author, but of the Subject Matter of it, which is JUSTICE; a Virtue in so distinguishing a Manner Yours, that by it, both from Your own Merits, and the general Consent of Mankind, You have acquired a Title worthy so great a King, and are now every where known by the Name of JUST, no less than that of LEWIS. It was the Height of Glory to the *Roman* Generals, to be surnamed from some of their conquered Countries, as *Crete*, *Numidia*, *Africa*, *Asia*, and the like. But how much more glorious Your Surname, by which you are declared the irreconcilable Enemy, and perpetual Conqueror, not of any Nation or Man, but of Injustice? It was esteemed a great thing among the *Egyptian* Kings, for one of them to be stiled, the Lover of his Father, another the Lover of his Mother, another of his Brother. But how far short these of Your Name, which comprehends not only those, but every thing else that can be conceived beautiful and virtuous? You are JUST, as you honour the Memory of the great King your Father by imitating him: JUST, as You instruct your Brother by all imaginable Methods, but none more than that of Your own Example: JUST, as You procure the greatest Matches for Your Sisters: JUST, as You revive the Laws almost dead, and, to the utmost of Your Power, oppose the growing Wickedness of the Age: JUST, but at the same time Merciful too, as You deprive Your Subjects, whom the Ignorance of Your Goodness had caused to transgress the Bounds of their Duty, of nothing but the Liberty of offending, nor use any Violence to those who differ from You in Matters of Religion: JUST, and at the same time Compassionate, as you relieve by Your Authority oppressed Nations, and distressed Princes, and controul the exorbitant Power of Fortune. Which singular Beneficence in You, as near the Divine as Human Nature can admit, obliges me even in this publick Address to return You my private Thanks. For as the celestial Bodies not only influence the great Parts of the World, but also suffer their Virtues

to be communicated even to every individual Animal; so you, like a Star of most benign Influence to the Earth, not contented to have raised up dejected Princes, or given Succour to Nations, have condescended to give Protection and Comfort to me, also, when ill-treated by my Native Country. To Your publick Actions You have, to compleat the Measure of Justice, added such Innocence and Sanctity of Life, as deserves the Admiration, not of Men only, but of the blessed above. For who of the meanest People, or even of those who have sequestred themselves from the Conversation of the World, attains to that Perfection of Purity and Virtue, as you whom the Splendor of Fortune exposes daily to innumerable Charms of Vice? But how great is it to attain that in a multiplicity of Business, in a Crowd, in a Court amongst so many so various Examples of Vice, which others scarce are able, often are not able to do in Solitude? This is to merit the Name not of JUST only, but of *Saint* also, and that in this Life, which the Piety of the Age attributed to your Ancestors *Charles the Great*, and *Lewis*, only after their Deaths: This is to deserve the Title of *most Christian*, not by Descent, but your own proper Right. But as there is no part of Justice which does not belong to You, so that which concerns the Subject of this Book, *viz.* the Affairs of Peace and War, is properly Yours, as you are a King, and especially as King of *France*. Vast is Your Dominion, which extends from Sea to Sea, and comprehends so many spacious and happy Provinces; but it is a greater Dominion than this, not to desire others Dominions. Worthy is this of Your Piety, worthy of Your high Pitch of Grandeur, not to attempt the Invasion of any Man's Right by Force of Arms, or the Alteration of ancient Limits; but together with War, to carry on Negotiations of Peace; nor to begin it, but with a Desire of bringing it to a speedy Conclusion. When it shall please God to call You to his Kingdom, which alone is better than that which You now possess, how becoming, how glorious, how joyful to the Conscience will it be for You to be able to say with Boldness; This Sword, received from thee for the Safeguard of Justice, I restore again pure, innocent, stained with no Man's Blood rashly shed? Thus it shall be, that the Rules which we now seek for in Books, shall hereafter be learned from Your Actions, as the most perfect Pattern. Which thing itself, though of great Importance, yet the Christian World presumes to require something still greater from you; that is, that Wars every where ceasing, Peace may be restored, not only to Civil States, but to the Churches; and our Age submit itself to be modelled after the Pattern of the Apostolical Age, in which all unanimously acknowledge the Christian Faith to have been true and uncorrupted.

The Minds of Men, now grown weary of Dissention, are encouraged to hope for this, as the Effect of the Friendship lately contracted, and by the happy Marriage of Your Sister confirmed, between You and the King of *Great Britain*, a Prince eminent for his great Wisdom and ardent Love for the Peace of the Church. A Work indeed of vast Difficulty, by reason of the growing Animosity of Parties: But of two such great Kings nothing is Worthy but what is Difficult, and to all others impracticable. The God of Peace and Justice grant to Your Majesty, most Just and Peaceable Prince, together with all other Happiness, the Honour of accomplishing this great Work. MDCXXV.

THE PRELIMINARY DISCOURSE:

Concerning the Certainty of Right in general; and the Design of this Work in particular.

I. **T**HE Civil Law, whether that of the Romans, or of any other People, many have undertaken, either to explain by Commentaries, or to draw up into short Abridgments: But that Law, which is common to many Nations or Rulers of Nations, whether derived from Nature, or instituted by Divine Commands, or introduced ¹ by Custom and tacit Consent, few have touched upon, and none hitherto treated of universally and methodically; tho' it is the Interest of Mankind that it should be done.

II. Cicero ¹ rightly commended the Excellence of this Science, in the Business of Alliances, Treaties, Conventions between States, Princes, and foreign Nations, and in short, in all Affairs that regard the Rights of War and Peace. And Euripides prefers this Science before the Knowledge of all other Things, whether Divine or Human, when he makes Helen say thus to Peace. Of War and Theonoe :

² 'Twould be a base Reproach
To you, who know th' Affairs present and future
Of Men and Gods, not to know what Justice is.

III. And indeed this Work is the more necessary, since we find some, both in this and in former Ages, so far despising this Sort of Right, as if it were nothing but an empty Name. The Saying of Euphemus in Thucydides is almost in every ones Mouth, ¹ To a King or Sovereign City, no

I. (1) The Author here means what he calls the Law of Nations, which he distinguishes from the Law of Nature as making a separate Class. But in this he is mistaken; as is acknowledged by most, who have pursued this Study. See Note 3. on B. I. Chap. I. § 14.

II. (1) This is not CICERO's Sense. The Words here quoted only signify that Pompey, of whom he is speaking, was very well versed in Alliances, Treaties, and Conventions made, concluded, and formed, between States, Princes, and foreign Nations, &c. *Equidem contra existimo, Judices, quum in omni genere ac varietate Artium, etiam illarum, quæ sine summo otio non facile discuntur, Cn. Pompeius excellat, SINGULAREM QUAM DAM LAUDEM EJUS ET PRÆSTABILE MESSE SCIENTIAM in fœderibus, pactionibus, conditionibus Populorum, Regum, exterarum Nationum: in omni denique Belli Jure ac Pacis.* Orat. pro L. Corn. Balbo, Cap. VI.

² Ἀρχὸν τὰ μὲν σε θεῶν πάντ' ἐξιδέσθαι,
τὰ τ' ὄντα, καὶ μὴ, τὰ δὲ δίκαια μὴ εἰδέναι.

HELEN. Ver. 928, 929.

This Theonoe was an Egyptian Priestess, who dealt in Divination. HELEN does not here design to prefer the Knowledge of what is just and unjust, to that of all things human and divine, as our Author pretends. The Poet only intimates, that we ought to join the Study of Morality with the Study of Religion. In this Sense the Verses here quoted may very justly be understood as addressed to all employed in the publick Ministry of

Religion, either to remind them of their Duty, or reprove them for the Faults committed in the Discharge of it, which has been but too often the Case at all Times. See what I have said on this Subject in my Preface to PUFENDORF, § 7, &c.

III. (1) These Words occur in the sixth Book of that Historian. (Chap. LXXXV. Edit. Oxon.) We find the same Maxim in the fifth, where the Athenians, whose Power was then very considerable, speak thus to the Melians. For you cannot but know that, according to the common Notions of Mankind, Justice is regulated by the equal Necessities of the Parties; and that those who are invested with a superior Power, do all they find possible, while the Weak are obliged to submit. (Chap. LXXXIX.) GROTIUS.

The former of these Passages is not properly applied. It may be observed that the Word here used is ἀλόγον, which signifies unreasonable, not unjust. Besides, it appears from the Sequel of the Discourse that the Question does not here turn on what is just, or unjust. Hermocrates, the Syracusan Ambassador, had remonstrated to the Camarinians, that there was not the least Probability, that the Athenians would, after the Reduction of Chalcis, grant the Leontines their Liberty, who were Inhabitants of the same Country. Chap. LXXIX. To which Euphemus replies, that the Athenians had an Interest in making that Distinction, and shews how they would find their Account in it. So that ἀλόγον in this Place signifies, what is not conformable to the Rules of good Policy, and is the same as ἐκ ὑπολόγου in Chap. LXXVI.

The PRELIMINARY DISCOURSE.

thing is unjust that is profitable. Not unlike to which is this, ² That amongst the Great the stronger is the juster Side; and, That no State can be governed ³ without Injustice. Besides, the Disputes that happen between Nations or Princes, are commonly decided at the Point of the Sword. Now, it is not only the Opinion of the Vulgar, that War is a Stranger to all Justice, but many Sayings uttered by Men of Wisdom and Learning, give Strength to such an Opinion. And indeed, nothing is more frequent than the mentioning of Right and Arms, as opposite to one another. Thus Ennius ⁴,

They have recourse to Force of Arms, not Law.

And Horace ⁵ thus describes the Fierceness of Achilles:

Laws as not made for him he proudly scorns,
And every Thing demands by Force of Arms.

Another Latin Poet ⁶ introduces another Conqueror, who entering upon War, speaks in this Manner,

Now, Peace and Law, I bid you both farewell.

Antigonus, ⁷ though old, laughed at the Man, who presented him with a Treatise concerning Justice, at the very Time he was besieging his Enemies Cities. And Marius said ⁸ he could not bear the Voice of the Laws for the ⁹ clashing of Arms. Even the ¹⁰ modest bashful Pompey ¹¹ could have the Face to say, Can I think of Laws, who am in Arms?

IV. Among Christian Writers we find many Sayings of the same kind; let that of Tertullian suffice for all; ¹ Fraud, Cruelty, Injustice, are the proper Business of War. Now they that are of this Opinion, will undoubtedly object against me that of the Comedian,

² You that attempt to fix by certain Rules
Things so uncertain, may with like Success
Strive to run mad, and yet preserve your Reason.

The Existence
of Right as-
serted against

the Objecti-
ons of Car-
neades.

V. But since it would be a vain Undertaking to treat of Right, if there is really no such thing; it will be necessary, in order to shew the Usefulness of our Work, and to establish it on solid Foundations, to confute here in a few Words so dangerous an Error. And that we may not engage with a Multitude at once, let us assign them an Advocate. And who more proper for this Purpose than Carneades, who arrived to such a Degree of Perfection, (the utmost his Sect aimed at,) that he could argue for or against Truth, with the same Force of Eloquence? This Man having undertaken to dispute against Justice, that kind of it, especially, which is the Subject of this Treatise, found no Argument stronger than this. ¹ Laws (says he) were instituted by Men

² The Words here used by the Author, are taken from TACITUS. *Id in summâ fortunâ æquius, quod validius.* Annal. Lib. XV. Cap. I.

³ The Author alludes to a Fragment of the second Book of CICERO's Treatise *De Republicâ*, preserved by St. AUGUSTIN; where Scipio, on the contrary, maintains, that it is impossible to govern a State well, without observing the Rules of Justice with the utmost Exactness. *De Civit. Dei. Lib. II. Cap. XXI.*

⁴ This Fragment, which may be seen in CICERO's Oration for *Muræna*, Cap. XIV. is more entire in AULUS GELLIUS, *Lib. XX. Cap. X.*

*Non ex jure manu confertum, sed mage ferro
Rem repetunt, regnumque petunt, vadunt solidâ vi.*

But the Poet speaks only of Civil Laws; and sets violent Measures, the distinguishing Characteristics of War, in Opposition to the legal Proceedings, used for composing Differences in Times of Peace. The same is to be observed of some of the following Passages.

⁵ *Art. Poet. Ver. 122.*

⁶ LUCAN puts this Speech into the Mouth of Julius Cæsar on his passing the Rubicon.

⁷ PLUTARCH *De fortuna Alexand. Mag. p. 330. Tom. II. Edit. Wech.*

⁸ He spoke of the Civil Laws. The Words here referred to are that General's Answer on Occasion of his being blamed for conferring the Freedom of Rome on a thousand valiant Soldiers, who had signalized themselves in the War against the Cimbri, without the Authority of any Law. See the Passage at Length in PLUTARCH's *Apophthegms*, p. 202. Tom. II. See likewise the Life of Marius by the same Author; and VALERIUS MAXIMUS, *Lib. V. Cap. II. Num. 8.*

⁹ The Inhabitants of Argos being engaged in a Dispute with the Lacedemonians about some Lands, and the former having supported their Claim with the best Reasons, Lysander drew his Sword, saying: He, who is Master of this, reasons best about the Boundaries of Lands. PLUTARCH's *Apophthegms*, p. 190. The same Author, in the Life of Cæsar, p. 725. Tom. I. relates that Metellus, Tribune of the People, opposing that General for taking Money out of the publick Treasury, and alledging some Laws against that Practice, Cæsar replied, that the Laws must give Place to the Exigencies of War.

SENECA in his fourth Book *De Beneficiis*, Cap. XXXVII. observes, that Princes make many Grants, without enquiring into the Reasonableness of the Demand, especially during a War, when a just and equitable Man is not able to gratify so many Passions supported by Force. He adds, that it is not possible to be at the same Time an honest Man, and a good General. GROTIUS.

¹⁰ He was very apt to blush, especially when he was obliged to appear in the Assembly of the People. See SENECA's eleventh Epistle, and GRONOVIVS's Note on it.

¹¹ PLUTARCH, in the Life of Pompey, relates the Matter thus, The Mamertines pretending to be independent on Pompey, by Virtue of an old Roman Law, that General broke out into the following Expression: Will you still continue to alledge the Laws against us, while we have our Swords by our Sides? QUINTUS CURTIUS observes that War inverts even the Laws of Nature. *Lib. IX. (Cap. IV. Num. 7.) GROTIUS.*

IV. (1) This Passage is taken from the ninth Book of his Treatise against the *Jerus.*

² TERENCE in his *Eunuch*, Act I, Scene I, Ver. 16, &c.

V. (1) In LACTANTIUS, *Instit. Divin. Lib. V. Cap. XVI. Num. 3. Edit. Cellar.*

for

for the sake of Interest ; and hence it is that they are different, not only in different Countries, according to the Diversity of their Manners, but often in the same Country, according to the Times. As to that which is called NATURAL RIGHT, it is a mere Chimera. Nature prompts all Men, and in general all Animals, to seek their own particular Advantage : So that either there is no Justice at all, or if there is any, it is extreme Folly, because it engages us to procure the Good of others, to our own Prejudice.

VI. But what is here said by the Philosopher, and by the Poet after him;

By naked Nature ne'er was understood
What's Just and Right.

CREECH.

i. Natural.

must by no Means be admitted. For Man is indeed an Animal, but one of a very high Order, and that excels all the other Species of Animals much more than they differ from one another ; as the many Actions proper only to Mankind sufficiently demonstrate. Now amongst the Things peculiar to Man, is his Desire of ² Society, that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding ; which Disposition the ³ Stoicks termed *ὁμιέωσις* ⁴. Therefore the

VI. (1) HORACE, *Lib. I. Sat. III. Ver. 113.*

² The natural Inclination of Mankind to live in Society is a Principle which has been admitted by the Wife and Learned of all Ages. ARISTOTLE advances it in all his Books of Morality and Politics. Man, says he, is a sociable Animal in regard to those, to whom he is related by Nature. There is therefore such a Thing as Society, and somewhat that is just, even independently of what we call Civil Society. *Eudem. Lib. VII. Cap. X. p. 280. Edit. Paris.* The same Philosopher observes elsewhere, that Man is by Nature more strongly inclined to Society than Bees, or any other Animals, which are observed to flock or herd together. *Polit. Lib. I. Cap. II. p. 298.* And this he proves from the Consideration of Man alone being in Possession of the Use of Speech. See Note 3 on the 3d Section of Chap. I. Book VII. of PUFFENDORF'S *Law of Nature and Nations*. CICERO, reasoning on the Principles of the Stoicks, lays it down for a certain Fact, that no Man would chuse to live in absolute Solitude, even though he might enjoy an Infinity of Pleasures. From which he immediately infers, that we were born for Society. To this he adds, that as we make Use of our Limbs, before we have learnt what was the Design of Nature in furnishing us with them ; so we are naturally formed for civil Society ; without which there would be no Room for the Exercise of Justice or Goodness. *De finib. Bon. & Mal. Lib. III. Cap. XX.* See also *Lib. V. Cap. XXIII.* and *De Officiis, Lib. I. Cap. IV. VII.* and *XLIV.* SENECA, *De Benef. Lib. VII. Cap. I.* and *Epist. XCV. p. 470.* DIOGENES LAERTIUS, *Lib. VII. § 123.* and the Passages quoted in Note (6) on the following Paragraph. And here I cannot conclude this Note without a beautiful Passage taken out of EPICTETUS'S Discourses, collected by ARRIAN, in which we have an excellent Argument *ad hominem* against such as deny the natural Inclination of Men to Society. The Stoick Philosopher thus attacks his Antagonists. "EPICURUS, while he is endeavouring to destroy the Principle of natural Society, reasons on the very same Principle. Suffer not yourselves to be imposed on, says he ; beware of Illusion. Take my Word for it, there is naturally no such Thing as Society amongst reasonable Creatures ; those, who affirm there is, only abuse your Credulity. But, we may ask him, how does this concern you ? Leave us in quiet Possession of our Error. What Damage will you suffer, if all but you and your Followers should be persuaded that there is a natural Society amongst Mankind, and that we ought to do all in our Power for its Support ? Why so much Concern for us ? What can induce you to light up your Lamp, and spend whole Nights in Study for our Sakes ? Why are you at the Pains of composing so many Books ? You will tell us, it is with a View of undeceiving us in this Particular, That the Gods interest themselves in our Affairs ; and that Happiness essentially consists in something else than Pleasure. — But what is it to you whether others form a right Judgment on these Points or not ? What tie is there between you and us ? What Interest have you in what regards us ? Have you any Compassion for the Sheep, because they submit to be shorn, milked and slaughtered ? Ought not you to wish, that Men,

"enchanted and lulled to sleep by the Stoicks, would as tamely deliver up themselves to the Direction of you and your Companions ? — In short, what was it that deprived Epicurus of his Rest, and engaged him to write all he published ? Nature, without doubt, that most powerful Principle of human Motions, which strongly influenced him, and forced his Obedience, in spite of all the Resistance he could make, such is the invincible Force of human Nature ! — As it is neither possible nor conceivable that a Vine should shoot like an Olive-tree, and not according to the Impulse of its own Nature, and so *vice versa* ; so neither is it possible for Men to be entirely free from human Motions. If you castrate a Man, you cannot extinguish all carnal Inclinations and Desires in him. Thus Epicurus, as much as in him lies, has cut off all the Relations of Husband, Master of a Family, Citizen and Friend, but the Inclinations of human Nature are still entire in him. It was no more in his Power to divest himself of those, than it was in that of the wretched Academicks to throw away or blind their Senses, though no Set of Men ever took so much Pains to do it." *Dissert. Lib. II. Cap. XX. p. 201, &c. Edit. Colon. 1591.* The late Lord Shaftesbury has reasoned in the same manner, but with a lively Turn, which gives his Piece the Air of an Original, against Hobbes, who with still more Warmth than his Master Epicurus, undertook to persuade the World that all Men are by Nature so many Wolves one to another. See that Lord's *Essay on the Use of Rallery, &c. p. 64, & seq.* printed at the Hague in the Year 1710.

³ "We have, says St. CHRYSOSTOM, *Hom. XXXII. ad Roman.* a certain natural Affection one for another, which subsists even amongst Beasts." See what the same Father says farther on the first Chapter to the *Ephesians*, where he affirms that Nature has furnished us with the Seeds of Virtue. To all this let us add the Words of that great Philosopher, the Emperor ANTONINUS. "It has long since been shewn that we are born for Society. Is it not evident that Things which are less perfect were made for the Use of the more perfect, and that those which have greater Degrees of Perfection were designed for the Service one of another ?" *Lib. V. § 16.* GROTIUS.

⁴ *ὁμιέωσις*. The Author, in the preceding Note, alleges no other Authority but that of St. CHRYSOSTOM ; for the Word in question does not occur in the Passage quoted from ANTONINUS. In the following Passage of PORPHYRY the Term is used precisely in regard to the natural Sociability of Man. *Τάχα μὲν καὶ Φυσικῆς τινὸς οἰκίωσιν ὑπαρχούσης τοῖς ἀνθρώποις πρὸς ἀλλήλους, &c. De Abst. Anim. Lib. I. p. 13. Edit. Lugd. 1620.* See also *Lib. II. p. 159. Lib. III. p. 294, 328.* and PLUTARCH, *De Stoicorum Repugn. p. 1308. Tom. II. Edit. Wech.* ANTONINUS uses the Adverb *οἰκίως* in the same Sense. *Lib. IX. § 1.* And ARRIAN has the Verb *οἰκεῖω*. *Dissert. Epict. Lib. III. Cap. XXIV.* They all seem to have copied ARISTOTLE in this Particular, who says "Ἰδοὺ δ' ἄν τις, καὶ ἐν ταῖς πλάναις, ὡς οἰκεῖον ἄλλας ἀνθρώπων ἀνθρώπων καὶ φίλων. *Ethic. Nicom. Lib. VIII. Cap. I.*

Saying,

Saying, that every Creature is led by Nature to seek its own private Advantage, expressed thus universally, must not be granted.

VII. For even of the other Animals there are some that forget ¹ a little the Care of their own Interest, in Favour ² either of their young ones, or those of their own Kind. Which, in my Opinion, proceeds from ³ some extrinsick intelligent Principle, because they do not shew the same Dispositions in other Matters, that are not more difficult than these. The same may be said of Infants, in whom is to be seen a Propensity to do Good to others, before they are capable of Instruction, as Plutarch ⁴ well observes; and Compassion likewise discovers itself upon every Occasion in that tender Age. But it must be owned that a Man grown up, being capable of acting
in

VII. (1) It is an old Proverb that a Dog will not eat Dog's Flesh. VARRO *De Ling. Lat.* Lib. VI. p. 71. Edit. H. Steph. See likewise ERASMUS's *Adagia*. JUVENAL remarks that Tigers live peaceably together, and that the wildest Beasts spare those of their own Species.

————— parcit
Cognatis maculis similis fera
Indica Tigris agit rabida cum Tigride pacem
Perpetuam: sævis inter se convenit ursis.

Sat. XVI. Ver. 159, & seq.

PHILO, the Jew, has a beautiful Passage to this Purpose. Addressing himself to Men in regard to the Duties of the fifth Commandment, "At least, says he, imitate the Behaviour of some brute Beasts, which know how to make an affectionate Return for Favours received. Dogs keep the House, and even expose their Lives in Defence of their Masters, when in imminent Danger. It is said that Shepherds Dogs go before the Flocks and fight till they die, rather than suffer any of their Cattle to be lost. Is it not most shameful that Man should be outdone by a Dog in Point of Gratitude, the tamest and most civilized Creature, by the most brutal of Beasts? But if the Conduct of terrestrial Animals is not sufficient for our Instruction, let us pass on to the Consideration of the Birds of the Air, and learn our Duty from them. The Storks, when rendered incapable of flying by Age, stay in their Nests, whilst their Young traverse Sea and Land in quest of Food for them. The old ones, enjoying a Repose suitable to their Age, live in Plenty and Pleasure, whilst the young ones supporting the Fatigue of their Course cheerfully, with the Satisfaction they find in acquitting themselves of their Duty, and the comfortable Expectation of the same Assistance in their old Age, perform this necessary Office at a proper Time, in return for the Treatment they have received. Thus the same Birds feed their Young whilst unfledged, and their Parents when in the Decline of Life. Thus they are taught by Nature to provide with Pleasure for the Sustainance of those, from whom they received it, when not able to take Care of themselves. Is not this sufficient to confound such as shew no Concern for their Parents, and neglect those who alone, or at least preferably to all others, have a Right to their Assistance? especially when they consider that in this Case they only return what they have received. For all that Children call their own is received from their Parents, who either gave the Things themselves, or put their Children in a Condition of acquiring them." See concerning the particular Care of Pigeons about their Young, PORPHYRY *De non usu Animalium*, Lib. III. And as to certain Fishes, called *Scari* and *Sauri*, which shew a Concern for those of their own Species, CASSIODORUS *Var.* Lib. XI. Cap. XL. GROTIUS.

In regard to the Fishes our Author mentions, they seem to express a Concern for their Species in the following Instances. When one *Saurus* sees another taken by a Hook, he gnaws the Line, in order to set him at Liberty, and sometimes succeeds in the Attempt. And it is no uncommon Thing to observe several of them unite in a Body to deliver a Captive; so that if it endeavours to escape by the Tail, as he usually does, they assist him to the utmost of their Power. If he puts out his Head, one of them presents his Tail, that he may fasten on it, and thus disengage himself, while the other throws himself forward and drags him along. In which, as ELIAN observes, "they act like Men, and practise the Laws of Friendship, which they learn only

"from Nature." *Hist. Animal.* Lib. I. Cap. IV. See also PLINY's *Nat. Hist.* Lib. XXXII. Cap. II. OVID's *Halieutic. Fragm.* Ver. 13. &c. PLUTARCH, *De Solertiâ Animalium*. Tom. II. p. 977. C.

2 GRONOVIVS on this Place brings the Example of Hens which feed their Chickens, and Cocks which feed the Hens out of their own Mouths. Every one has observed this Practice, as well as the Ardour, with which the wildest Beasts expose their own Lives in Defence of their Young; and the Abstinence of Hounds, which bring the Game to their Masters. Nor are we less acquainted with the Fervour, with which Bees and Pismires unite their Labours for the Good of their respective Communities, as remarked by the same Annotator from CICERO and QUINTILIAN. The Words of the former in the 19th Chapter of his 3d Book *De Finibus Bonorum & Malorum*, are; "Even Bees, Pismires and Storks, do some Things for the Sake of others. This Union is much stronger among Men; we are therefore formed by Nature for Society, mutual Assistance, and living in Community." The latter in his *Instit. Orat.* Lib. V. Cap. XI. p. 303. Edit. Obrecht. gives this Direction: "If you press a Concern for the Commonwealth, you may shew how those little dumb Creatures, the Bees and Pismires, labour for the common Good." Several of those who have undertaken to criticize, or comment on our Author, have given his Thoughts a wrong Turn in this, and many other Places. The Weakness of their Criticism sufficiently appears from this single Consideration; that our Author only affirms that the Principle of Sociability has so real a Foundation in the Nature of Man, that we find some faint Tracks of it even amongst irrational Animals, in regard to those of their own Species. He does by no means pretend either that there is any Right common to Men and Beasts, or that any certain Consequences can be drawn from the Actions of Brutes, for proving any one particular Thing conformable or contrary to the Law of Nature. See what he says *Book I. Chap. I. § II.* and my Remark in the Notes on PUFENDORF's *Law of Nature and Nations*, Book II. Chap. III. § 2.

3 See the Passage of PUFENDORF, referred to in the preceding Note. By this intelligent and exterior Principle our Author means God himself; as appears from his Treatise *Of the Truth of the Christian Religion*; where he expresses himself more clearly; but still he does not give us a more just and philosophical Idea of the Thing. *Lib. I. § 7.* Consult Mr. LE CLERC's Note on that Piece, p. 13. of the last Edition of *Amsterdam*, 1717.

4 I know of no other Place in PLUTARCH, where that Philosopher speaks of this natural Propensity or Inclination of Children, but in his Account of his little Daughter, who, he tells us, was so surprisingly sweet tempered and benevolent, that she expressed a Desire that her Nurse should give the Breast not only to other children, but even to her Puppets and Play-things, sharing with others, whatever was most agreeable to herself. *Consol. ad Uxorem.* p. 608. Tom. II. Edit. Wech. But he is not there speaking of the common Inclination of all Children: On the contrary, he seems to attribute something particular to his little Girl, as a Reason for being more sensibly affected by her Death. As to the Thing itself, I think it very probable that, though the Principles and Maxims of the Law of Nature cannot be deduced from the Behaviour of Children, at an Age when their Inclinations act with most Freedom, which our Author indeed does not insinuate, there is still great Room to believe, that notwithstanding the infinite Diversity of Tempers, such Dispositions as are contrary to Humanity, are rather the Result of a bad Education and Custom, than of a natural and invincible Inclination; fo

in the same ⁵ Manner with respect to Things that are alike, has, besides an exquisite Desire ⁶ of Society, for the Satisfaction of which he alone of all Animals has received from Nature a peculiar Instrument, viz. the Use of Speech; I say, that he has, besides that, a Faculty of knowing and acting, according to some general Principles; so that what relates to this Faculty is not common to all Animals, but properly and peculiarly agrees to Mankind.

VIII. This Sociability, which we have now described in general, or this Care of maintaining Society ¹ in a Manner conformable to the Light of human Understanding, ² is the Fountain of Right, properly so called; to which belongs the Abstaining ³ from that which is another's, and ⁴ Peculiar to Man, properly and strictly called.

so that it may be maintained that all Men, even before they arrive to Years of Discretion, have the Seeds of Sociability, which consequently are founded in human Nature, and have no Dependence on a View of Interest, which is all our Author designs to advance.

5 Whereas Beasts act in a certain and uniform Manner only in regard to one Thing, to which they are impelled, or from which they are diverted by their natural Instinct.

6 The Emperor Marcus Antoninus observes that "whenever Man, who is born with a Disposition to do good Offices, exerts an Act of Beneficence, he does no more than what he was formed for by Nature." *Lib. IX. § 42.* He also asserts that "we may sooner find a terrestrial Body entirely separated from all that is terrestrial, than a Man divided from all other Men." *Ibid. § 9.* NICETAS CHONIATES, one of the Writers of the *Byzantine History*, says, "Nature has engraved and planted in us a sort of Sympathy for one another as Members of the same Family." See ST. AUGUSTINE *De Doctrina Christiana*, *Lib. III. Cap. XIV.* GROTIUS.

The Earl of SHAFESBURY proves the Existence of this natural and social Affection, from the Love of our Country, a Passion, which is found in some Degree in the Hearts of all Mankind. See *Tom. III.* of his *Characteristicks*, printed in 1727. p. 141, &c. The Arguments of that ingenious and penetrating Author are too long to be inserted here. But we have another Passage much shorter in the same Volume, p. 220, 221. which contains a remarkable Reflection. "Well it is for Mankind, says he, that, though there are so many Animals, who naturally herd for Company's Sake, and mutual Affection, there are few, who for Convenience, and by Necessity, are obliged to a strict Union, and kind of confederate State. The Creatures, who according to the Economy of their Kind, are obliged to make themselves Habitations of Defence against the Seasons and other Incidents, they, who in some parts of the Year are deprived of all Subsistence, and are therefore necessitated to accumulate in another, and provide withal for the Safety of their collected Stores, are by their Nature indeed as strictly joined and endowed with as proper Affections towards their Community, as the looser Kind, of a more easy Subsistence and Support, are united in what relates merely to their Offspring, and the Propagation of their Species. Of these thoroughly-affociating and confederate Animals, there are none, I have ever heard of, which in Bulk or Strength exceed the Beaver. The major Part of these political Animals and Creatures of a joint Stock, are as inconsiderable as the Race of Ants or Bees. But, had Nature assigned such an Economy as this to so puissant an Animal, for Instance, as the Elephant, and made him withal as prolifick as those smaller Creatures commonly are, it might have gone hard perhaps with Mankind; and a single Animal, who by his proper Might and Prowess has often decided the Fate of the greatest Battles, which have been fought by human Race, should he have grown up into a Society, with a Genius for Architecture and Mechanicks proportionable to what we observe in those smaller Creatures; we should with all our invented Machines, have found it hard to dispute with him the Dominion of the Continent."

VIII. (1) Hence it appears that our Author does not mean that bare natural Instinct in the Rule of the Law of Nature; but that he adds Reason for the Direction of such Instinct, without which it might misguide us, and induce us to consult only our private Interest. Hence it is also that he elsewhere makes what belongs to the Law of Nature consist in a necessary Conformity to, or Dissimilarity from a REASONABLE AND SOCIABLE NA-

TURE, *Book I. Chap. I. § 12. Num. I.* So that it is ridiculous to object, as GASPARD ZIEGLER has done, that the Desire of Society, which GROTIUS lays down as the Foundation of the Law of Nature, might be gratified, though a Man were united in Society and Friendship with one Nation only, or even with one single Family: and that Highwaymen and Pyrates have also their Societies, &c. For Reason, which is peculiar to Man, and which is more natural to him than the Desire of Society, of which we find some Traces in Beasts, clearly teaches us that it is not proper to confine Sociability and Affection to a small Number of Persons, or to one single Community; but that it ought, in some Manner or other, to extend to all Men, or to all of our own Species; on whom it is equally diffused by Virtue of the Design of Nature, and on the Account of their being naturally all alike and equal. I shall not here enlarge on this Subject, but refer the Reader to the Explication and Defence of the general Principle of Sociability, in my Notes on PUFENDORF'S *Law of Nature and Nations*, *Book II. Chap. III.* So that, on the whole, a Man must be very wrong headed, who will hereafter expose himself by starting and multiplying frivolous Difficulties against a Truth, which when well understood, leaves no room for any plausible Objection.

2 SENECA makes an excellent Application of this Principle. "That a Sentiment of Gratitude, says he, is a Thing valuable in its own Nature, appears from the odious Character which Ingratitude bears in the World, there being nothing so destructive of Concord and the Union of Mankind, as this shameful Vice. In reality, on what does our Security depend, but on the mutual Exchange of good Offices? Certainly nothing but this Commerce of Benefits can make Life commodious, and put us in a Condition of guarding against unforeseen Insults and Invasions. How miserable would Mankind be, if every one lived apart, and had no Resource, but in himself? So many Men, so many Persons exposed every Moment to be the Prey and Victims of other Animals: Blood continually ready to be spilt, in a Word, Weakness itself. Other Animals are strong enough to defend themselves. All such as are designed for a wandering Life, and whose natural Ferocity doth not allow them to go in Bodies, come into the World armed, as I may say. Whereas Man is defenceless on all Sides, having neither Claws nor Teeth to make him formidable. But in Society with his like he finds the wanted Succours. Nature to make him amends, has furnished him with two Things, which from weak and miserable as he would have been, render him very strong and powerful; I mean, Reason and a Disposition to Society. So that he, who when alone was not able to resist any other, by this Union becomes Master of all. The Disposition to Society gives him the Dominion over all the Animals, not even excepting those bred in the Sea, which live in another Element. It is Society also that furnishes him with Remedies against Distempers, Assistance in his old Age, Relief and Comfort in the midst of Sorrows and Afflictions. This is what puts him in a Condition of defying Fortune, if I may use the Expression. Take away the Disposition to Society, and you will at the same Time destroy the Union of Mankind, on which the Preference and Happiness of Life depend. Now to maintain that Ingratitude is not a detestable Vice and what ought to be avoided for its own Sake, but only on the Account of its pernicious Consequences, is no better than destroying the Disposition to Society." *De Benefic. Lib. IV. Cap. XVIII.* GROTIUS.

3 PORPHYRY, *Of Abstinence from Animals*, *Book III.* Justice consists in this, the Abstaining from what is another's,

the Restitution of what we have of another's, or of the Profit we have made by it, the Obligation of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men.

IX. From this Signification of Right arose another of larger Extent. For by reason that Man above all other Creatures is endued not only with this Social Faculty of which we have spoken, but likewise with Judgment to discern Things ¹ pleasant or hurtful, and those not only present but future, and such as may prove to be so in their Consequences; it must therefore be agreeable to human Nature, that according to the Measure of our Understanding we should in these Things follow the Dictates of a right and sound Judgment, and not be corrupted either by Fear, or the Allurements of present Pleasure, nor be carried away violently by blind Passion. And whatsoever is contrary to such a Judgment ² is likewise understood to be contrary to Natural Right, that is, the Laws of our Nature.

Improperly
and more
loosely.

X. And to this belongs a ¹ prudent Management in the gratuitous Distribution of Things that properly belong to each particular Person or ² Society, so as to prefer sometimes one of ³ greater before one of less Merit, a Relation ⁴ before a Stranger, a poor Man before one that is rich, and that according as each Man's Actions, and ⁵ the Nature of the Thing require; which many both of the Ancients and Moderns take to be ⁶ a part of Right properly and strictly so called; when notwithstanding that Right, properly speaking, has a quite different Nature, since it consists in leaving ⁷ others in quiet Possession of what is already their own, or in doing for them what in Strictness they may demand.

XI. And

ther's, and the doing no Injury to those that do none to us. GROTIUS.

IX. (1) *Indicium ad æstimanda quæ delectant aut nocent — Et quæ in utrumvis possunt ducere.* These Words Mr. BARBEYRAC renders — *choses agréables Et désagréables, &c.* On which Occasion he professes to follow the Author's Sense, rather than his Expression. The Word *delectant*, says he, is not directly opposed to *nocent*; and I suspect some Omission in the Text; though the Passage appears the same in all Editions of this Work. It is probable, continues our learned Commentator, that GROTIUS wrote, or designed to write, *Quæ delectant aut DOLOREM CREANT, quæ jurant, aut nocent, &c.* and that the Words here given in the Roman Character being left out, he did not observe the Omission in reading over this Place.

² It is evident that this includes those Duties of Man in regard to himself, which are enjoined him even by the Frame of his Nature, and which may be seen at large in PUFENDORF'S *Law of Nature and Nations*, Book II. Chap. IV.

X. (1) St. AMBROSE treats of this in his first Book *Of Offices*. GROTIUS.

Our Author probably had his Eye upon Chap. XXX, where that Father treats of *Beneficence*, and speaks, as usual, in a loose and confused manner of the Rules to be followed in the prudent Management of the Good we do to others.

Our Author speaks here of such Rewards as are given by the State, or those who represent it, to Persons distinguished by their Merit; as also of the Collation of publick Offices. For they who receive the former, or are placed in the latter, had no full Right to demand them, nor to claim considerable ones as their due, how great soever their Merit may be, or how glorious soever the Actions are, which recommended them. See Book II. Chap. XVII. § 2.

³ This Maxim is always to be observed by those, whose Business it is to dispose of publick Employments. But it does not always take Place in private Liberalities and the Services we do one another; the Ties of Blood, a pressing Necessity, and other such Considerations, sometimes require the Preference of a Person, otherwise of less Merit. See a beautiful Passage of CICERO to this Purpose, quoted at large in my PUFENDORF'S *Law of Nature and Nations*, Book III. Chap. III. § 15.

⁴ This takes Place, all Things else being equal. For it would be a mistaken piece of Charity to bestow a publick Employ on one who is in great Necessity, to the Prejudice of another, much more capable of discharging the Obligations of such a Post. In that Case, a Regard to the Poverty of the Candidate, would be a Respect of Persons as culpable as that of a Judge, who should on that Consideration pronounce Sentence in Favour of a poor Man, contrary to Law and Equity; which is expressly forbid by the Law of *Moses*, Exod.

xxiii. 3. on which Place see the Note of Mr. LE CLERC.

⁵ Much Judgment and Circumspection are to be used in this Particular; and it is difficult to lay down any general Rules in Relation to it, because the Practice of this Duty is diversified by an infinite Variety of Circumstances. Mr. BUDDEUS has written an useful Dissertation on that Subject, intitled, *De Comparatione Obligationum, quæ ex diversis hominum statibus oriuntur*; it was printed in 1704, among the *Selecta Juris Naturæ & Gentium*.

⁶ The Author speaks of such as follow ARISTOTLE, and make the Distribution in Question belong to *distributive Justice*, according to that Philosopher's Acceptation of the Term, who reckons it part of *private* or *rigorous Justice*, by Virtue of which a Man may make a rigorous Demand of what is his Due. See the following Note, and what the Author says, Book I. Chap. I. § 7, 8.

⁷ Since it consists in leaving others in quiet Possession of what is already their own, or in doing for them what in Strictness they may demand. This is the Sense of the Author's concise Expressions: *Ut quæ jam sunt alterius, alteri permittantur, aut impleantur.* It is probable that he had written or designed to write, *aut QUÆ ALTERI DEBENTUR, impleantur*, as I have observed in my Edition of the Original. A few Examples will explain his Meaning. When we forbear striking, wounding, robbing, injuring or defaming any one, we only leave him in quiet Possession of what was his own; for the good Condition of his Limbs, his Goods, and Reputation, are actually his own, and no Man has a Right to dispossess him of them, while he has done nothing to deserve such Treatment. When we repair the Damage he has sustained in his Person, Goods, or Reputation, whether designedly or through Inadvertency, we restore what we had taken from him, and what was his own, which he had a strict Right to demand. When we keep our Word to him, when we perform our Promise, or make good an Engagement, we do not indeed restore, what he was once in actual Possession of; but we perform what he might strictly require at our Hands. All this relates to the *Law of Nature*, taken in the strict and proper Sense of that Term; not to mention the Punishment of the Guilty, of which our Author seems not to design to speak in this Place; though he ranks it in the same Class, as we have seen § 8, and as we shall shew in our last Note on Book I. Chap. I. § 5. When the Sovereign refuses to bestow an Employment on one of his Subjects, who is worthy of it, or prefers one less capable of discharging the Duty, or does not reward the Person according to his Merit, he does indeed offend against the *Law of Nature*, taken in an improper, and less extensive Sense, according to our Author's Ideas; but he does that Subject no Wrong, properly speaking, because he had no full and rigorous Rights to demand the Employment, or the Reward. The same

XI. And indeed, all we have now said would take place, ¹ though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs. The contrary of which appearing ² to us, partly from Reason, partly from a perpetual Tradition, which many Arguments and Miracles, attested by all Ages, fully confirm; it hence follows, that God, as being our Creator, and to whom we owe our Being, and all that we have, ought to be obeyed by us in all Things without Exception, especially since he has so many Ways shewn his infinite Goodness and Almighty Power; whence we have Room to conclude that he is able to bestow, upon those that obey him, the greatest Rewards, and those eternal too, since he himself is eternal; and that he is willing so to do ought even to be believed, especially if he has in express Words promised it; as we Christians, convinced by undoubted Testimonies, believe he has.

XII. And this now is another Original of Right, besides that of Nature, being that which ² Voluntary, proceeds from the free Will ¹ of God, to which our Understanding infallibly assures us, we ought ¹ Divine. to be subject: And even the Law of Nature itself, whether it be that which consists in the Maintenance of Society, or that which in a looser Sense is so called, though it flows from the internal Principles of Man, may notwithstanding be justly ascribed ² to God, because it was his Pleasure that these Principles should be in us. And in this Sense Chrysippus ³ and the Stoicks said, that the Original of Right is to be derived from no other than Jupiter himself; from which Word Jupiter it is probable ⁴ the Latins gave it the Name Jus.

XIII. There is yet this farther Reason for ascribing it to God, that God by the Laws which he has given, has made these very Principles more clear and evident, even to those who are less capable of strict Reasoning, and has forbid us to give way to those impetuous ¹ Passions, which, contrary

is to be said of those, who refuse Relief or Assistance to the poor and miserable, not in extreme Necessity; for in that Case they have a strict Right to demand what they want, as we shall see in the proper Place. The learned GRONOVIVS, prepossessed with ARISTOTLE'S Ideas, and not giving due Attention to the Matter, and the Sequel of our Author's Discourse, widely mistakes his Meaning, and perplexes the Question both here and elsewhere; in which he has been faithfully followed by Mr. DE COURTIN.

XI. (1) This Assertion is to be admitted only in the following Sense: That the Maxims of the Law of Nature are not merely arbitrary Rules, but are founded on the Nature of Things; on the very Constitution of Man, from which certain Relations result, between such and such Actions, and the State of a reasonable and sociable Creature. But to speak exactly, the Duty and Obligation, or the indispensable Necessity of conforming to these Ideas, and Maxims, necessarily supposes a superior Power, a supreme Master of Mankind, who can be no other than the Creator, or the supreme Divinity. We shall treat of this Subject more largely in the fourth Note on Book I. Chap. I. § 10.

² The Reader may see on that Subject the excellent Treatise of our Author, Concerning the Truth of the Christian Religion.

XII. (1) For this Reason, according to the Sentiment of MARCUS ANTONINUS, every Man, who commits an Act of Injustice, renders himself guilty of Impiety. *Ὁ ἀδικῶν ἀσεβῆς*. Lib. IX. § 1. GROTIUS.

This Passage is beautiful, but ill applied. The Author ought to have placed it among those quoted in the following Note. In Reality, he is here talking of Voluntary Divine Law, as he himself calls it, Book I. Chap. I. § 15. or of that, which, being in its own Nature indifferent, becomes just or unjust, because God hath commanded or forbidden it. This is evident from the very Terms he employs, and the Sequel of the Discourse; for he calls the Will, which is the Source of this Right, a free or arbitrary Will; and afterwards observes, as it were occasionally, that the Law of Nature, of which he has been laying the Foundation, may be also considered as flowing from the Divine Will, because it was his Pleasure to establish such interior Principles in Men; or that his Nature should be framed in the Manner it is. Our Author's Meaning therefore in this Place is, that even though there were no Natural Right, or though the Frame of our Nature did not of itself engage us to act in such or such a manner, yet upon the Acknowledgment of a Deity, of whose Existence we cannot reasonably be ignorant or doubtful, we must likewise own ourselves obliged to obey him, whatever he commands, even though his Laws had no other Foundation but his absolute and arbitrary

Will. Thus we should always find a Source of Right there; for that God, who has so clearly revealed himself to Men in the Books, which we call the HOLY SCRIPTURES, has there prescribed them a Set of Laws entirely like those, which we say were imposed on them by the Frame of their own Nature. But it may be farther said that the Law of Nature, though sufficiently founded in itself, does likewise derive its Origin from God, independently of Revelation, as it was his Pleasure, &c. This I take to be the Meaning of our Author, and the Connexion of his Discourse, which does not appear at first Sight. The Impropriety of this Quotation will appear still more from the Words immediately following, which it is not amiss to produce. The Emperor gives a Reason for what he had advanced, viz. that every Injustice is a real Impiety. For, says he, universal Nature having made reasonable Creatures for one another, that they may assist one another, according to the Merits of each Individual, and do no Hurt to others; he who disobeys her Will, is manifestly guilty of Impiety against the most ancient Divinity. Many Pagan Authors have also acknowledged that the Law of Nature is a divine Law. See some Passages alledged in my Remark on PUFENDORF, Book II. Chap. IV. § 3. Num. 4.

² "When I speak of Nature, says St. CHRYSOSTOM, on 1 Cor. xi. 3. I mean God; for he is the Author of Nature." And CHRYSIPPUS expresses himself thus. "For it is not possible to find any other Principle or Origin of Justice, than Jupiter and universal Nature; for there we must always begin, whenever we design to treat of Good and Evil." Book III. Of the Gods. GROTIUS.

This last Passage cited from a Stoick, whose Works are not extant, though he published a great Number, is preserved by PLUTARCH, in his Treatise *De Stoicorum repugnantibus*, p. 1035. Tom. II. Edit. Wechel.

³ See the preceding Note. CICERO also maintains, that the wisest and most learned Men have been of Opinion that the Source of all Law and Justice is to be sought for in the Divinity. See his Treatise *de Legibus*, Lib. II. Cap. IV. and Lib. I. Cap. V, VII, X.

⁴ Perhaps, it might be rather said that as *Offum* has been converted into *Os*, so *Jussum* has been changed into *Jus*, Gen. *Jusis*, which was afterwards made *Juris*, as *Papissi* was turned into *Papirii*. See CICERO *Ep. ad Fam.* Lib. IX. Ep. XXI. GROTIUS.

XIII. (1) Disorderly Passions are condemned through the whole SCRIPTURE, especially in the New Testament, which forbids us, under very severe Penalties, to allow ourselves to be hurried away by those blind Motions. The Apostle St. JOHN includes them all under three Heads, the Lust of the Flesh, the Lust of the Eyes, and the Pride of Life, 1 Ep. Chap. II. Ver. 16. that is,

contrary² to our own Interest, and that of others, divert us from following the Rules of Reason and Nature; for as they are exceeding unruly, it was necessary to keep a strict Hand over them, and to confine them within certain narrow Bounds.

XIV. Add to this, that sacred History, besides the Precepts it contains to this Purpose, affords no inconsiderable Motive to social Affection, since it teaches us that all Men are descended from the same first Parents. So that in this Respect also may be truly affirmed, what Florentinus said in another Sense, That¹ Nature has made us all akin: Whence it follows, that it is a Crime for one Man to act to the Prejudice of another.

XV. Amongst Men, Parents¹ are as so many Gods² in regard to their Children: Therefore the latter owe them an Obedience, not indeed unlimited, but as extensive³ as that Relation requires, and as great as the Dependence of both upon a common Superior permits.

² Human.

Civil of every State.

XVI. Again, since the fulfilling of Covenants belongs to the Law of Nature, (for it was necessary there should be some Means of obliging Men among themselves, and we cannot conceive any other more conformable to Nature) from this very Foundation¹ Civil Laws were derived. For those who had incorporated themselves into any Society, or subjected themselves to any one Man, or Number of Men, had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained.

XVII. Therefore the Saying, not of Carneades only, but of others,

Interest, that Spring of Just and Right. CREECH.

if we speak accurately, is not true; for the Mother of Natural Law is human Nature itself, which, though even the Necessity of our Circumstances should not require it, would of itself create in us a mutual Desire of Society: And the Mother of Civil Law is that very Obligation which arises from Consent, which deriving its Force from the Law of Nature, Nature may be called as it were, the Great Grandmother of this Law also. But to the Law of Nature Profit is annexed: For the Author of Nature was pleased, that every Man in particular² should be weak of himself, and in Want of many Things necessary for living commodiously, to the End we might more eagerly affect Society: Whereas of the Civil Law Profit was the Occasion; for that entering into Society, or that Subjection which we spoke of, began first for the Sake of some Advantage. And besides, those who prescribe Laws to others, usually have, or ought³ to have, Regard to some Profit therein.

Of Nations;
of all or most
States.

XVIII. But as the Laws of each State respect the Benefit of that State; so amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the Advantage not of one Body in particular, but of all in general. And this is what is called the Law of Nations, when used in Distinction to the² Law of Nature. This

in the Language of the Philosophers, sensual Pleasure, Covetousness, and Ambition.

² In the Original it is quite the reverse: *Qui nobis ipsi, quique aliis consulunt*. But though all the Editions I have seen, and even that of 1632 read it so, it is evidently faulty. It should be read *malè consulunt*, as I have corrected it in my Edition of the Original, where the Reader may see the Reason why the Word supplied is here absolutely necessary.

XIV. (1) Digest. Lib. I. Tit. I. De *Justitiâ & Jure*. Leg. III. The Ideas of the Stoicks, and such was this Lawyer, concerning the Origin of Mankind, were very confused; and though they introduced the Divinity, it was in a very different Manner from what MOSES uses in his History of the Creation. See JUSTUS LIPSIUS's *Physiolog. Stoic. Lib. III. Dissert. IV.* The Kindred, which they conceived as subsisting among Men, did not consist in their considering all Mankind as descended from the same Father and the same Mother; but only in the Conformity of their Nature, and the Principles or Materials of which they thought them composed. See MARCUS ANTONINUS, Book II. § 1. and GATAKER's learned Notes on that Place.

XV. (1) The Author here passes almost imperceptibly to another Species of Voluntary Law, which however is founded in Nature; it is what a Father and a Mother prescribe to their Children; for Children are obliged to obey their Parents, because they gave them Birth; in which Action, though the Husband and Wife are no more than blind Instruments, they in some Measure imitate God.

² Hierocles, in his Comment on Pythagoras's Golden Verses, says that a Father and a Mother are terrestrial Gods. Philo, on the Decalogue, calls them visible Gods, who imitate the unoriginated God, in producing living Creatures. Pag. 761. Edit. Paris. St. Jerom (Ep. XLVII. Tom. I. p. 224. Edit. Basil.) says that the

Relation between Parents and their Children is next to that between God and Men; *secunda post Deum fœderatio*. PLATO calls Fathers and Mothers Images of the Divinity. De Legib. Lib. XI. (p. 930, 931. Tom. II. Edit. H. Steph.) Parents are to be honoured like the Gods, according to ARISTOTLE. *Ethic. Nicomach. Lib. IX. Cap. II.* GROTIUS.

The Passage here quoted out of Hierocles, is not in his Commentary on the Golden Verses. They occur in Stobæus, Serm. LXXVII. where he says a Man would not commit a Mistake, who should call them (Parents) Gods of a second Class, and terrestrial Deities. Pag. 461. Edit. Wechel.

³ See below Book I. Chap. IV. § 6. Num. 2.

XVI. (1) So that the Civil Law, though no kind of Law is in itself more arbitrary, is at the Bottom no more than an Extension of Natural Law, a Consequence of that inviolable Law of Nature, that every one is obliged to a religious Performance of his Promise.

XVII. (1) *Atque ipsa Utilitas Justî propè mater, & Equi.* HORAT. Lib. I. Sat. III. Ver. 98.

Upon which Place, an ancient Commentator on Horace, whether Acron or any other Grammarian, makes the following Remark. "The Poet here opposes the Tenets of the Stoicks; for his Design is to prove that Justice is not Natural, but derived from Interest." See what St. Augustin says against this Opinion, *De Doctrina Christiana*, Lib. III. Cap. XIV. GROTIUS.

² Ibid. § 8. Note 2.

³ See PUFENDORF, Book VII. Chap. IX. § 5.

XVIII. (1) See Book I. Chap. I. § 14.

² For these two Names are sometimes confounded. See what I have said on PUFENDORF, Book II. Chap. III. § 23. Note 3.

Part of Law Carneades omitted, in the Division he made of all Law into Natural and Civil of each People or State; when notwithstanding, since he was to treat of the Law which is between Nations (for he added a Discourse concerning Wars and Things got by War) he ought by all means to have mentioned this Law.

XIX. But it is absurd in him to traduce Justice with the Name of Folly. ¹ For as, according to his own Confession, that Citizen is no Fool, who obeys the Law of his Country, though out of Reverence to that Law he must and ought to pass by some Things that might be advantageous to himself in particular: So neither is that People or Nation foolish, who for the Sake of their own particular Advantage, will not break in upon the Laws common to all Nations; for the same Reason holds good in both. For ² as he that violates the Laws of his Country for the Sake of some present Advantage to himself, thereby saps the Foundation of his own perpetual Interest, and at the same Time that of his Posterity: So that People which violate the Laws of Nature and Nations, break down the Bulwarks of their future Happiness and Tranquillity. But besides, though there were no Profit to be expected from the Observation of Right, yet it would be a Point of Wisdom, not of Folly, to obey the Impulse and Direction of our own Nature.

XX. Therefore neither is this Saying universally true,

¹ 'Twas Fear of Wrong that made us make our Laws. CREECH.

which one in Plato expresses thus, ² The Fear of receiving Injury occasioned the Invention of Laws, and it was Force that obliged Men to practise Justice. For this Saying is applicable only to those Constitutions and Laws which were made for the better Execution of Justice: Thus many, finding themselves weak when taken singly and apart, did, for fear of being oppressed by those that were stronger, unite together to establish, and with their joint Forces to defend Courts of Judicature, to the End they might be an Overmatch for those whom singly they were unable to deal with. And now in this Sense only may be fitly taken what is said, That Law is that which the stronger pleases to impose; by which we are to understand, that Right has not its Effect externally, unless it be supported by Force. Thus Solon did great Things, as he himself boasted,

³ By linking Force in the same Yoke with Law.

XXI. Yet neither does Right lose all its Effect, by being destitute of the Assistance of Force. For Justice brings Peace to the Conscience; Injustice, Racks and Torments, such as Plato ¹ describes in the Breasts of Tyrants. Justice is approved of, Injustice condemned by the Consent of all good Men. But that which is greatest of all, to this God is an Enemy, to the other a Patron, who does not so wholly reserve his Judgments for a future Life, but that he often makes the Rigour of them to be perceived in this, as Histories teach us by many Examples.

XIX. (1) Add to all this what PUFENDORF says Book II. Chap. III. § 10.

² The Emperor MARCUS ANTONINUS makes a judicious Use of this Comparison. Every Action of yours, which has not a near or remote Relation to the Publick Good, as its End, destroys the Harmony and Uniformity of Life: It is seditious, like that of a Citizen, who by forming Cabals, breaks the Union of the State. Book IX. § 23. And in another Place he says, He who divides himself from another, cuts himself off from all human Society. Book XI. § 8. In Reality, as the same Emperor elsewhere observes, what is useful to the whole Swarm, is useful to each particular Bee. GROTIUS.

The Author, who probably trusted his Memory on this Occasion, has misquoted the second of these Passages; for instead of ὅλης τῆς κοινωνίας ἀποπέριωκε, he writes εἰ δύναται μὴ καὶ ὅλην φύλιν ἀποκοπέσθαι, i. e. must necessarily be cut off from the whole Body of Mankind. The Mistake was occasioned by the last Words immediately preceding the former Sentence, and making part of a Comparison; which the Author forgetting, and confounding with what follows, has changed οὐκ εἶ, the Word in the Original, into φύλη. The whole Passage runs thus: A Branch broken off from the Branch to which it grew, must necessarily be broken off from the whole Tree; so likewise a Man, &c. The last Passage is in Book VI. § 54, and stands thus: What is not good for the Swarm, is not good for the Bee.

XX. (1) Jura inventa metu injusti fatare necesse est. HORAT. Sat. III. Ver. 111.

² Book II. Of the Common-Wealth, Tom. II. p. 359. Edit. H. Steph. See likewise GORGAS, Tom. I. p. 483, and PUFENDORF, Book I. Chap. VI. § 10.

³ Ὅμῳ βίην τε καὶ δίκην συναρμύσας. PLUT. in Solon. Tom. I. p. 86. Edit. Wechel. To the same Purpose OVID:

In caufaque valet, caufamque tuentibus armis.

That is, "He has a good Right, and his Right is supported by Arms." Metam. Lib. VIII. Ver. 59. GROTIUS.

See PUFENDORF, Book I. Chap. VI. § 12. In the Passage from OVID, where Scylla, the Daughter of Nisus, speaks of Minos, King of Crete, the common Pointing, which our Author follows, is not just. The last Words of it are to be joined to the Beginning of the next Verse, and read thus:

caufamque tuentibus armis:
Ut puto, vincemur.

That is, "And it is my Opinion we shall be overcome by the Superiority of his Arms, which favour the Justice of his Cause." See Mr. BURMAN's Edition, published in 1713.

XXI. (1) See Gorgias, Tom I. p. 524, 525, and Book IX. of PLATO's Republic. Tom. II. p. 579. TACITUS produces that Philosopher's Thought on Occasion of the Remorse of Conscience, with which Tiberius was tortured. The wisest of Men had good Reason for affirming that if the Souls of Tyrants could be exposed to View, we should see them under violent Racks and Tortures; for as the Body is torn with Whips, so is the Mind with Cruelty, Lust, and Male-Administration. Neither the Splendor of the Imperial Dignity, nor Retirement, could secure Tiberius, or hinder him from confessing the Torments of his Soul, and interior Punishment of his Crimes. Annals, Book VI. Chap. VI.

Equally concerns private Persons, Nations, and Rulers of Nations.

XXII. But whereas many that require Justice in private Citizens, make no Account of it in a whole Nation or its Ruler; the Cause of this Error is, first, that they regard nothing in Right but the Profit arising from the Practice of its Rules, a Thing which is visible with Respect to Citizens, who, taken singly, are unable to defend themselves. But great States, that seem to have within themselves all things necessary for their Defence and Well-being, do not seem to them to stand in need of that Virtue which respects the Benefit of others, and is called Justice.

XXIII. But, not to repeat what has been already said, namely, that Right has not Interest merely for its End; there is no State so strong or well provided, but what may sometimes stand in need of Foreign Assistance, either in the Business of Commerce, or to repel the joint Forces of several Foreign Nations Confederate against it. For which Reason we see Alliances desired by the most powerful Nations and Princes, the whole Force of which is destroyed by those that confine Right within the Limits of each State. So true is it, that the Moment we recede from Right, we can depend upon nothing.

XXIV. If there is no Community which can be preserved without some Sort of Right, as Aristotle¹ proved by that remarkable² Instance of Robbers, certainly the Society of Mankind, or of several Nations, cannot be without it; which was observed by him who said,³ That a base Thing ought not to be done, even for the Sake of ones Country. Aristotle⁴ inveighs severely against

XXII. (1) *Que foras spectat.* GRONOVIVS observes, that our Author here makes Use of an Expression of APULEIUS, Book II. Of Moral Philosophy, (p. 15, 16. Edit. Elmenhorst.) where that Platonist, treating of the Virtues according to the Notions of his School, says, that When Justice is advantageous to the Possessor of that Virtue, it is termed Benevolence; but when it extends to the Interest of others, it is properly called Justice. The Commentator, who produces this Passage, might have gone higher, and discovered the Source from which both APULEIUS and GROTIUS derived this Distinction. CICERO, in Book II of his Republic, says, JUSTICE regards what is without us; it is diffused and extensive. And in this he only follows ARISTOTLE, whose Words are these: The Just Man acts for the Benefit of others; and it is for this Reason that we say Justice is a Good belonging to others. Ethic. Nicom. Lib. V. Cap. X. p. 67. Ed. Paris.

XXIII. (1) The Words here used are taken from a Passage in one of CICERO's Epistles, which our Author quotes in his Note on the next Paragraph. They do not relate to Right in general, but to Civil Laws only. The same is to be observed of the Passage in the Oration for Cecina, to which GRONOVIVS refers us in this Place, as if the Author had it in View, and it exactly expressed his Thought.

XXIV. (1) I am very much mistaken, if the Author has not put the Scholar's Name for that of the Master. I am induced to think so, not only because he has not specified the Place of ARISTOTLE either in the Margin, or the following Note, where he has thrown together several Passages of other Authors to the same Purpose; but also because I never saw that Philosopher quoted for the Observation in Question; nor do I remember to have found this Thought in any of his Moral or Political Works. On the contrary, the Commentators have quoted PLATO, on a well-known Passage of CICERO, where the same Remark is very finely turned; so that it is surprizing that GROTIUS takes no Notice of either of those two great Writers. The Grecian Philosopher speaks thus: Do you imagine that a City, an Army, a Gang of Thieves or Highwaymen, or any other Body of Men, united in an unjust Design, could ever succeed in their Enterprizes, if they dealt unjustly with one another. No certainly, replied the other Person in the Dialogue. De Rep. Lib. I. p. 351. Edit. Steph.

Such is the Force of Justice, says CICERO, that even they that live by their Crimes cannot subsist, without practising some Sort of Justice among themselves: For if any one of those, who rob in a Gang, defrauds or robs his Companion, he is no longer allowed a Place even in that infamous Society. A Chief of the Pirates, who does not make an equal Distribution of the Booty, is either killed or abandoned by his Men. It is even said that Highwaymen have a Set of Laws, to which they submit, and which they observe. De Offic. Lib. II. Cap. XI.

2. St. CHRYSOSTOM has the same Observation. But you will ask how Highwaymen live peaceably together; and when this is the Case? Certainly, when they do not act like Robbers; for if in the Distribution of what they get, they do not observe the Laws of Justice, and give every one his Share,

you will then see them quarrel and fight with one another. In Eph. IV. PLUTARCH having set down Pyrrhus's Expression, that he would leave his Kingdom to that of his Sons, whose Sword should be sharpest, compares it with a Verse in the Phenician Women of EURIPIDES: (Ver. 68.) They divide my Estate with a sharp Sword. To which he adds this Exclamation: So unsocial and brutal is the Passion of Avarice! In the Life of Pyrrhus, Tom. I. p. 388. Edit. Wech. CICERO says, We can have no certain Dependence on any Thing, when Justice is disregarded. Ep. ad Fam. Lib. IX. Ep. XVI. POLYBIUS observes that the Dissolution of the Society of Villains and Robbers, is chiefly owing to unjust Practices among themselves, and their not being true one to another. Chap. XXIX. GROTIUS.

3 The Author probably had his Eye upon a Passage of CICERO, where that great Orator and Philosopher proposes this Question: Whether the Interest of a Community most conformable to the Law of Nature is always to be preferred to Moderation and Modesty; he answers in the Negative; For, says he, there are some Things so shameful and criminal, that a wise Man will not do them even for the Preservation of his Country. De Offic. Lib. I. Cap. XLV. He afterwards asserts, that by good luck it can never happen that the Interest of the State should require such Things to be done, which ought to be well observed. GROTIUS.

4 The Passage here alledged is in the seventh Book of ARISTOTLE's Politics, Chap. II. p. 427. See also his Rhetoric, Book I. Chap. III. p. 519. Tom. II. Edit. Paris, 1629. For the better understanding his Thought, it is to be observed that he is opposing the Opinion of such as maintain that good Policy requires making Conquests, and extending them as far as possible, at the Expence of the Liberty of the neighbouring People. The Philosopher, amongst other Reasons against this way of thinking, urges that "It does not become an able Administrator of the State, and a wise Legislator, to do any thing which is not lawful, or agreeable to the Rules of Civil Society. But, says he, it is unlawful, and contrary to the Rules of Civil Society, to desire to have the Command of others at any Rate, justly or unjustly; and Conquests may be unjust. This way of reasoning holds good in regard to other Sciences. For Example, it is not the Business of a Physician or a Pilot to use Persuasion or Force indifferently in their respective Professions. But, adds ARISTOTLE, the Generality of Mankind give into this Mistake, that political and despotick Governments are but two Names for the same Thing: They make no Scruple of doing that to others, which they look on as unjust, and prejudicial in regard to themselves. They are willing to submit only to those who command them with Justice; but when it comes to their turn to command, they give themselves no Concern about the Justice of the Action." On reading these Words, one would conclude that ARISTOTLE entertained very just Ideas of the natural Quality of each Man in particular, and Nations in general. But it appears from the Sequel, that he was of Opinion that some Men, and even some People, were naturally Slaves, on whom

against those ⁵, who, though they would not have any to govern amongst themselves, but he that has a Right to it, yet in regard to Foreigners are not concerned whether their Actions be just or unjust.

XXV. A Spartan King having said, ¹ That is the most happy Commonwealth, whose Bounds were determined by Spear and Sword; the same Pompey, whom we lately mentioned on the contrary Side, correcting that Maxim said, That is happy indeed, which has Justice for its Boundaries. For which he might have used the Authority of another Spartan King ², who preferred Justice before ³ military Fortitude, for this Reason, that Fortitude ought to be regulated by some sort of Justice: And that if all Men were just, they would have no Occasion for that Fortitude. The Stoicks defined ⁴ Fortitude itself to be the Virtue that contends for Justice. Themistius, in his Oration to Valens, says very elegantly, that Kings, who conduct themselves by the Rules of Wisdom, take Care, not only of the Nation whose Government they are entrusted with, but of all Mankind; and are, as he expresses himself, not φιλομαχίδες Friends to the Macedonians only, or φιλορῳμαίοι to the Romans, but φιλανθρώποι ⁵ to all Men without Exception. Nothing else made the Name of Minos odious to Posterity, ⁶ but his confining Equity within the Limits of his own Empire.

XXVI. But so far must we be from admitting the Conceit of some, that the Obligation of all Right ceases in War; that on the contrary, no War ought to be so much as undertaken but for the obtaining of Right; nor when undertaken, ought it to be carried on beyond the Bounds of Justice and Fidelity. Demosthenes ¹ said well, that War is made against those who cannot be restrained in a judicial Way. For judicial Proceedings are of Force against those who are sensible of their Inability to oppose them; but against those who are or think themselves of equal Strength, Wars are undertaken; but yet certainly, to render Wars just, they are to be waged with no less Care and Integrity, than judicial Proceedings are usually carried on.

XXVII. Let it be granted then, that ¹ Laws must be silent in the midst of Arms, provided they are only those Laws that are Civil and Judicial, and proper for Times of Peace; but not

whom he thought War might be made without any other Reason; and he makes use of the Comparison of a Hunter, who is not indeed allowed to take or kill Men for Food or Sacrifice, but may lawfully pursue such Animals as are wild and proper for the Purposes designed. See what I have said on this Philosopher's Notions in my Preface to PUFENDORF, p. xcvi. § XXIV. Second Edition, Of the Law of Nature and Nations.

⁵ PLUTARCH, in his Life of Agesilaus, blames the Lacedemonians for making Virtue consist principally in the Interest of their Country, and being unacquainted with any other Justice, but what they thought might contribute to the aggrandizing of Sparta. THUCYDIDES gives us the Sentiments of the Athenians concerning the Humour of that People. The Lacedemonians generally observe the Rules of Virtue among themselves, and in what relates to the Laws of their own Country; but several Examples might be given of their different Conduct in regard to others; in short, they esteem only that virtuous, which is agreeable to them, and only that just, which promotes their Interest. Book V. Chap. CV. p. 344. Edit. Oxon. GROTIUS.

XXV. (1) I know not whence this is taken. PLUTARCH says nothing like it, either in his Life of Pompey, or in his *Apophthegms*; and it is not probable he would have omitted so remarkable an Expression. Nor do I find the Saying of the Spartan King, as it stands here, in the *Apophthegms* of the Lacedemonians, or elsewhere. So that I much suspect our Author has depended too much on his Memory; and imagine the Mistake may be thus accounted for. Phraates, King of the Parthians, having sent an Embassy to Pompey, desiring him to be content with bounding his Empire by the Euphrates; that great General replied, that the Romans chose rather to make Justice the Boundary of their Empire. PLUTARCH, *Apophthegm*, p. 204. Tom. II. Edit. Wech. See also the *Life of Pompey*, Tom. I. p. 637. where the Story is told with some Difference. The same Philosopher ascribes the following Reply in one Place to Agesilaus, and in another to his Son Archidamus: One of these Kings being asked how far the Lacedemonian Dominions extended, brandished his Spear, and answered, as far as this can be carried. P. 210. See likewise p. 218, both of the second Volume. Out of these two Stories confusedly remembered, our Author has formed what he here relates, and which, as far as I know, is to be found no where as he gives it.

² It was Agesilaus; and PLUTARCH has preserved this Saying, as an Answer to a Question proposed concerning the comparative Excellency of the two Virtues. *Apophthegm*: Lacon: p. 213. Tom. II.

³ Agesilaus having observed that the Inhabitants of Asia had a Custom of distinguishing the King of Persia by the Appellation of Great, asked: How is that Prince greater than I, unless he is more just and more wise? PLUTARCH, *Apophth. Lacon*. p. 213. GROTIUS.

⁴ This Definition is produced and commended by CICERO, *De Offic.* Lib. I. Cap. XIX.

The Emperor Marcus Antoninus declares, that, as Antoninus, he considered Rome was his City and native Country; but as a Man, the whole World. (Book VI. § 44.) PORPHYRY says, the Man, who is conducted by Reason, forbears injuring his Fellow-Citizens, and observes the same Rule still more rigorously in regard to Strangers and all Mankind; and thus keeping the irrational Part in due Subjection, becomes more rational, and consequently more like Divinity than those with whom he deals in this manner. Of Abstinence, Book II. (p. 333.) GROTIUS.

⁶ We have a Verse of an old Poet to this Purpose.

Καὶ νήσων διπλοῖσι βαρὺν ζυγὸν ἐπέθηκε Μίνως.

King Minos has laid a heavy Yoke on the Necks of the Islands.

See St. CYRIL's VIth Book against the Emperor Julian. GROTIUS.

The Father from whom our Author has taken this Verse, quotes it as belonging to Callimachus; and gives it with some small Difference in the Words, though to the same Sense.

Καὶ νήσων ἐπέθηκε βαρὺν ζυγὸν ἀρχαῖε Μίνως.

Pag. 191. Edit. Spanh.

XXVI. (1) The Passage, which our Author had in View, occurs in the Oration on *Cerberus*, where Demosthenes, undertaking to dissuade the sending of a new General into the Hellespont, in the Room of Diopithes, who lay under an Accusation of Extortion and Piracy, shews that it would be an extravagant Piece of Madness to proceed to that Extremity against a Subject of the State, whom they might easily punish without so much Noise. It is proper, says the Orator, and even necessary to pay Troops, employ Vessels, and erect publick Funds against an Enemy, who cannot be reduced by the Laws; a Decree, an Impeachment, and a single Galley are sufficient against our own Citizens, in the Opinion of all considerate Men. P. 38. Edit. Basil. 1572.

XXVII. (1) See the Commentators on these Words of CICERO, in his Oration for Milo; silent enim Leges inter Arma. Cap: IV.

those

those that are of perpetual Obligation, and are equally suited to all Times. For it was very well said of Dion Prusænsis ², That between Enemies, Written, that is, Civil Laws, are of no Force, but Unwritten ³ are, that is, those which Nature dictates, or the Consent of Nations has instituted. This we are taught by that ancient Form of the Romans, ⁴ These Things I think must be recovered by a pure and just War. The same ancient Romans, as Varro observed ⁵, were very slow and far from all Licentiousness in entering upon War, because they thought that no War but such as is lawful and accompanied with Moderation, ought to be carried on. It was the Saying of Camillus ⁶, That Wars ought to be managed with as much Justice as Valour : And of Scipio Africanus ⁷, That the Romans both begin and finish their Wars with Justice. An Author ⁸ maintains, There are Laws of War, as there are of Peace. Another ⁹ admires Fabricius for a very great Man, and remarkable for a Virtue which is extremely difficult, Innocence in War, and who believed that there are some Things, which it would be unlawful to practise even against an Enemy.

XXVIII. Of how great Force in Wars is the Consciousness of the Justice of ¹ the Cause, Historians every where shew, who often ascribe the Victory chiefly to this Reason. Hence the Proverbial

² No written Law is of Force in Regard to Enemies ; but there are certain Rules and Customs, which are observed by all, even when the Enmity is carried to the greatest Length. Orat. *in idem*. This Passage is quoted by PETER DU FAUR, *Semestr. Lib. II. Cap. I. p. 8. Edit. Genev.* The Orator instances in the Permission of burying the Dead, the Security of Embassadors, &c.

³ Upon this Principle it was, that King Alphonfus, being asked which of the two he had been most obliged to, Books or Arms ; answered, that he had learned by Books, both the Art of War, and the Rights of War. PLUTARCH says, that amongst good Men there are Laws of War ; and that we ought not to push the Desire of conquering so far, as to make an Advantage of wicked and impious Actions. GROTIUS.

PLUTARCH has put these Words into the Mouth of Camillus, when he generously declined making an Advantage of the Schoolmaster's Treachery, who betrayed the Children of the Falisci into his Hands. *Life of Camillus*, Tom. I. p. 134.

⁴ This Formulary is found in LIVY, Book I. Chap. XXXII.

⁵ This occurs in a Fragment of that learned Author, preserved by Nonius, and was taken from his second Book *De Vita Populi Romani*. See what is said on this Passage, Book III. Chap. III. § 11. Note 2.

⁶ These are the Words of that great General, as related by LIVY, on the Occasion of the perfidious School-Master ; whence PLUTARCH has taken Occasion to ascribe to him a Speech very like this, which we have related above, Note 3. *There are Laws of War as well as of Peace ; and we have learnt how to carry on a War with as much Justice as Bravery.* Book V. Chap. XXVII.

⁷ LIVY makes him speak thus, in his Answer to the Embassadors from Carthage, who came to sue for a Peace, that, though he was almost secure of Victory, he does not refuse to make a Peace, that the whole World may know the Roman People have a strict Regard to Justice both in engaging in and finishing their Wars. Book XXX. Chap. XVI. The thing itself, however, is far from being indisputable. On the contrary, if we look into the Conduct of the Romans, we shall find Injustice practised in several of their Wars, either in regard to the Subject, the Manner, or Conclusion of them ; though ALBERIC GENTILIS has taken upon him to justify that People in his Treatise *De Armis Romanis*. See Mr. BUDDEUS's Dissertation, intitled, *Juris prudentiæ Historiæ Specimen*, § 82, &c. among his *Selecta Juris Naturæ & Gentium* ; and what GROTIUS himself says in his Book *De Verit. Rel. Christi*. Lib. II. § 12. I remember a Passage in CICERO, where that celebrated Orator and Philosopher says, that Equity and Fidelity are most commonly observed in entering on, pursuing, and ending a War. *De Legib. Lib. II. Cap. XIV.*

⁸ LIVY, whose Words have been quoted Note 6.

⁹ SENECA, Ep. CXX. We admired that great Man, persevering in his Resolution of giving a good Example, and unmoved by all the King's Offers, or the Promises made him on the other Side ; preserving his Innocence in War, which is extremely difficult, being persuaded that some Things were not allowable even in an Enemy, P. 595. Edit. Gronov. 1672.

XXVIII. (1) APPIAN makes Pompey speak thus to his Army : " We ought to rely upon the Gods and the

" Goodness of our Cause, since we are engaged in this
 " War out of an honest and just Desire of maintaining
 " the Government and Liberty of our Country." *De Bell. Civil. Lib. II. p. 460. Edit. H. Steph. p. 755. Edit. Amstel.* The same Historian introduces Cassius saying, that in War nothing gives so great Hopes as the Justice of the Cause (*De Bell. Civil. Lib. IV. p. 645. H. Steph. 1034. Edit. Amst.*) JOSEPHUS says that King Herod made use of this Consideration to animate his Soldiers, that God is with those, who have Justice on their Side. *Antiq. Jud. Lib. XV.* We find in PROCOPIUS many Thoughts to the same Purpose ; as for Instance, what Belisarius says in the Speech he made, when he went into Africa. " Valour will not render us victorious, " unless it be regulated and conducted by Justice." (*Vandalic. Lib. I. Cap. XII.*) See also another Speech of the same General's before an Engagement, near Carthage (*Ibid. Cap. XIX.*) In the Discourse of the Lombards to the Herculi, we have the following Passage, which I have a little corrected. " We call God to witness, " whose Power is so great, that the least Particle of it " infinitely surpasses all human Force. There is Reason to believe, that having a Regard to the Causes of " the War, he will give to it an End answerable to the " Deserts of both." (*Gothic. Lib. II. Cap. XIV.*) And it is remarkable, that this Prediction was soon accomplished by a wonderful Event, which the Historian afterwards recites. Totilas, in the same Author, says to the Goths : " It is not possible, no, it is not possible, that " those who commit Acts of Injustice and Violence, " should acquire Glory by Arms ; but every one is fortunate or unfortunate, as he behaves himself well or " ill." (*Ibid. Lib. III. Cap. VIII.*) After the taking of Rome, Totilas makes another Speech, tending to the same Purpose. (*Ibid. Cap. XXI.*) AGATHIAS, another Historian of those Times, tells us, Book II. Chap. I. that Injustice and Irreligion ought always to be guarded against, and are very prejudicial, but especially when we are obliged to make War, and to come to an Engagement with the Enemy. He proves it elsewhere (*Cap. V.*) by the Examples of Darius, Xerxes, and the Athenians in their Expedition against Sicily. See also what Crispinus says to the Inhabitants of Aquileia in HERODIAN, Lib. VIII. (*Cap. VI. Edit. Oxon. 1678.*) THUCYDIDES observes, that the Lacedæmonians believed they had brought upon themselves, by their own Fault, the Disasters they met with at Pylos and other Places, because they had refused to submit to the Decision of Arbitrators, though summoned thereto by the Athenians, according to their Treaty. But the Athenians having afterwards refused in their turn to give the same Satisfaction, after several Infringements and unjust Enterprizes, the Lacedæmonians from thence conceived good Hopes of Success in their Affairs for the future. Lib. VII. GROTIUS.

The Passage of THUCYDIDES, which our Author means, is in § 18. p. 421. of the Oxford Edition. Several States of Peloponnesus making Preparations for War against the Athenians, the Lacedæmonians joined them with so much the more Resolution and Confidence, as they believed the Event would not be the same as in the preceding War ; which, they themselves acknowledged, had been occasioned rather through their own

Proverbial Sayings, ² A Soldier's Courage rises or falls according to the Merit of his Cause; ³ seldom does he return safely, who took up Arms unjustly; Hope is the ⁴ Companion of a good Cause; and others to the same Purpose. Nor ought any one to be moved at the prosperous Successes of unjust Attempts; for it is sufficient that the Equity of the Cause has of itself a certain, and that very great Force towards Action, though that Force, as it happens in all human Affairs, is often hindered of its Effect, by the Opposition of other ⁵ Causes. The Opinion that a War is not rashly and unjustly begun, nor dishonourably carried on, is likewise very prevalent towards procuring Friendships; which Nations, as well as private Persons, stand in need of upon many Occasions. For no Man readily associates with those, who, he thinks, have Justice, Equity and Fidelity in Contempt.

XXIX. Now for my Part, being fully assured, by the Reasons I have already given, that there is some Right common to all Nations, which takes Place both in the Preparations and in the Course of War, I had many and weighty Reasons inducing me to write a Treatise upon it. I observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of: a Running to Arms upon very frivolous or rather no Occasions; which being once taken up, there remained no longer any Reverence for Right, either Divine or Human, just as if from that Time Men were authorized and firmly resolved to commit all manner of Crimes without Restraint.

III. The Author's Reasons for writing this Book.

Restraining the Licentiousness in making War.

XXX. The Spectacle of which monstrous Barbarity worked many, and those in no wise bad Men, up into an Opinion, that a Christian, whose Duty consists principally in loving all Men without Exception, ought not at all ¹ to bear Arms; with whom seem to agree sometimes Johannes Ferus ² and our Countryman ³ Erasmus, Men that were great Lovers of Peace both Ecclesiastical and Civil; but, I suppose, they had the same View, as those have who in order to make Things that are crooked straight, usually ⁴ bend them as much the other Way. But this very Endeavour of inclining too much to the opposite Extreme, is so far from doing Good, that it often does Hurt, because Men readily discovering Things that are urged too far by them, are apt to slight their Authority in other Matters, which perhaps are more reasonable. A Cure therefore was to be applied to both these, as well to prevent believing that Nothing, as that all Things are lawful.

XXXI. At the same Time I was likewise willing to promote, by my private Studies, the Profession of Law, which I formerly practised in publick ¹ Employments with all possible Integrity; this being the only Thing that was left for me to do, being unworthily ² banished my Native Country, which I have honoured with so many of my Labours. Many have before this designed

An Endeavour to promote the Knowledge of Law, by giving an Example of a Method for it.

Fault, than that of the Athenians. For, having sided with the Thebans, when the latter came to attack Plataeæ, during a Truce (Lib. II. § 1. & seq.); and having moreover refused, contrary to an express Clause of their Treaty, (Lib. V. § 18. p. 302.) to terminate some Difference in a judicial Way, though they had been summoned to it by the Athenians; they were fully persuaded they had been unsuccessful on that Account, and ingeniously ascribed to their Breach of Faith the Calamities that befel them at Pylos, and upon other Occasions. But after the Athenians, having equipped a Fleet, were gone to ravage the Lands of Epidaurus, Præsa, and other Places, and from Pylos made Incursions into their Country; after they refused, in their turn, to submit to a Decision in an amicable Manner, when any Dispute arose in relation to their Treaties: I say, after that time, the Lacedæmonians believing they had made the Injustice to pass over to the other Side, eagerly sought an Opportunity of declaring War against them.

² The Author here makes use of the very Terms of PROPERTIUS, and not of OVID, as GRONOVIVS pretends. His Memory failed him on this Occasion, which was also the Case of the learned Mr. MENAGE. This Mistake has been corrected by the last Commentator on the Poet last mentioned.

Frangit & adtollit vires in milite causa:
Quæ nisi iusta subest, excutit arma pudor.

Lib. IV. Eleg. VI. Ver. 51, 52. Edit. Broekhuys.

³ This Thought is contained in the following Verse of EURIPIDES, taken from one of his Tragedies, not now extant.

Οὐδὲς ἐραίσυνας ἄδικα, σὺς ἦλθεν πάλιν.

Erechtei Fragm. Ver. 44. Edit. Barnes.

⁴ LUCAN introduces Pompey employing this Reason for encouraging his Soldiers before the Battle of Pharsalia.

Causa jubet melior superos sperare secundos.

Our better Cause bids us hope for the Favour of the Gods.
Lib. VII. Ver. 349.

But long before that Poet's Time, Menander had said in general:

Ὅλιν τι πράττεις ὅσιος, ἀγαθὴν ἐλπίζῃ
Πρόβαλλε σταντῶ, τῷτο γινώσκων, ὅτι
Τόλμη δικαία καὶ Θεὸς συλλαμβάνει.

When you engage in any good Action, entertain Hopes of Success; being assured that God favours a just Enterprize.

Fragm. è Vulcanalib. p. 190. Edit. Cleric.

See also some Passages cited by our Author, Book II. Chap. I. § 1.

⁵ TACITUS makes Otho say that good and lawful Undertakings are frequently attended with very bad Success, for want of a judicious Manner of proceeding, Hist. Book I. Chap. LXXXIII.

XXX. (1) Gladius bene de Bello cruentus, & melior homicida. TERTUL. De Resurr. Carnis. Cap. XVI. GROTIUS.

See below, Book I. Chap. II. § 8. and my Preface to PUFENDORF, § 9; where I have inserted other Passages from the Fathers of the Church, who have condemned War as absolutely unlawful.

² He was a Franciscan Preacher at Mentz, who lived in the Reign of Charles V. ZIEGLER on this Place quotes Sixtus of Sienna, Biblioth. Lib. VI. Annot. 115, 156; where the Author produces and criticizes the Passages of those two Writers on this Subject.

³ This great Author has a long Digression on the Proverb, Dulce Bellum inexpertis.

⁴ This has very often been the Practice of several Moralists, in all Ages. See a beautiful Passage of SENECA on this Subject, which I have given at Length, with a Translation in my Treatise On Gaming, Book I. Chap. III. § 12.

XXXI. (1) The Author had been Advocate-General, and Pensionary of Rotterdam.

² He wrote this at Paris in 1625.

to reduce it into a System ; but none has accomplished it ; nor indeed can it be done, unless those things (which has not been yet sufficiently taken Care of,) that are established³ by the Will of Men, be duly distinguished from those which are founded on Nature. For the Laws of Nature being always the same, may be easily collected into an Art ; but those which proceed from Human Institution being often changed, and different in different Places, are no more susceptible of a methodical System, than other Ideas of particular Things are.

XXXII. But if the Professors of true Justice would undertake to treat of the several Parts of that Law which is perpetual and natural, setting aside every Thing which owes its Rise to Voluntary Institution, so that one for Instance would treat of Laws, another of Tributes, another of the Office of Judges, another of the Conjecture of Wills, another of the Evidence in Matters of Fact, there might at last from all the Parts collected together be a Body of Law composed.

IV. The Contents and Order of the Work.
Book I.

XXXIII. What Method we thought fit to use, we have shewn in Deed rather than in Words in this Treatise, which contains that Part of Law, which is by far the noblest.

XXXIV. For in the first Book, after premising some Things concerning the Origin of Right, we have examined the general Question, whether any War is just ; afterwards to discover the Difference between a publick and private War, our Business was to explain the Extent of the Supreme Power, what People, what Kings have it in full, who in part, who with a Power of alienating it, and who have it without that Power. And then we were to speak of the Duty of Subjects to their Sovereigns.

Book II.

XXXV. The second Book, undertaken to explain all the Causes from whence a War may arise, shews at large, what Things are common, what proper, what Right one Person may have over another, what Obligation arises from the Property of Goods, what is the Rule of Regal Succession, what Right arises from Covenant or Contract, what the Force and Interpretation of Treaties and Alliances, what of an Oath both publick and private, what may be due for a Damage done, what the Privileges of Embassadors, what the Right of burying the Dead, what the Nature of Punishments.

Book III.

XXXVI. The third Book treats first of what is lawful in War ; and then, having distinguished that which is done with bare Impunity, or which is even defended as lawful among foreign Nations, from that which is really blameless, descends to the several Kinds of Peace, and all Agreements made in war.

V. The Necessity of Writing.

Nothing of the ancient Authors extant on this Subject.

XXXVII. But I thought this Undertaking still the more worth my Pains, because, as I said before, this Subject has not been fully handled by any Body ; and those who have treated of the Parts of it, have done it so, that they have left a great deal for the Labour of others. There is nothing of this Kind extant of the ancient Philosophers, whether those of the Pagan Greeks, (amongst whom Aristotle had composed a Book intitled, *Δικαιώματα Πολέμων*¹, The Rights of War,) or those of the Primitive Christians, which was very much to be wished for. Nay, of those Books of the ancient Romans concerning the² Feacial Law, we have nothing transmitted to us but the bare Name : Those who have made Sums of Cases of Conscience, as they call them, have made only Chapters, as of other Things, so of War, of Promises, of an Oath, of Reprizals.

The Defects of the Moderns.

XXXVIII. I have likewise seen some particular Treatises concerning the Rights of War, some of which were written by Divines, as³ Franciscus Victoria, Henricus⁴ Gorichemus, ⁵ Wilhelmus Matthæi, Johannes⁶ de Carthagena ; some by Professors of Law, as⁷ Johannes Lupus, ⁸ Franciscus Arius, ⁹ Johannes de Lignano, ¹⁰ Martinus Laudensis. But upon so copious a Subject, they have all of them said but very little, and most of them in such a Manner, that they have, without any Order, mixed and confounded together those Things that belong severally to the Law Natural, Divine, of Nations, Civil and Canon.

XXXIX. What was most wanting in all those, viz. Illustrations from History, the most Learned¹ Faber has undertaken to supply in some Chapters of his *Semestria*, but no farther than served

³ Laws merely positive.

XXXVII. (1) The Author is misled here by a corrupted Passage of AMMONIUS the Grammarian, in his Treatise *Of like and different Words*, upon the Word Νῆς, where we read, *Δικαιώματα πολέμων*, The Laws of War, instead of πόλεων, States ; as it is quoted by EUSTATHIUS on the seventh Book of the *Iliad*. See MENAGE on DIOGENES LAERTIUS, Book V. § 26. and SELDEN, *Of the Law of Nature and Nations*, Juxta Displ. Hebr. Lib. I. Cap. I. p. 4.

² The Justice of War is taught most strictly by Feacial Law of the Romans. CICERO, *De Offic.* Lib. I. Cap. XI. See Book II. Chap. XXIII. § 4 and 8 of this Treatise.

XXXVIII. (1) He was a Spanish Dominican, who lived in the XVIth Century ; and the Treatise here mentioned is intitled, *De Indis & Jure Belli*, and appears among his twelve Theological Lectures.

² A Dutchman, so named from the Place of his Birth, and Chancellor of *Cologn*. He lived about the Middle of the XVth Century, and wrote a Treatise *De Bello Justo*.

³ I know not who, or what Countryman he was. Mr. DE COURTIN has translated his Name *Matthison* ; and thus he appears to be an *Englishman* ; but perhaps this is only done by guess.

⁴ His Book was printed at *Rome*, in 1609. GROTIUS.

⁵ A Native of *Segovia*. His Treatise *De Bello & Bellatoribus*, may be found in the large Collection, called *Traſtatus Traſtatuum*, Tom. XVI.

⁶ A Spaniard, his Name is *Arias*, and his Book is in the same Volume of the same Collection, under the Title of *De Bello & ejus Justitiâ*.

⁷ A Native of *Bologna* in *Italy*. His Treatise *De Bello*, is inserted in the same Volume of the Collection already specified.

⁸ His Name was *GARAT*. His Treatise *De Bello* appears in the same Volume of that Collection. It was reprinted at *Louvain* in 1647, with the Treatise of *AYALA*, which our Author speaks of a little lower.

XXXIX. (1) PETER DU FAUR of *St. Jori*, Counsellor in the Grand Council, afterwards Master of Requests, and

served his Purpose, and only by alledging some Authorities. The same has been done more largely, and that by applying a Multitude of Examples to some general Maxims laid down, by Balthazar² Ayala, and still more largely by Albericus³ Gentilis, whose Labour, as I know it may be serviceable to others, and confess it has been to me, so what may be faulty in his Stile, in Method, in distinguishing of Questions, and the several Kinds of Right, I leave to the Reader's Judgment. I shall only say this, that in the Decision of Controversies, he is often wont to follow either a few Examples that are not always to be approved of, or even the Authority of modern Lawyers in their Answers, not a few of which are⁴ accommodated to the Interest of those that consult them, and not formed by the invariable Rules of Equity and Justice. The Causes, from whence a War is denominated just or unjust, Ayala has not so much as touched upon: Gentilis has indeed described after his Manner some of the general Heads; but neither has he touched upon many famous Questions, which turn upon Cases that are very common.

XL. We have been careful that nothing of this Kind be passed over in Silence, having likewise shewn the very Foundations upon which we build our Decisions, so that it might be easy to determine any Question that may happen to be omitted by us. It remains now, that I briefly declare with what Assistance, and with what Care I undertook this Work. My first Care was, to refer the Proofs of those Things that belong to the Law of Nature to some such certain Notions, as none can deny, without doing Violence to his Judgment. For the Principles of that Law, if you rightly consider, are manifest and self-evident, almost after the same Manner as those Things are that we perceive with our outward Senses, which do not deceive us, if the Organs are rightly disposed, and if other Things necessary are not wanting. Therefore Euripides in his *Phœnissæ* makes Polynices, whose Cause he would have to be represented manifestly just, deliver himself thus:

I speak not Things hard to be understood,
But such as, founded on the Rules of Good
And Just², are known alike to Learn'd and Rude.

And he immediately adds the Judgment of the Chorus, (which consisted of Women and those too Barbarians) approving what he said.

XLI. I have likewise, towards the Proof of this Law, made Use of the Testimonies of¹ Philosophers, Historians, Poets, and in the last Place, Orators; not as if they were to be implicitly believed; for it is usual with them to accommodate themselves to the² Prejudices of their Sect, the Nature of their³ Subject, and⁴ the Interest of their Cause: But that when many Men of different Times and Places unanimously affirm the same Thing for Truth, this ought to be ascribed to a general Cause; which in the Questions treated of by us, can be no other than either a just

at last First President of the Parliament of Toulouse. He was Scholar to Cujas. His Work intitled *Semestrium Libri tres*, is full of Erudition. It has born several Impressions at Paris, Lyons, and Geneva.

² He was a Native of Antwerp, of Spanish Extraction. His Treatise, *De Jure & Officiis Bellicis*, was printed in that City in 1597, in 8vo. The Edition I make use of is that of Louvain, 1648.

³ This Author has written *De Jure Belli*: My Edition is printed at Hanau, 1612.

⁴ This Reproach does not fall on the modern Lawyers alone; Mr. NoODT has plainly proved that the ancient Professors of that Science have sometimes been guilty of the same Fault. See his *Probabilia Juris*, Lib. II. Cap. II.

XL. (1) Τάυτ' αὐτίκα, μαῖτιρ, ἐχὶ περιπλοκάς
Λόγων ἀθρόιστας ἵπον, ἀλλὰ καὶ σοφοῖς
καὶ τοῖσι φύλοισι ἑταῖρ, ὡς ἐμοὶ δοκεῖ.
Ver. 497, &c.

See my Preface to PUFENDORF, § 1, &c. Cassiodorus observes, that to teach Men the Duties of Justice is indeed a Work of some Difficulty, but not impossible; because the Divinity has been so indulgent to all, that even they, who are unacquainted with the Principles of Law, are yet sensible of the consequential Truths derived from them. Var. VII. 26.

² The same Poet introduces Hermione speaking thus to Andromache.

Οἱ βαρβάρων νόμοισιν οἰκῶμεν πόλιν.

"We do not govern our State by the Laws of Barbarians." To which Andromache replies:

Καὶ καὶ τὰ γ' αἰσχρὰ καὶ ἀνάδ' αἰσχρόν τι φέρει.

"What is dishonourable or dishonest among them, bears the same Character also among us."

Androm. Ver. 242, 243. GROTIUS.

XLI. (1) Why should they not be thus employed? The Emperor Alexander Severus read every Day CICERO's Books *De Republicâ*, and his Treatise *Of Offices*. GROTIUS.

This Account is taken from the Life of that Prince, written by ÆLIUS LAMPRIDIUS, who says, when he read Latin Books, he preferred none to CICERO's *Pieces Of Offices*, and *On the Commonwealth*, Cap. XXX.

³ The Philosophers, in Consequence of certain false Principles, with which they were infatuated, frequently advanced very false Maxims, and sometimes contradicted themselves. The Academists were particularly remarkable on this Account, valuing themselves on the Art of maintaining both Sides of all manner of Subjects. See BUDDEUS's *Dissertations Of Moral Scepticism*, and the *Errors of the Stoicks*, among his *Analekta Historiæ Philosophicæ*, and the Morality of the ancient Philosophers, abridged in my Preface to PUFENDORF's great Work.

⁴ The Historians, as well as the Poets, with a View of keeping up the Character of the Persons introduced, often put Maxims into their Mouths, which are false and contrary to Natural Law. The Writers of both Classes entertained likewise some Ideas which were far from being just, and sometimes very gross, on several Subjects; but the Poets exceeded the Historians in this Particular. In regard to the former, see my Preface to PUFENDORF, § 16; and as to what concerns the latter, Mr. LE CLERC's *Parrhasiana*, Tom. I. p. 200, &c. Our Author, in the Course of this Work, produces a great Number of Passages, which may serve to prove beyond Dispute what he here advances. We have already seen some of them, at the Entrance of this Preliminary Discourse, § III. Notes 1, 2. which are taken from THUCYDIDES and TACITUS, two of the greatest and most judicious Historians of Antiquity, the one Greek, and the other Latin.

Of Nations. Inference drawn from the Principles of Nature, or an universal Consent. The former shews the Law of Nature, the other the ⁵ Law of Nations. The Difference between which is not to be understood from the Testimonies themselves (for the Law of Nature and of Nations are Words used every where ⁶ promiscuously by Writers) but from the Quality of the Subject. For that which cannot be deduced from certain Principles by just Consequences, and yet appears to be every where observed, must owe its rise to a free and arbitrary Will.

the Civil Law. XLII. Therefore these two I have very carefully endeavoured always to distinguish no less from one another, than from the Civil Law: And even in the Law of Nations, I have made a Distinction between that which is truly and in every Respect lawful, and that which only produces a certain external Effect after the Manner of that primitive Law; so that, for Instance, it may be lawful to resist it, or that it even ought to be every where defended with the publick Force, for the Sake of some Advantage that attends it, or that some great Inconveniencies may be avoided. Which Observation, how necessary it is in many Respects, will appear in the following ¹ Treatise. We have been no less careful in distinguishing Things belonging to Right properly and strictly so called, whence arises the Obligation of making Restitution, from those which are only said to belong to it, because that the acting otherwise is repugnant to some other Dictate of right Reason: Which Distinction we have already touched upon.

II. Assistance in the Work. 1. Philosophers. Aristotle, his Praise. XLIII. Among Philosophers Aristotle deservedly holds the chief Place, whether you consider his Method of treating Subjects, or the Acuteness of his Distinctions, or the Weight of his Reasons. I could only wish that the Authority of this great Man had not for some Ages past degenerated into Tyranny, so that Truth, for the Discovery of which Aristotle took so great Pains, is now oppressed by nothing more than the very Name of Aristotle. I, for my Part, both in this and in all my other Writings, take to myself the Liberty of the ancient Christians, who espoused no Sect of Philosophers; not that they held with those who asserted that nothing can be known, than which there is nothing more foolish; but were of Opinion, that there was no one Sect that had discovered all Truth, nor any but what held something that was true. Therefore to collect into a Body the Truths that were dispersed in the Writings of each Philosopher and each Sect, they conceived to be nothing else, but ¹ to deliver the true Christian Doctrine.

His Faults. XLIV. Among other Things, (that I may mention this by the by, as not being foreign to our Purpose,) it is not without Reason, that some of the Platonists and ancient ¹ Christians seem to dissent from Aristotle in this, that he placed the very Nature of Virtue ² in a Mediocrity of Passions and Actions; which being once laid down, drove him to this, that of Virtues of a different Kind, as for Instance, ³ Liberality and Frugality, he made but one; and assigned

⁴ This relates to the Orators. See PUFENDORF'S *Law of Nature and Nations*, Book IV. Chap. I. § 21. Note 1.

⁵ See what I say on Book I. Chap. I. § 14.

⁶ See on PUFENDORF, Book II. Chap. III. § 23. Note 3.

XLII. (1) See, for Example, Book III. Chap. VII. § 6, 7.

XLIII. (1) This is what LACTANTIUS says, *Would any one but collect what Truths are scattered through the Writings of each of them, and diffused through the several Sects, and reduce them into one Body, he would not differ from us.* Instit. Divin. Lib. VII. Cap. VII. (Num. 4. Edit. Cellar.) JUSTIN MARTYR speaks to the same Purpose in his first Apology: Not, says he, because the Doctrines of PLATO are entirely different from those of CHRIST; but because they are not conformable to them in every Particular. Which is also the Case in regard to the Tenets of the other Philosophers, as of the Stoicks, and of the Poets and Historians; for each of them, being directed by a Ray of the Light of innate Divine Reason, discovered something conformable to it, and spoke well so far (p. 34. Edit. Oxon.) TERTULLIAN frequently calls SENECA, our Seneca; but then he observes that, none but CHRIST could give us a complete Body of Spiritual Virtues, (Adv. Jud. Cap. IX.) St. AUGUSTINE lays it down as a Fact that those Rules of Morality, which are so highly commended by CICERO, are taught and learnt in the Christian Churches, diffused through the whole World, Ep. CCII. See what the same Father says in regard to the Platonists, whom he maintains to be almost Christians, Ep. LVI, in his Treatise *De Verâ Religione*, Cap. III. and *Confess.* Book VII. Chap. IX. and Book VIII. Chap. II. GROTIUS.

To these Authorities we may add that of CLEMENT of Alexandria, who talks in the same manner, *Strom.* Lib. I. p. 338, 349. Edit. Oxon. See the Life of that Father, written by Mr. LE CLERC, in his *Bibliothèque Universelle*, Tom. X. p. 187, &c. and the Dissertation of the late Mr. OLEARIUS, *De Philosophiâ Ecclésiâ*, p. 1216, in the Latin Version of Mr. STANLEY'S *Philosophical History*, printed at Leipzig in 1712.

XLIV. (1) LACTANTIUS treats on this Point at large in his *Divine Institutes*, Book VI. Chap. XV, XVI, XVII. Let us add this Passage of CASSIODORE: *Non adfectibus moveri, sed secundum eos moveri, utile vel noxium.* GROTIUS.

² *Ethic. Nicom.* Lib. II. Cap. VI.

³ Whatever the learned GRONOVIUS may say on the Subject, these are really two different Virtues. ARISTOTLE might give the Greek Word *ἐλευθεριότης* a compound Idea, including both that Disposition, by which a Man is inclined to give freely, and that which directs him to a prudent Regulation of his Expences; but they are in Reality two different Dispositions, and two distinct Ideas. It is true, the more saving we are, the more we have to give away; but it does not therefore follow that Frugality, or a commendable Savingness, is only Part of Liberality. It is a very different Modification of the Soul, which indeed puts us in a Condition of performing more numerous and more considerable Acts of Liberality, on certain Occasions; but which is not therefore more a Part of Liberality itself, than Sobriety and a Love of Work are Parts of Chastity, because they are good Preservatives against Temptations to Impurity, and because those three Virtues, like most others, mutually assist one the other. Whoever takes a Delight in relieving the Indigent with his Substance, and actually does it on proper Occasions in a judicious manner, and as far as his present Circumstances permit, is so far truly liberal, even though for want of that Economy, and Care of his Affairs, which compose the Character of a good Manager, he should be reduced to a Station, in which he is no longer able to give as much as would otherwise have been in his Power. We shall sometimes see Persons, who, in spite of all their Negligence, and after their superfluous Expences, have still something to give, and bestow it freely on all, whom they have an Opportunity of assisting; will any one deny such Men the Character of Liberality? In a Word, Liberality, and Frugality, are two different Virtues; but they are both to be equally acquired and cultivated, but the Want of the latter should hinder the Practice of the former,

assigned ⁴ to Veracity two Opposites between which there is not an equal Contrariety, viz. Boasting and false Modesty; and imposed the Name of Vice upon some Things, which either are not in Nature, or in themselves are not Vices, as; the ⁵ Contempt of Pleasure and ⁶ Honours, and

former, or at least confine the Exercise of it to too narrow a Compass. The Philosopher himself owns that *Liberality*, according to his Definition, consists more in giving and spending judiciously than in getting Debts in, and keeping one's Money. *The Use of Money seems to consist in Expences and Gifts; for receiving and keeping it are rather to be called Possession; so that it is the Business of a liberal Man rather to give to whom he ought to give, than to receive from those who are indebted to him, and not receive where it is not due.* Ethic. Nicomach. Lib. IV. Cap. I. Thus our Author rightly observes that ARISTOTLE was obliged to reduce the two Virtues under Consideration to one, in order to find two opposite Vices, one by Defect, the other by Excess; for *Avarice* is indeed opposite to *Liberality*, according to the common Ideas; but *Prodigality* is so far from being in itself contrary to *Liberality*, that it bears some Resemblance to that Virtue, and may have some Tendency toward promoting the Practice of it, which at least is not incompatible with it. If some prodigal Persons become niggardly, when the Necessitous are to be relieved, there are others, who give freely, and take a Pleasure in doing good, though they often do it without much Judgment, or a sufficient Regard to all Circumstances.

4 There are several Faults in this Distinction. 1. The Philosopher does not distinguish the Virtue in question by any particular Name, but only calls the Person endowed with it *ἀληθῆς* and *φιλαλήθης*; and understands by it that Disposition which directs a Man to love Truth, and commit no violence on it by his Actions, in Things indifferent, i. e. in regard to which we were otherwise under no Obligation to speak and act sincerely from the Laws of Fidelity and Justice; for, says he, *Sincerity in Dealings, and every thing that regards Justice and Injustice, relates to another Virtue.* Ethic. Nicom. Lib. IV. Cap. XIII. Thus he makes a faulty Distinction of two Sorts of *Sincerity*, and *Veracity*, one relating to Things indifferent, the other to those, which are obligatory; as if the Diversity of the Objects on which one and the same Virtue is employed, would privilege the Multiplication of that Virtue into as many different Species. 2. He no where treats of that other Sort of *Veracity* and *Sincerity*, which is only occasionally mentioned in this Place; and that which he here treats of is entirely reduced to indifferent Things; which relate only to the Person of him, who speaks or acts. But is it not possible for a Man to lie, feign, or dissemble in a thousand other indifferent things, on a Point of History, for Example, a Phenomenon of Nature, an Event, on some Action or Quality of another Man, which does neither good nor harm to any one? 3. Strictly speaking, Boasting and Dissimulation, which ARISTOTLE gives us for the two opposite Extremities, are both of them contrary to *Truth* and *Sincerity* by Defect, and not by Excess. Both he who attributes to himself Qualities, with which he either is not endowed at all, or not in so high a Degree, and he who refuses to acknowledge or extenuates those of which he is really possessed, are faulty in deviating from the Truth. If one says more than true and the other less, they only take two different Ways of saying things otherwise than they are. The opposite Extremity in the Excess would be to speak and act too sincerely, and with an excessive Simplicity, which discovers either by Words or Conduct what was not proper to be known. Besides, the End of Dissimulation, of which the Philosopher discourses, is commonly to acquire more Esteem than we deserve, while we either seem unwilling to acknowledge our Merit, or undervalue it; and he himself observes that *it sometimes seems to be a sort of Boasting in Disguise*; and concludes the Chapter, which treats of these two Vices, by saying that *Boasting is diametrically opposite to Veracity, and even worse, than Dissimulation.* The same Inequality of Opposition is found between several other Vices; from which it appears how loose and useless his Principle of *Mediocrity* proves.

5 Our Philosopher owns himself that *no Man is without a Relish for Pleasure*; and that *human Nature is a*

Stranger to such an Insensibility; that *even Brutes make a Distinction in their Food, and are pleased with one Kind preferably to another*: If any one, says he, *finds nothing delightful, or makes no Distinction between one thing and another, he is far from being a Man. As there is no such Person in the World, there is no Name assigned him.* Ethic. Nicom. Lib. III. Cap. XIV. It appears from this Passage that ARISTOTLE had an Idea of a thing that has no Existence; for where is the Man, to whom every thing is indifferent, and who takes a Pleasure in nothing? If any one be found insensible to the natural Pleasures of the Taste and Touch, to which the Philosopher confines *Temperance*, and makes this Insensibility the Extremity by Defect, it must be the Result of a very singular Constitution, a deep Melancholy, or some other Indisposition of Body; and in this Case the Defect will not be moral, but purely physical. In regard to other Pleasures, as that of *Musick*, or what arises from a Contemplation of the Beauties of *Painting*, or *Architecture*, &c. an Insensibility to them is not a thing evil in itself. The Instance here alledged by GRONOVIVS, of *Timon the Man-hater*, and the Conduct of *Mark Anthony*, who copied his Example for a short Time, are nothing to the Purpose. That famous Humourist, notwithstanding his Enmity to Mankind, and his Aversion to Society, took a Pleasure in cultivating his Garden. MR. HEMSTERHUIS has given us his Character, and all the Particulars to be found in History concerning him, in his beautiful Remarks on LUCIAN's *Timon*, published in 1708, in a new Edition of the *Select Dialogues*, and some other Pieces of *Grecian Antiquity*. One might with more Propriety here alledge the Example of *Misers*, who deprive themselves of the Comforts and Conveniences, and sometimes even of the Necessaries of Life. But, besides that it is no common thing to see the Matter carried to that Excess, if they deny themselves the Use of several Things, this does not commonly proceed from a stupid Insensibility to the most natural Pleasures, but from the Preference they give their Money; for when it is in their Power to taste those Pleasures, without being at any Expence, they indulge themselves without Reserve, and are more apt to exceed the Bounds of Moderation, than those who pay for the Use of what Nature offers them.

6 GRONOVIVS is of Opinion that the Philosopher would not be understood to speak of the Contempt of Honours, which is not Evil, but only of the Contempt of Reputation, by which a Man is induced to act ill, to get above the Consideration of *what will People say*, and sink into a base and sordid way of living. He instances in the famous *Dionysius*, Tyrant of *Syracuse*, who having left his Kingdom, retired to *Corinth*, where he wore dirty and ragged Cloaths, drank freely with all he met, frequented Taverns and Brothels, and amused himself with chattering about Trifles with the Refuse of Mankind, as JUSTIN tells us, *Book XXI. Chap. V.* But we need only observe ARISTOTLE's Description of the Contempt of Honours, in which he makes the Extremity opposite to *Magnanimity* in the Defect consist, to be convinced that the learned Gentleman, whose Explication I have given, disguises the Philosopher's Thought out of a too warm Concern for the Credit of the Antients. ARISTOTLE says: *Those who are subject to the Fault in Question do not seem to be bad Men, because they are guilty of no Crime: That the pusillanimous are faulty only in depriving themselves of those Honours, which the Philosopher considers as real Goods, though they deserve them, and forego the Possession of some valuable Thing, for want of a due Sense of their own Merit.* — That such Persons seem rather chargeable with Laziness than Folly. The Opinion, they entertain of themselves, makes them still worse. — they forbear engaging in good Actions and glorious Enterprizes, as unworthy of appearing in them, and decline the Enjoyment of exterior Goods. Ethic. Nicom. Lib. IV. Cap. IX. Such a Disposition has nothing in it that is of itself vitious, and even comes near to Humility, of which the Pagans had some Idea, as I have shewn in my Treatise *On Play*, *Book I. Chap. III. § 6.* As long

and an Insensibility to Injuries, which ⁷ hinders us from being angry against Men.

All Virtue
has not Vice
in Excess.

XLV. But that this Principle of Mediocrity, taken universally, is not rightly laid, appears from the Instance of Justice itself, whose Opposites, too much and too little, when he could not find in the Affections and their subsequent Actions, ¹ he sought for Both in the Things themselves about

as a Man is ignorant of his own Merit, he is so far from being culpable for not aspiring at Honours, that require Qualifications, of which he believes himself not possessed, that he is to be commended for not aiming at them; and Ignorance in this Case is the more excusable, as we are much more inclined to the opposite Extreme, and to flatter ourselves with the Possession of good Qualities, of which we are entirely unprovided. It is good always to entertain a Diffidence of ourselves in that Point, in order to avoid the Illusion of Self-Love; and there is commonly great Reason for presuming, that the Man who declines Honours, does it rather on a Principle of Modesty, than out of Indolence, or Meanness of Soul. ARISTOTLE, however, maintains that Puffillanimity (by which Term he means an Indifference to Honours) appears more frequently in Opposition to Magnanimity, than Ambition, and that it is the more culpable of the two, Ibid. Experience shews the Falsity of the former of these Assertions; in regard to the latter, it must be allowed that the Philosopher speaks conformably enough to the Notions of the Vulgar, and the ambitious Part of Mankind. Hence it was that among the Romans, for Example, those who had a Right to aspire at the Consulship, and declined the Charge, were particularly careful to offer the Reasons for their Conduct in the strongest Terms, to avoid the Reproach of Puffillanimity. See CICERO'S Epistles to Atticus, Book I. Ep. I. p. 8. Edit. Græv. But, consulting the Ideas of sound and right Reason, it will appear that there is more Greatness of Soul in refusing Honours than in pursuing and embracing them.

⁷ According to our Philosopher, it is no less a Folly not to be angry on just Occasions, as to give a loose to Passion without Reason. They, who are not angry, as Persons, Times, and Things require, are chargeable with Folly. They seem miserable, incapable of being affected, or revenging an Injury. To which he adds that to suffer patiently in such Cases, and neglect the Defence of our Friends, is a Mark of a mean and servile Mind. Ethic. Nicom. Lib. IV. Cap. XI. Hence it appears that ARISTOTLE considers the Disposition of all those in general, who command their Passion, when they have just Reason to be angry, as a Vice opposite to Lenity by Defect; and that he does not, as GRONOVIVS pretends, confine that Censure to the stupid and mean Patience of Buffoons and Parasites, who tamely submit to the greatest Affronts and Indignities, in Consideration of some paltry Advantage. But if we consider the Matter in itself, the Tranquillity of a Mind, free from Anger, is not a moral Defect. For supposing, what is very seldom to be found, a Man either naturally or by the Force of long Custom so hard to be moved, that he is seldom or never angry, he is thus very happy, as being secured from the Excesses of a blind Passion; nor will such a Man be less disposed, or less able to maintain his just Rights, and that of his Friends. On the contrary, by being Master of his Passions, and of a peaceable Disposition, he will be able to take more just Measures, and manage his Interest better than those, who are actuated by a Passion so hard to govern as Anger. Though Anger is not evil in its own Nature, and may be allowed to a certain Point, it is never absolutely necessary. We always may, and that with more Security, support our Dignity and maintain our Right, without being in a Passion. But it is evident that our Philosopher makes a Virtue of a moderate Degree of Anger, and a Desire of Revenge, the natural Effect of that Passion; which being in itself vitious, never allows Anger to be kept within due Bounds.

XLV. (1) He speaks in the following Manner of Justice, properly so called, which he terms particular or private, to distinguish it from universal or general Justice, including the Practice of all the Virtues which relate to our Neighbour. This Distinction being made, it is evident that a just Action consists in observing a Medium between doing an Injury and receiving one. He that does an Injury, has more, and he who is injured, less than his due. Justice

is a Mediocrity; not in the same manner as the Virtues already spoken of; but as the Medium is its Object, and Injustice includes the two Extremes. Justice therefore is a Disposition to act what is right with Choice and Deliberation, and to render every one his Due, both in our Dealings with others, and those which others have with one another; so that we do not take to ourselves more of what is agreeable and advantageous, or less of what is disagreeable and prejudicial than is our Due, leaving others too small a Share of the former, and too much of the latter, but observe a just Proportion here, as well as in the Distribution to be made among others. Injustice, on the contrary, is a Disposition of doing Wrong designedly, that is of giving each Person too much or too little of what is advantageous or prejudicial, without any regard to exact Proportion. Thus there is both Excess and Defect in Injustice, because it consists in giving too much and too little, that is, in appropriating to ones self too large a Share of what is simply advantageous, and taking too little of what is prejudicial; and observing the same unequal Distribution in regard to other Men, deviating from the Rule of Proportion sometimes on one Side, and sometimes on the other. The Extreme in unjust Actions, by way of Defect, is to receive an Injury; that by way of Excess, to do one. Ethic. Nicom. Book V. Chap. IX. GRONOVIVS thinks ARISTOTLE sufficiently defended against our Author's Criticism, by saying, that whereas in other Virtues there is but one Medium, fixed by Geometrical Proportion, Justice observes sometimes the Medium of this Geometrical Proportion, and sometimes that of Arithmetical Proportion; so that here is only an Explication and Distinction of Terms, not a Transition from one kind of Thing to another. But the present Question does not turn on the Nature of the Medium, or the Proportion to be observed for determining it. The Subject, in which this Medium is placed, must be specified, so as to be found between two opposite Extremes of the same Thing, whatever Proportion is observed for determining it. According to ARISTOTLE, the Medium, in which the Essence of Moral Virtue consists, is planted, as one may say, in certain Sorts of Passions and Actions, not vicious in themselves, but which become such, by deviating from that Medium, and thus form two opposite Vices, one by Excess, the other by Defect. Fear, for Example, is a Passion not evil in its own Nature; too much Fear is Timidity, or Cowardice; too little is Audacity, or a rash Boldness: The just Medium is Fortitude, or rational Courage. Speaking, laughing, a regular Composure of the Face and exterior walking, standing still, in short all we say or do in Conversation are in themselves indifferent. Behaving ourselves in these Particulars so as to endeavour at pleasing every one, or certain Persons on all Occasions, is Flattery: on the contrary, to act as if we had no Concern for pleasing any one, is Clownishness or Incivility; the just Medium is Civility, or a reasonable Complaisance. See Ethic. Nicom. Book II. Chap. VI, VII. To return to Justice, the Virtue under Consideration, according to our Philosopher, its Medium consists in a certain Equality, an equal Distribution of Advantages and Disadvantages; for this is what he means by that Equality to which the Actions, whereby we practise Justice, relate. An exact Observation of this Equality, is the proper Employment of Justice, and what constitutes its Nature. A Disregard of this Equality, whether we take or give more or less than it requires, is a Vice opposite by Defect; the more or the less is not then in Matter of Justice, but in the Things about which it is employed: We do not observe this Equity too much or too little, we do not exceed the just Equality, but always fall short of it, even when we take or give too much, this is no more than a different manner of Inequality. Where then is the other opposite Extreme, which ought to consist in an excessive Concern for maintaining the Equality in question? It will not be the Jus summum, that rigorous Justice, which is called the Height of Injustice. (Summum Jus, summa Injuria, CICERO De Offic. Lib. I. Cap. X. TERENCE Heautont. Act. IV. Scene V. Ver. 48.) For when a Man

about which Justice is conversant. Which very thing is in the first Place to leap from one kind of Thing to another, which he deservedly blames in others; and in the next Place, to receive less² than one's Due may indeed happen to be a Vice, when the Circumstances of himself or his Family cannot allow of any Abatement; but certainly it cannot be repugnant to Justice, since it consists wholly in abstaining from that which is another Man's. Like to which Mistake is that of his not allowing³ Adultery proceeding from Lust, and Murder from Anger, to belong properly to Injustice: Whereas the very Nature of Injustice consists in nothing else, but in the Violation of another's Rights; nor does it signify, whether it proceeds from Avarice, or Lust, or Anger, or imprudent Pity, or Ambition, which are usually the Sources of the greatest Injuries. For to resist all Temptations of what Kind soever, and that for this only Reason, viz. the preserving of Human Society inviolable, is indeed the proper Business of Justice.

XLVI. To return from this Digression, true indeed it is, that to some Virtues it happens, that they moderate the Affections, yet not for the Reason, that it is the proper and perpetual Office of all Virtue to do so; but because right Reason, which Virtue always follows,¹ prescribes a Measure to be followed in some Things; in others it excites us to the utmost we are capable of. We cannot, for Instance,² serve God with too much Ardour; for the Crime of Superstition consists

Consists often in the utmost we are capable of.
not

Man pushes his Demands as far as he may according to the Rigor of the Law, or presses the Terms of the Law too severely in pronouncing Sentence, it is a Defect of Equity: He offends against the Spirit of the Law, against that very Equality which the Law designs to establish, and introduces a real Inequality contrary to Equity, as ARISTOTLE himself makes appear, *Book V. Chap. XIV.* In a Word, our Philosopher was very sensible of the Lameness of his Principle of *Mediocrity*, when applied to this Virtue, and shews it plainly enough in the Words already quoted. He owns that Justice is a Mediocrity, not in the same manner as other Virtues are, but as a Medium is its Object, and Injustice only is its opposite Vice, which alone includes the two Extremes. This abundantly shews the Uselessness and Insufficiency of ARISTOTLE's Principle. Besides, it will appear, on a careful Examination of the Matter, that the Nature of all the Virtues may be accurately explained without having recourse to that Principle. See a Passage from MR. GREY, an ingenious *Englisman*, quoted in my Preface to PUFENDORF, p. xciv, xcv. of the second Edition.

2 The learned GRONOVIVS calls this Chicanry; because, says he, this *less*, according to ARISTOTLE, relates to Hardships and Disadvantages, and not Profits and Advantages. But he is himself guilty of the Fault with which he charges our Author. GROTIVS has his Eye on the Definition of an Unjust Action, which occurs in the Close of the Passage quoted in the foregoing Note; according to which receiving an Injury, or having less than one's due is comprehended in the Idea of Injustice, as well doing an Injury, or taking more than one's Due. The Philosopher explains himself clearly in another Place, where he says, *It is evident that both receiving and doing an Injury are evil; for by the former a Man has less, and by the latter more than the Medium requires* — But doing an Injury is the more culpable of the two, because done maliciously; whereas a Man receives an Injury without Malice, or an Inclination to Injustice. — So that receiving an Injury is in itself the less evil, though it may by Accident become a greater. *Ethic. Nicom. Lib. V. Cap. XV. p. 73.* On reading this last Sentence, we immediately perceive the tacit Allusion which GROTIVS makes to it, while he explains it, and refutes the Philosopher's Opinion.

3 Supposing one Man commits Adultery for Lucre's Sake, and receives his Reward; another is guilty of the same Crime out of a Motive of Lust, and pays for it. The latter seems rather sensual than covetous; whereas the former is unjust, but not sensual, because he acted with a View of Gain. Besides, every other unjust Action has always a Relation to some View. Thus Adultery relates to Intemperance; abandoning one's Comrade in an Engagement, to Cowardice; striking, to Anger. But when a Man gains by his Crime, it relates only to Injustice. *Ethic. Nicom. Lib. V. Cap. 4.* We see here that the Philosopher does not sufficiently distinguish between the Principle or Motive, which induces a Man to commit an Injustice, and the unjust Action itself; for he pretends that one and the same Action, by which we invade another's Property, relates either to universal Justice, or to particular Justice, which is Justice properly so called, as the Agent is influenced by a Motion of Sensuality, Cowardice, Anger, or by a

formal Design of seizing on what belongs to another, and taking more than one's Due. Now besides that this formal Design is seldom found in Injustice, few Men doing an Injury merely for the Sake of doing it, and without being actuated by some Passion, without which they would rather choose to leave their Neighbour's Right untouched; besides this Consideration, I say, the Diversity of Principle may indeed make us offend at the same Time both against Justice, properly so called, and against some other Virtue, relating either to ourselves or others; but, this notwithstanding, every Action tending to the Prejudice of another's Right, such as Adultery and Murder, will always be a real Injustice in itself; and all that GRONOVIVS has advanced in Defence of ARISTOTLE, is nothing to the Purpose. He may, if he pleases, alledge the Example of *Mæstres* the Comedian, who was proof against all the Solicitations of *Messalina*, till the Emperor *Claudius*, her Husband, commanded him to do whatever she should require of him. This Comedian, according to our Commentator, did indeed commit an unjust Action, and an Act of Intemperance; but if we judge of his Conduct in a moral Manner, he was neither chargeable with Injustice nor Intemperance. I own he was not so culpable, as if he had solicited *Messalina*; but even granting that a Husband can yield to another Man his Right to his Wife's Body, this was by no means the Emperor's Intention, whose general Order to obey the Empress did not extend to this Action. So that the Comedian ought still to have persisted in his Refusal, and by his Compliance he certainly became even more guilty of Injustice than Intemperance; though this single Action did not denominate him habitually unjust or intemperate, which is not the present Question. As to Murder committed by a Motion of Anger, it is sufficiently specified in the Passage here quoted, *striking*, relates to Anger. So that GRONOVIVS had no Reason to say he knew not whence this was taken, and that it could only be from *Eth. Nicom. Lib. V. Cap. X. p. 68*, in which he pretends our Author contradicts himself; for he himself quotes and commends this very Passage, *Book III. Chap. XI. § 4.* But the Question there turns on a different Thing, viz. the Distinction between unjust Actions committed maliciously, and such as are done without any premeditated Design.

XLVI. (1) AGATHIAS makes a famous General speak thus: *Those Motions of the Soul, which by Nature prompt us to what is pure, good, eligible and our Duty, are to be indulged without Restraint. Those, which have a contrary Tendency, are not to be followed on all Occasions, but only so far as is consistent. Thus Prudence is in the Opinion of all Mankind a pure Good, without the least Mixture of Evil; and Anger, so far as animates us to Action, is commendable; but an Excess of that Passion is to be avoided as prejudicial.* In *Belisarius's* Speech, *Book V. (Chap. VII.)* GROTIVS.

2 HERE GRONOVIVS makes two Replies in Favour of ARISTOTLE. First, that the Philosopher is to be excused for not ranking Piety, Faith, Hope and Charity among the Moral Virtues, as they are known only by Revelation delivered to Christians; for ARISTOTLE, says he, as all the ancient Pagan Philosophers did, in-

cluded

not in serving God with too much Ardour, but in serving him perversely. Neither can we too much desire eternal Happiness, nor too much dread eternal Misery, nor too much hate Sin. It is therefore truly said of Gellius³, there are some Things whose Extent has no Bounds, and which are so much more commendable as they are carried to a higher Pitch. Laëtantius⁴, after having discoursed largely on the Passions, says, Wisdom does not consist in moderating them, but in regulating the Impressions of the Causes that produce them, for they are excited by external Objects. Neither ought a Restraint to be put principally upon them, because it is possible for them to be very weak in those who commit the greatest Crime, and to be very violent without leading to any Crime at all. Our Purpose is to set always a high Value upon Aristotle, but so as to reserve to ourselves the same Liberty which he himself took with his Masters, for the Sake of finding Truth.

Histories.

XLVII. Histories have a double Use with respect to the Subject we are upon, for they supply us both with Examples¹ and Judgments. Examples, the better² the Times and the wiser the People were, are of so much the greater Authority; for which Reason we have preferred those of the ancient Grecians and Romans before others. Nor are the Judgments we meet with in Histories to be despised, especially when they agree: For the Law of Nature, as we have already said, is in some Measure proved from hence, but of the Law of Nations there is no other Proof but this.

Poets, Orators.

XLVIII. The Opinions of Poets and Orators are not of so great Weight: And we often make use of them, not so much for the Sake of building any Thing upon them, as that their Expressions may add an Ornament to what we have a mind to say.

II. Sacred Books.

1. The Old Testament.

XLIX. The Authority of those Books which Men inspired by God, either writ or approved of, I often use, but with a Difference of the Old and New Law. Some there are who¹ urge the Old Law for the very Law of Nature, but they are undoubtedly in the wrong: For many Things² in it proceed from the Free Will of God, which yet is never repugnant to the Law of Nature itself; and so far an Argument may be rightly drawn from it, provided we carefully distinguish the³ Rights of God, which God sometimes exercises by the Ministry of Men, from the Rights of Men

cluded the Worship of the Deity under Magnificence. *Ethic. Nicom. Lib. IV. Cap. V.* This Idea is followed by SALLUST, *Bell. Catilin. Cap. IX.* *In supplicis Deorum magnifici*, &c. and by JUSTIN, *Book XXIV. Chap. VI.* speaking of the Presents offered in the Temple of Delphos. Now Excess in this Case is possible, as appears from that ancient Law: *Pietatem adhibento: opes amovento.* CICERO *de Legib. Lib. II. Cap. VIII.* and from the Reason assigned by LYCURGUS for a Law he had made for regulating the Expence of the Sacrifices. *PLUT. Apophthegm. Lacon. p. 229. Tom. II. Edit. Wech.* The other Answer is, that solid Piety indeed cannot be carried too far, and the same is to be said of all other Virtues, which, as such, are always found in the just Medium, to what Length soever they are carried; but that there may be Excess in exterior Actions, by which alone one Man can form a Judgment of another's Sentiments. For how do we make it appear that we serve God? Is it not by frequenting Places of Worship; by praying on our Knees, bear-headed, and with our Hands joined and raised up to Heaven: By giving Alms, by contributing to the necessary Expences of the publick Worship; by observing Festivals; by reading and meditating on the Holy Scriptures; by abstaining from every thing, which we think contains any Impiety, and hindering the Commission of it, as much as in us lies, &c. Now who does not know that in each of these Particulars we may do more than God requires, and found Reason allows? Thus, conformably to ARISTOTLE'S Principle, Piety will certainly hold the middle Way between Superstition, which makes its Excess, and Impiety or Atheism, which is its Defect. This is our learned Commentator's Reasoning; on which I have two observations to make. First, it is no very easy Matter entirely to justify ARISTOTLE'S Omission of so considerable a Virtue as Piety; and several judicious Authors have with good Reason blamed him for allowing Religion no Place in his System of Morality, as I have shewn in my Preface to PUFENDORF, § 24. In Reality, as soon as we acknowledge a Deity, as he did, if we reason with ever so little Exactness, we must necessarily discover certain Duties in which we stand engaged to that Being. Thus we see several of the Pagan Philosophers have spoken very finely on that Subject. In vain does GRONOVIVS pretend that according to the Ideas of all the ancient Heathen Writers, the Worship of the Divinity is included in that Virtue, which ARISTOTLE calls Magnificence. He had forgot that beautiful Passage

of CICERO. *The best, the purest, most holy and most pious Worship of the Gods is always to honour them with Purity, Sincerity, and Integrity both of Mind and Words.* For the Philosophers are not the only Persons, who have distinguished Piety from Superstition; our Ancestors have done the same. *De Nat. Deor. Lib. II. Cap. XXVIII.* See also his Oration *Pro domo sua, ad Pontifices*, Cap. XLI. with GRÆVIVS'S Notes, and the Passages quoted from SENECA and EPICTETUS in my first Note on PUFENDORF, *Book II. Chap. IV. § 3.* It is evident from those and several other Authorities, which might easily be produced, that many of the wise Pagans made Piety, and the Worship of the Divinity consist principally in the interior Sentiments, and not in the exterior Acts of Devotion. Secondly, we must then find out two vicious Extremes in the interior Sentiments: It must be possible for a Man to entertain too exalted an Idea of God, respect and love him too much, be too submissive to his Will, &c. in all which there never can be any Excess. So that whatever they may say who are resolved to reconcile ARISTOTLE with Reason and good Sense at any Rate, it will still be certain that here, as in several other Virtues, there is no Medium, equally or almost equally removed from two opposite Extremes, in the same Kind of Things, which are the proper Object of Virtue.

³ *Noët. Attic. Lib. IV. Cap. IX. at the End.*

⁴ *Instit. Div. Lib. VI. Cap. XVI. Num. 7. Edit. Cellar.*

XLVII. (1) Which are to be used with much Caution. See the Author's Reflection on that Subject. *Book I. Chap. III. § 5. Num. 6.*

2 Of this Sort, according to GRONOVIVS, are these found in the Roman History, down to the six hundredth Year from the Foundation of Rome, or the third Punic War; and those in the Grecian History to the Peloponnesian War.

XLIX. (1) The same GRONOVIVS, says our Author, had BODIN and other Judaizing Christians in View in this Place.

2 The Ceremonial, and several Political Laws.

3 From what God is pleased to do or command by Virtue of his supreme Authority over the Life and Goods of his Creatures, no Consequence can be drawn that the same Thing is ordered in Regard to Men, or allowed by the Law of Nature. On this Occasion are alledged the Example of Abraham, whom God commanded to sacrifice his Son: And that of the Israelites, who received an

Men among themselves. We have therefore avoided, as much as we could, both this Error, and also another contrary to it, viz. ⁴ that since the Promulgation of the New Testament the Old one is of no Use. We are of a contrary Opinion, both upon Account of what we have said already, and also because the Nature of the New Testament is such, that whatever are the moral Precepts in the Old Testament, the same, or more perfect ⁵, are enjoined by the New also: And in this Manner we see the Testimonies of the Old Testament made Use of by the Writers among the Primitive Christians.

L. But to understand the Sense of the Books of the Old Testament, the Hebrew Writers may afford us no little Assistance, those ¹ especially who were thoroughly acquainted with the Language and Manners of their Country. The Hebrew Writers.

LI. The New Testament I use for this Purpose, that I may shew, what cannot be elsewhere learned, what is lawful for Christians to do; which Thing itself, I have notwithstanding, contrary to what most do, distinguished from the Law of Nature; as being fully assured, that in that most holy Law a greater Sanctity is enjoined us, than the meer Law of Nature in itself requires. Nor have I for all that omitted observing, what Things in it are rather recommended to us than commanded, to the Intent we may know, that as to transgress the Commands is a Crime that renders us liable to be punished; so to aim at the highest Perfection, in what is but barely recommended, is the Part of a generous Mind, and that will not fail of a proportionable Reward. 2. The New Testament,

LII. The Canons of Councils ¹, when they are just and reasonable, are Consequences drawn from the general Maxims of the Divine Law, fitted to particular Cases that happen: These likewise either shew what the Divine Law commands, or exhorts us to what God recommends. And this is the Office of the true Christian Church, to deliver to us those Things that are delivered to her of God, and in the same Manner as they are delivered. But even the Customs ² likewise that were 3. The Canons of Councils.
4. The Manners and Customs of the first Christians.

an exprefs Order from him to carry off the Egyptians Gold and Silver Vessels, and utterly exterminate the seven Nations of Canaanites, after having seized on their Country, and all their Possessions. See what our Author says on this Subject, *Book I. Chap. I. § 10. Num. 6. Book II. Chap. XXI. § 14. and Book III. Chap. I. § 4. Num. 6.*

⁴ This some Anabaptists maintain. ZEIGLER refers us to *Sixtus Senonensis's Bibliotheca Sancti. Book VIII. Heref. I.*

⁵ This is to be understood of the Letter, not of the Spirit of the Law, or the Intention of the Legislator. See what I have said in my Treatise *Of Play, Book I. Chap. III. § 1.* and my first Note on *Book I. Chap. I. § 17.* of this Work.

L. (1) This is an Observation of CASSIAN in his *Divine Institutions*. GROTIUS. But the most judicious Part of the learned World have at present but little Value for the Rabbies, and are of Opinion that those Doctors are of very little Use for understanding the Old Testament. The most antient Rabbies, whose Writings are extant, are the Authors of the *Talmud*, who lived some Centuries after JESUS CHRIST. The Hebrew had then long been a dead Language; they had no Book in that Tongue but the Old Testament; they were very bad Critics, and Men of little Judgment. They had no other antient Monuments of the History of their own Nation, than the Books of the Old Testament, and were unacquainted with Heathen Authors: Their Traditions must have undergone much Alteration and Corruption by Length of Time. To supply their Defect of Knowledge, and indulge their Inclination to Fables and Allegories, they have invented the most extravagant and chimerical Facts and Customs. So that they are on no Account comparable to Christian Interpreters, who, like GROTIUS, have studied the Languages methodically, and had recourse to all the Monuments of Antiquity. See CUNÆUS, *De Repub. Hebr. Lib. II. Cap. XXIV.* Mr. LE CLERC's Thoughts on Father SIMON's *Critical History*, p. 198, 199, and the Defence of that Book, *Letter VI.*; the *Bibliothèque Universelle*, Vol. IV. p. 315, &c. Vol. VII. p. 247, &c. Vol. X. p. 117, 118. Vol. XXIV. p. 115, &c. *Bibliothèque Choisie*, Vol. VII. p. 83, 84. DAVID LE CLERC's *Quæstiones Sacrae*, p. 139, 285, &c. and JOHN LE CLERC's *Quæstiones Hieronymianæ*, Quæst. VI. ZIEGLER here quotes a Passage of ISAAC CASAUBON's *Exercit. in Baron. XVI. Num. 15.* and another from JOSEPH SCALIGER, *De Emendat. Temporum*, Lib. VII. But the Rabbies are least to be depended on in Matters of Morality and Law.

SELDEN's Treatise *De Jure Nat. ac Gent. secundum Disciplinam Hebræorum*, is a good Proof of what I advance, how advantageous an Opinion soever that learned Gentleman may have entertained of the Jewish Doctors. See my *Preface* to PUFENDORF, § 7. BOECLER accuses GROTIUS of not reading the Books of the Rabbies with sufficient Care and Attention, and confining himself almost wholly to *Moses* the Son of *Maimon*. But others, perhaps, will think he allows them too much Weight, and lost too much of his Time in perusing them, though the Strength of his Judgment preserved him from the Contagion.

LI. (1) See my nineteenth Note on *Book I. Chap. II. § 9.*

LII. (1) These Canons can be of no great Use to our Author's Design. First, because we have very little remaining of the Councils of the two or three first Centuries, when, according to him, the Doctrine of the Church must have been in its greatest Purity; and several of those that have come to our Hands, are either supposititious, falsified, or corrupted in several Places. Secondly, because, generally speaking, the Decisions of Councils commonly run either on speculative Points, or on Ecclesiastical Discipline. Thirdly, because the Councils not only were subject to Error, but have very often actually erred, even in such Things as were very easy. Our Author gives us to understand as much, when he says, *Synodici Canones, qui recti sunt*; i. e. *Those Synodical Canons which are just and reasonable*. So that, after all, Recourse must be had to the Scripture, which, when well interpreted, is the Touchstone for examining the Decisions of the Councils, in order to see whether they are just and reasonable. Lastly, it is well known that the Proceedings of most of the Councils were very irregular, and they were generally only so many Cabals of Men devoted to the Emperors, or some other prevailing Party; so that the least Concern on those Occasions was to furnish the Mind with necessary Knowledge, or bring an upright and Christian Heart to such Assemblies.

2 It is a great Mistake to imagine the Generality of the primitive Christians Men of a Piety and Probity exactly conformable to the Rules of the Gospel. See Mr. LE CLERC's *Ecclesiastical History*, Sec. I. Anno LVII. § 6, &c. But how good soever they might have been, their Judgment and Conduct cannot be here admitted as a Rule, in Matters not otherwise clearly and expressly decided in Scripture. The Extent of their Knowledge, and the Justness of their Judgment were not always equal to the Warmth of their Zeal, and the Integrity of their Heart.

5. Both the Writings and the Consent of the Fathers.

6. Schoolmen.

III. Lawyers.

were received or commended amongst those antient Christians, who maintained the Dignity of so high a Title, have deservedly the Force of Canons. The next in Authority to these, are the Decisions of those who were famous in their Times for their Christian Piety and Learning, and were not charged with any gross Error: For even what these assert with great Positiveness, as if they were certain of it, ought to have no little Weight in interpreting the Places that seem obscure in Holy Scripture, and that the more, by how much the more there are that consent in the same Thing, and the nearer they are to the Times in which the Church was most pure, when as yet neither Dominion, nor Faction, was able to corrupt the primitive Truth.

LIII. The Schoolmen that succeeded these, give us many Proofs of their great Capacities; but their Misfortune was to live in unhappy Times, when good Learning was entirely neglected: The less Wonder then, that among many Things, in their Writings commendable, there are some that need Indulgence. And yet when they agree in Matters of Morality, they seldom err; as being quick in discerning those Things that are blameable in the Sayings of others; and even in this their prevailing Humour of contradicting, they set us a laudable Pattern of Modesty, as disputing against one another with Arguments, and not, as the Custom of late hath been, to the Dishonour of Learning, with Reproaches, the base Offspring of an impotent Mind.

LIV. Of those that profess the Knowledge of the Roman Laws, there are three Sorts. The first is of those whose Works appear in the Digest, the Codes of Theodosius and Justinian, and the Novels. The second is, of those who succeeded ¹ Irnerius, as ² Accursius, Bartolus ³, and many others, that for a long time reigned at the Bar. The third comprehends ⁴ those who joined the

Heart. Every one knows that several of them entertained too high a Notion of the Necessity of Martyrdom, and thus prepossessed run to it with some Rashness. The Generality of them seemed to think it unlawful to engage in a War, to go to Law, to bear publick Offices, to take an Oath, to carry on Trade, to marry a second Time, or receive Interest for Money; all which it is impossible to prove evil in themselves, either from Reason or Scripture. Thus too great a Veneration for the unlightened Simplicity of those first Ages seems to have induced our Author to give into the Distinction of *Evangelical Councils*, and *Precepts*; as appears from *Book I. Chap. II. § 9.* where my Remarks on that Subject may be seen at Length.

3 I have been pretty large in shewing, in my *Preface* on PUFENDORF, § 9, and 10, that the Fathers of the Church, of whom our Author speaks in this Place, are but indifferent Matters, and even bad Guides in Law and Morality. I have not changed my Opinion since Father CELLIER, a *Benedictin* Monk opposed me on that Head in a Book in 4to, entitled, *An Apology for the Morality of the Fathers of the Church*, published at Paris in 1718. I could easily make it appear that I have been so far from dealing in false Accusations, that I have advanced nothing on the Subject in Question, but what may be demonstrated either by the Confession of my Antagonist himself, or the Weakness of the Reasons he offers in Favour of these antient Doctors of the Church, whom he undertakes to justify at any Rate. Their Cause is not in very good Hands, since their Apologist, on one Side, does not understand the State of the Question; and on the other, distrustful the Force of his Proofs, calls in Invektives and abusive Language to his Assistance; not to mention an Infinity of trifling Things, nothing to the Purpose.

LIV. (1) This IRNERIUS, or, as some call him, WERNERIUS, lived at the Beginning of the XIth Century; some make him a *Milanese*, others a *German*. The *Roman Law* had been for some Ages, if not absolutely unknown and out of Use in the West, at least but little known or followed. The Digest in particular seemed then quite buried in Oblivion. But the famous *Pandects of Florence* being found at *Amalphi*, in the Kingdom of *Naples*, when the Town was taken by the Emperor *Lotharius II.* in the War which he made, in Conjunction with Pope *Innocent II.* on *Roger King of Sicily*, the Inhabitants of *Pisa*, who had furnished the Emperor with some Ships, desired that Copy, as a Recompence of their Services, and obtained it. The Taste of Learning was then beginning to revive, and Professors in all Sciences had been lately settled at *Bologna*. PEPLO, one of that Number, undertook to explain the *Roman Law*. But he did not succeed in that Post. IRNERIUS, who had been Professor of the Liberal Arts at *Ravenna*, took his Place. He was called *Lu-*

cerna Juris, i. e. *The Light of the Law*, and introduced the *Roman Law* into the Schools, either of his own Head, or as the *Abbé D'URSPERG* says, at the Solicitation of *Matilda*, Countess of *Tuscany*. Soon after the *Roman Law* made its Way to the Bar, and *Lotharius* and his Successors gave it the Force of Law. IRNERIUS, who understood *Greek*, had studied the *Basilics*, and other *Greek Books* of the *Roman Law*, preserved in the East. He made short *Scholia* on the Body of the Civil Law, and thus gave Birth to the *Glosses*, which increased very much under his Successors. See *Delineatio Historiæ Juris Romani & Germanici*, written by Mr. THOMASIIUS, § 121, &c. published at *Leipsic*, in 1704; at the Head of FRANCIS HOTMAN'S *Anti-tribonianus*: and *Origines Juris Civilis*, by the late Mr. GRAVINA, Professor at *Rome*, Book I. § 143. p. 101. &c. the last Edition, printed in 1717.

2 FRANCIS ACCURSIUS, a Native of *Florence*, lived in the Close of the XIIth and the Beginning of the XIIIth Century. He made a Collection of all the Explications of the Lawyers before his Time, with considerable Additions of his own; so that though he was almost forty Years old, when he entered upon that Study, he has left us *Glosses* on the whole Civil Law, somewhat larger than the former, but still pretty short. The great *CUJAS* places him above all the Expositors both *Greek* and *Latin*, with whom he was acquainted. See GRAVINA'S Book quoted in the preceding Note, § 153. p. 108.

3 He was born at *Sentinum*, a Town in *Umbria*, called at present *Sassoferrato*, and lived in the middle of the XIVth Century. He brought the Subtleties of *Logic*, and the barbarous Language of the Schools into the Law, so that he did not so much apply himself to the Explanation of the *Roman Law*, as to the Decision of an Infinity of Cases and Questions, of which the Laws take no Notice, but which he undertook to deduce from them, either by Consequences, and those often very remote, or without any Grounds. See Mr. GRAVINA'S *Origines Juris Civilis*, § 164. p. 112, &c. where a Distinction is also made between the Disciples of BARTOLI, as making a Class of Lawyers different from that of ACCURSIUS'S Scholars.

4 ANDREW ALCIATI, a Lawyer of *Milan*, was the first who united these two Studies, which ought to be inseparable. He was Professor, first at *Bourges*, and afterwards at *Avignon*. Returning into his own Country he taught publicly at *Bologna* and *Ferrara*; he then retired to *Pavia*, where he died in 1550, aged about 59. FRANCIS CUJAS went so far beyond him in this Point, that he is deservedly esteemed the chief Restorer of the *Roman Law*. That great Man was a Native of *Tholouse*. He taught in the Universities of *Cahors* and *Bourges*, at *Valence* in *Dauphiny*, and *Turin*. Having appeared to great Advantage in all those Places, he returned

the Knowledge of the Belles Lettres with the Study of Laws. For the first I have a great Deference ; for they both supply us with Reasons, and those often the very best, to demonstrate what belongs to the Law of Nature ; and also often give Testimony to it, as well as to the Law of Nations ; yet so as that they, as well as others, often ⁵ confound these Words, nay and often call that the Law of Nations, which prevails among some Nations only, and that not by a sort of tacit Agreement, but by Imitation of one another, or even by a casual Consent. But again, those Things which really belong to the Law of Nations, they often handle promiscuously and indiscriminately with those that belong to the Roman Law, as appears from the ⁶ Title concerning Captives and Postliminy. Therefore we took Pains to have these distinguished.

1. Ancient.

LV. The second Class, being regardless of the Divine Law and ancient Histories, studied to determine all Controversies between Kings and Nations from the Roman Laws, to which they sometimes joined the Canon Law. But these were likewise hindered, by the Infelicity of their Times, from discovering the true Sense of those Laws, though otherwise sagacious enough in searching into the Nature of Equity : From whence it comes, that they often make very good Overtures for new Laws, at the same Time that they are but bad Interpreters of Laws already made. But they are then chiefly to be attended to, when they give Testimony to such a Custom, as now in our Time passes for a Law of Nations.

2. Those of the middle Age.

LVI. The Professors of the third Class, confining themselves within the Limits of the Roman Law, and either never, or but lightly, meddling with this Law common to Princes and Nations, are scarce of any Use to us in our Subject. Amongst these, Covarruvias ¹ and Vasquez ², two Spaniards, have joined Scholastick Subtily with the Knowledge of Laws and Canons ; so that they could not forbear treating of the Controversies between Nations and Kings ; the one with a great deal of Freedom, the other more modestly, and not without some Exactness of Judgment. The French have with most Care attempted to introduce History into the Study of Law, amongst whom Bodin ³, and Hottoman ⁴ are in great Esteem, the one for a continued Treatise, the other for some scattered Questions. Their Decisions and Reasons will often furnish us with Matter for the Search of Truth.

3. Modern.

Spaniards.

Frenchmen.

LVII. In this whole Work there were three Things that I chiefly proposed to myself ; to render the Reasons of my Decisions as evident as possible, to dispose the Matters to be treated of into a regular Method, and to distinguish clearly those Things which might appear to be the same, but were not.

VII. The Design and Order observed through the whole Work explained.

LVIII. I have forbore meddling with those Things that are of a quite different Subject, as the giving Rules about what it may be profitable or advantageous for us to do : For they properly belong to the Art of Politicks ¹, which Aristotle rightly so handled by itself, that he mixed nothing foreign with it : Bodin on the contrary has confounded it with that which is the Subject of this Treatise. Yet in some Places I have made mention of the useful, but by the by, and to distinguish it more clearly from a Question of the just.

LIX. He will do me wrong whoever shall think that I had Regard to any Controversies of the present Age, either already risen, or that can be foreseen to arise. For I profess truly, that as Mathematicians consider Figures abstracted from Bodies, so I, in treating of Right, have withdrawn my Mind from all particular Facts.

LX. As to the Style, I was not willing, by joining a Multitude of Words with a Multitude of Things to be treated of, to create a Distaste in the Reader, whose Advantage I consulted. I have therefore followed, as much as I could, a concise way of speaking, as convenient for such as undertake to instruct ; that so, they who are employed in publick Affairs, may, as at one View, see, both what Kinds of Controversies usually arise, and also the Principles by which they may be

A concise way of speaking.

turned to Bourges, where he died in 1590, about 70 Years of Age. We meet with the most considerable Particulars relating to the Life, Character, and Writings of those two celebrated Lawyers, and the chief of their Successors in Mr. GRAVINA'S *Origines Juris Civilis*, Lib. I. § 170. p. 121, &c. to the End of the Book.

⁵ See Note the third on PUFENDORF, *Law of Nature and Nations*, Book. II. Chap. III. § 23.

⁶ See Book III. Chap. IX.

LVI. (1) DIEGO COVARRUVIAS was born at Toledo, and was the first Professor of Canon Law at Salamanca. He enjoyed several publick Employments, and died Bishop of Segovia in 1577. His Works have been printed several Times, in two Volumes in Folio.

² FERNANDO VASQUEZ, was Scholar to COVARRUVIAS. His *Controversie Illustres* is the chief Piece used in this Work. It is divided into six Books, and has born more than one Impression. Our Author has some Quotations from his Book *De Successionibus & ultimis voluntatibus*, which makes three Volumes in Folio.

³ JOHN BODIN, a Lawyer of Anjou, died in 1585. The Work here meant by our Author, is his famous Treatise *Of the Commonwealth*, which is extant both in Latin and French ; but the Latin Edition is the better

and more compleat. That which I make use of is printed at Francfort in 1622.

⁴ FRANCIS HOTMAN, a Native of Paris, and descended from a Silesian Family, died at Basil in 1590, after having written a great Number of Books. His *Quaestiones Illustres*, the Treatise here meant, appeared in 1573.

LVIII. (1) Good Policy ought to authorize nothing against the invariable Rules of Justice ; and that of the Machiavellians, which makes the Advantage of the State, or of those who rule it, the only Principle, is false and abominable. However, the Just and the Useful are really two different Things, even in Politicks ; as will be easily comprehended by one single Example taken from the Matter of the Work before us. Before engaging in a War, it is above all Things necessary, that a just Cause should appear for so doing. But how good soever the Reasons for such a Step may be, if Circumstances do not allow of taking Arms, without acting to the Prejudice of the Publick Good, if there is Danger of losing as much as, or even more than will be gained, it would then be contrary to good Policy.

decided ;

decided; which being known, it will be easy to suit the Discourse to the Subject Matter, and enlarge upon it as much as they please.

The very
Words of Au-
thors quoted.

LXI. *I have sometimes quoted the very Words of the ancient Writers, when they were such as seemed to be expressed, either with a singular Force or Elegancy; which I have done sometimes in regard to Greek Authors, especially when either the Sentence was short, or the Beauty of it such as I could not hope to equal in a Translation; which notwithstanding I have always subjoined, for the Use of those who have not learned the Greek Language.*

The Liberty
of judging left
to the Reader.

LXII. *And now, whatever Liberty I have taken in judging of the Opinions and Writings of others, I desire and beseech all those, into whose Hands this Treatise shall come, to take the same with me. They shall no sooner admonish me of my Mistakes, than I shall follow their Admonitions. And moreover, if I have said any thing contrary either to Piety, or to good Manners, or to Holy Scripture, or to the Consent of the Christian Church, or to any Kind of Truth, let it be unsaid again.*

H. GROTIUS.

H. G R O T I U S

O F T H E

Rights of W A R and P E A C E.

B O O K I.

C H A P. I.

What War is, and what Right is.

I. **A**LL¹ the Differences of those who do not acknowledge one common Civil Right, whereby they may and ought to be decided; such as are a multitude of People² that form no Community, or those that are Members of different Nations, whether³ private Persons, or Kings, or other Powers invested with an Authority equal to that of Kings, as the Nobles of a State, or the Body of the People, in Republican Governments: All such Differences, I say, relate either to the Affairs of War, or Peace. But because War is undertaken for the Sake of Peace, and there is no Controversy from whence War may not arise, all such Quarrels, as commonly happen, will properly be treated under the Head of the Right of War; and then War itself will lead us to Peace, as to its End and Purpose.

II. I. Being then to treat of the RIGHT OF WAR, we must consider what that *War* is which we are to treat of, and what the *Right* is which we search for. *Cicero*⁴ defines WAR a *Dispute by force*. But Custom has so prevailed, that⁵ not the

I. *The Order of the Treatise.*

II. *The Definition of War, and the Original of the Word (bellum.)*

¹ See PUFENDORF, *Law of Nature and Nations*. B. I. Chap. I. § 8. Note 1.

² Such were the antient Patriarchs, who lived in Tents, and travelled from Place to Place, without forming a Community or depending on any Government; though there were civil Societies already established in the World at that Time. The learned GRONOVIVS on this Place, alleges the Example of the *Aborigines*, the first Inhabitants of Italy, and of several People in *Africa*; *The Aborigines, a savage People, free and independent, without Laws or Government*. SALUST. Bell. Catil. Cap. VI. *The Getulians and Libyans, a rough and uncivilized Set of Men, were the first Inhabitants of Africa. . . . they lived without any Government or Laws, or the least Measures of Discipline among them*. Idem Bell. Jugurth. Cap. XXI. Edit. Waff. *They (the remote Inhabitants of Cyrenaica) being scattered about the Country in Families, and living under the Direction of no Law, had no common Regulations*. POMPONIVS MELA, Lib. I. Cap. VIII. Num. II.

Edit. Voff. We find even at this Day amongst the *Arabians*, and *Africans*, several Nations of *Savages*, and *Vagrants*, without Laws, Magistrates or any Form of Government.

³ See B. II. Chap. XI. § 1. Num. 5.

⁴ *For since there are two Ways of disputing Things, one by Debate, the other by Force, &c.* De Offic. Lib. I. Cap. XI. See PUFENDORF. B. V. Chap. XIII. where he treats of other Ways of deciding Differences in the independent State of Nature.

⁵ PHILO the Jew considers as Enemies not only such as actually attack us by Sea or by Land, but also those who make Preparations for either, those who erect Batteries against our Ports, or Walls, though no Battle is given. De Specialib. Lib. II. p. 790. Edit. Paris. SERVIUS, on Verse 545. of the first Book of the *Eneid*.

— *Quo justior alter
Nec pietate fuit, nec BELLO major & armis.*

Act of Hostility, but the State and Situation of the contending Parties, now goes by that Name; so that War is the State or Situation of those (considered ⁶ in that Respect) who dispute by Force of Arms. Which general Acceptation of the Word comprehends all the kinds of War of which we shall hereafter treat, not even excluding single Combats, which being really ancients than Publick Wars, and undoubtedly of the same Nature, may therefore well have one and the same Name. This agrees very well with the Etymology of the Word; for the *Latin* Word *Bellum* (*War*) comes from the old Word *Duellum* (à *Duel*) as *Bonus* from *Duonus*, and *Bis* from *Duis*. Now *Duellum* was derived from *Duo*, and thereby implied a Difference between *two* Persons, in the same Sense as we term Peace *Unity* (from *Unitas*) for a contrary Reason. So the ⁷ *Greek* Word πόλεμος, commonly used to signify *War*, expresses in its Original an Idea of Multitude. The ancient *Greeks* likewise called it *λύη*, which imports a *Disjunction* of Minds; just as by the Term *λύη*, they meant the *Dissolution* of the Parts of the Body.

2. Neither ⁸ does the Use of the Word (*War*) contradict this larger Acceptation. For tho' sometimes we only apply it to signify a Publick Quarrel, this is no Objection at all, since 'tis certain, that the more eminent ⁹ *Species* does often peculiarly assume the Name of its *Genus*. We do not include *Justice* in the Definition of War, because it is the Design of this Treatise to examine, whether any War be just, and what War may be so called. But we must distinguish that which is in Question, from that concerning which the Question is proposed.

III. Right, as it is attributed to Action, described, and divided into that of Governors and governed, and that of Equals.

III. 1. Since we intitle this Treatise *Of the Rights of War*, we design first to enquire (as I said before) whether any War be just; and then what is just in that War? For *Right* in this Place signifies meerly *that which is just*, and that too rather in a negative than a positive Sense. So that *the Right of War* is properly *that which may be done without Injustice* with Regard to an *Enemy*. Now that is unjust which is repugnant to the Nature of a Society of reasonable Creatures. So *Cicero* says, it is unnatural to take from another to enrich one's self; which he proves thus, because, ¹⁰ if every one were to do so, all Human Society and Intercourse must necessarily be dis-

Makes this Remark. *This is not an idle Repetition; for the Word Bellum, (War) includes Counsels, and Measures, taken against the Enemy; that is a Skill in Military Affairs. Whereas the Word Arma, (Arms) is used only to express the very Act of employing Forces: thus the former relates to the Mind, the latter to the Body.* The same Commentator, on Verse 547. of B. VIII. says: *Bellum is the whole Time employ'd in making the necessary Preparations for fighting or in Acts of Hostility: and Prælium denotes an actual Engagement.* GROTIUS.

6 For not only those who are at War, stand in several different Relations to other Persons, who observe a Neutrality, by Vertue of which they do many Things that by no Means relate to a State of Hostility: but they also may and frequently do act towards each other, as if they were not Enemies; so that in such Cases the Use of Force, and the Laws of War are suspended. This takes Place when two Enemies enter into an Agreement, or Treaty; as the Author shews at large in the proper Place. GRONOVIUS, in a Note on this Place, and HUBER *De jure Civitatis*, Lib. III. Sect. IV. Cap. IV. §. 2. allow of no Difference in the Main between CÍCERO's Definition, and that given by our Author. It is sufficient however, if the latter is more clear and extensive than the former. OBRECHT, in his Dissertation *De ratione Belli* (which is the eighth in the Collection published in 1704.) has defended our Author's Definition against the mistaken Criticisms of some Commentators.

7 Our Author, giving the Etymology of πόλεμος, derives it from πολεός; while others search elsewhere for the Origin of that Word; nor are we to be surpris'd at this. The Country of Etymologies is of a very large Extent, and affords great Numbers of different Roads, where each Man may walk at his Ease. However, in Complaisance to those who delight in such Enquiries, and for the Sake of clear-

ing up our Author's Meaning, we must say something on the last Words of this Paragraph, which stand thus in the Original: *Veteribus etiam λύη à dissolutione, quomodo & corporis dissolutio λύη.* Here the Commentators are silent, not excepting GRONOVIUS, a Critic by Profession; who only explains λύη by other *Greek* Words, signifying any Sort of Unhappiness. But this neither shews the Reason of our Author's Etymology, nor his Application of it. At first sight it might be imagined that the Text is faulty; and I know some have been of Opinion, that λύη ought to be repeated in this Place; but we find λύη in all the Editions of this Work; and I firmly believe I have found out what our Author Means, and what induced him to propose the Etymology of this Word, which he tacitly derives from λύω. He took λύη in the Sense which some Lexicographers give to λύω, *dolor*; and at the same Time was thinking of PLATO's Etymology of λύπη, *Pain*, which he derives from λύω, *to dissolve*; because, says he, *when we suffer Pain, the Body suffers a Dissolution*; in Cratylus, p. 419. Vol. I. Edit. H. Steph. Our Author in Imitation of that ancient Philosopher, derives λύη from λύω for the same Reason; for on a Separation of the Parts of the Body, it follows that those which before appear'd only as one continued whole, by their Union, become *more than one*. The Principles of the old Philosophy, in which our Author was educated, helped him moreover to form this Etymology; for we know that according to those Principles, *Pain* is caused by a *Dissolution* of Continuity.

8 See, for Example, HORACE B. I. Sat. III. v. 107. and TERENCE *Eunuch*. Act. I. Scen. I. v. 16.

9 The Author gives Instances of this B. II. Chap. XVI. § 9.

10 *De Officiis*, Lib. III. Cap. V.

solved.

solved. Florentinus ¹¹ declares; that it is a villainous Act for one Man to lay an Ambush for another, because Nature has founded a kind of Relation between us. And Seneca ¹² observes, As all the Members of the Human Body agree among themselves; because on the Preservation of each depends the Welfare of the Whole, so should Men favour one another, since they are born for Society, which ¹³ cannot subsist but by a mutual Love and Defence of the Parts.

2. But as in Societies, some are equal; as those of Brothers, Citizens, Friends and Allies. And others unequal, καὶ ὑπεροχὴν, ¹⁴ by Preeminence, as Aristotle terms it; as that of Parents and Children, Masters and Servants, King and Subject, ¹⁵ God and Man: So that which is just takes Place either among Equals, or amongst People whereof some are Governors and others governed, considered ¹⁶ as such. The latter, in my Opinion, may be called the ^a Right of Superiority, and the former the ^b Right of Equality.

IV. There is another Signification of the Word Right different from this, but yet arising from it, which relates directly to the Person: In which Sense Right is ¹⁷ a moral Quality annexed to the Person; enabling him to have, or do, something justly. I say, annexed to the Person, tho' this Quality sometimes follows the things; as ¹⁸ Services of Lands, which are called real Rights, in Opposition to Rights, ¹⁹ meerly personal, not because the first are not annexed to the Person, as well as the last, but because they are annexed only to him ²⁰ who possesses such or such a Thing. This moral Quality when ²¹ perfect, is called by us a Faculty; when imperfect, an Aptitude: The former answers to the Act, and the latter to the Power, when we speak of natural Things.

V. Civilians call a Faculty that Right which a Man has to his ²² own; but we shall hereafter call it a Right properly, and strictly taken. Under which are contain-

^a Jus Rectiorum.

^b Jus Equatorium.

IV. Right taken for Quality divided into Faculty, and Aptitude or Fitness.

V. Faculty strictly taken divided into Power, Property, and Credit.

¹¹ I have quoted this Law in my first Note on § 14. of the Preliminary Discourse.

¹² De Ira. Lib. II. Cap. XXXI.

¹³ In Ep. XLVIII. he says thus: We ought to observe carefully and religiously the Laws of this Society, which unite us all together, and teach us that there is a Law common to all Mankind. The Reader may likewise see what S. CHRYSOSTOM says on this Subject on 1 Cor. Chap. XI. v. 1. GROTIUS.

¹⁴ καὶ ὑπεροχὴν. But the Philosopher makes this Distinction with Regard to Friendship, which is the Bond of Societies. The Friendships already mention'd therefore, are founded on Equality But there is another Sort of Friendship, established on Pre-eminence, such as that between Father and Son, the Elder and the Younger, Husband and Wife, and between every Prince and his Subjects. Ethic. Nicom. B. VIII. Chap. VI. VII.

¹⁵ Concerning this Society, see PHILO the Jew, on these Words ἐξ ὧν ψε Νῶε. Noah awaked (from his Wine) p. 281, 282. Edit. Paris. PLUTARCH also has something on the same Subject in his Life of Numa. p. 62. Edit. Wech. Vol. I. GROTIUS.

I am surpris'd that our Author has not quoted the following remarkable Passage of CICERO, which is much more express, and more to his Purpose than those, to which he refers us. Since therefore nothing is more excellent than Reason, which is common to God and Man, the first rational Society is between God and Man. For where there is a Participation of Reason, there is also a mutual Participation of right Reason. Now this being a Law, we are to conclude a Society between the Gods and Men founded on Law. Farther, where there is one common Law, there is likewise a common Right; and those who hold these in common, are to be esteem'd, as it were, fellow-citizens. De Legib. Lib. I. Cap. VII. But, properly speaking, there is no Law, or Right common to God and Man. See PUFENDORF B. II. § 3. and Chap. III. § 5, 6. As also Mr. THOMASIVS's Dissertation call'd, Philosophia Juris, de Obligat. & Action. which is the third in the Collection printed at Lipsic. Cap. I. § 8, &c.

¹⁶ This Restriction is to be carefully observed. For, as ZIEGLER very well remarks on this Place, in all Dealings between a Superior and an Inferior, independently of the Relation of Superiority, the Right of Equality takes Place, as amongst Equals; thus, for Example, Contracts between a Prince and one of his Subjects require no other Rules than those which ought to be observed between two private Persons. When a Merchant has sold his Goods to his King, the King is as much obliged to pay for them, on the Terms, and at the Time agreed on, as the meanest Purchaser. To which I add, that there are some Cases, wherein a Superior becomes in certain Respects the Inferior; and that then the Right of Superiority is changed in Regard to the same Persons, according to the Nature of the Things. Thus a Magistrate is bound to honour his Parents, and consequently to submit to their Will to a certain Degree, whenever the Administration of publick Affairs is not concern'd; but, in the Character of Magistrate, he is to have no Regard for the Will of his Parents, but may even command them. See B. II. Chap. V. § 6. Note I.

¹⁷ See PUFENDORF, B. I. Chap. I. § 19, 20.

¹⁸ See the same Author, B. IV. Chap. VIII.

¹⁹ Such, for Example, is the Power of a Father over his Child, the Right of a Husband over his Wife, the Usufructuary Right and the Right of demanding the Performance of a Promise, by which a Man has personally engaged himself, &c.

²⁰ Thus the Right of Passage, belonging to the Proprietor of a Country House in the Neighbourhood, is inherent only in the Possessor of the said House, and is transmitted to all, who shall possess the same, till that Right is extinct.

²¹ Perfect Right, is that which we may assert by Force, and the Violation of which is a Wrong properly so called. Whence it is easy to judge what is Imperfect Right. See PUFENDORF, B. I. Chap. I. § 7. and our Author, B. II. Chap. XXII. § 16.

²² As when we say, Suum cuique tribuendum est, we must give every Man his own.

ed, 1. A Power either over our selves, which is term'd ²³ *Liberty*; or over others, such as that of a *Father over his Children*, or a *Lord over his Slave*. 2. ²⁴ *Property*, which is either *complete*, ²⁵ or *imperfect*. The last obtains in the Case ²⁶ of *Farms*, for Instance, or *Pledges*. 3. The *Faculty of demanding what is due*, and to this ²⁷ *answers the Obligation of rendering what is owing*.

VI. Another Division of Faculty into private and eminent.

VI. *Right strictly taken* is again of two Sorts, either *private and inferior*, ²⁸ which tends to the particular Advantage of each Individual: Or *eminent and superior*, such as a Community has over the Persons and Estates of all its Members for the common Benefit, and therefore it ²⁹ excells the former. Thus a regal Power is above ³⁰ that of a *Father and Master*; a King has a ³¹ greater Right in the Goods of his Subjects for the publick Advantage, than the Proprietors themselves. And when the

²³ Hence the *Roman* Lawyers very well called this *Liberty Facultas*. GROTIUS.

This Definition occurs twice in the Body of the Law: *Libertas est naturalis Facultas ejus, quod cuique facere libet, nisi quid Vi, aut Jure, prohibetur*. DIGEST. Lib. I. Tit. V. *De statu Hominum*. Leg. V. and INSTIT. Lib. I. Tit. III. *De Jure Personarum*, § 1. In order to understand it thoroughly, it will be proper to read Mr. NOODT's excellent Commentary on the first Part of the *Pandeets*, p. 29. See PUFENDORF's Remark on the Manner, how this natural Power of Man over himself is to be understood. B. I. Chap. I. § 19.

²⁴ The Scholiast on HORACE says the Word *Jus* is taken for *Property* or a *Right to a Thing*. *Jus pro Dominio*. GROTIUS.

Our Author probably had the following Passage in View:

Permutet Dominos, & cedat in altera Jura.

Lib. II. Ep. II. v. 174.

On which the Scholiast says: *In altera Jura, id est, in alterius Dominium.*

²⁵ See PUFENDORF. B. IV. Ch. IV. § 2.

²⁶ *Ut Ususfructus, Jus Pignoris*, says our Author. As these Words stand, they insinuate that the *Usufructuary*, and the *Creditor* have a Sort of Right of *Property*, though imperfect, the former to the Goods in his Possession by virtue of his Tenure, the latter to the Thing pledged in his Hands for Security of the Debt. But, if we reason conformably to the Ideas of the Law of Nature, neither of them has any such Right, of *Property*, properly so call'd. The whole Matter is, that the Enjoyment of the Goods by the *Usufructuary*, till the Time of the Tenure is expired; and the Detention of the Pledge by the Creditor till he is pay'd, renders the Property imperfect, of which the Master of the said Things, who remains solely such, has not all the Profits, or full Exercise, during that Time. But our Author had the Niceties of the *Roman* Law in View, which allows an *Usufructuary* Creditor, &c. a real Action for recovering the Possession of another Man's Goods, in the same Manner as if they were the real Proprietors of them; and thus they are often considered as such, and the Right to them near to that of *Property*: *Jus dominio proximum*, say the Interpreters.

²⁷ *Creditum: Debitum*. Short, and very proper Expressions, taken from the *Roman* Law. See what I have said on PUFENDORF B. I. Chap. I. § 20. Note 3. of the second Edition: and B. V. Chap. XI. § I. Note 5. The learned GRONOVIVS, without Reason, restrains the Terms in Question to Contracts of Loan, properly so called. It is surprising, that he did not observe, that our Author here imitates the Language of the *Roman* Lawyers; and the more so, because some other Commentators, much less skill'd in Criticism, have perceived this Allusion. In my Opinion it may be affirm'd, without the least Hesitation, that by the Word *Creditum*, we are here to understand, not only the Right a Man hath to demand what is due to him by Virtue of some Contract, Bargain, Promise, or Law; but also the Right we have to require Satis-

faction for any Damage or Injury received; all which is included in the Idea affix'd to that Word by the *Roman* Lawyers. *CREDITORUM Appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur; ut si cui ex empto, vel ex locato, vel ex alio ullo debetur: Sed etsi ex delicto debeatur, mihi videtur Creditoris loco accipi.* DIGEST. Lib. I. Tit. XVI. *De verborum, & rerum signif.* Leg. XI, XII. See B. II. Chap. I. § 2. and Chap. XVII. § 1. I believe our Author goes still farther, and extends the Word *Creditum* to the Right of punishing, and that of *Debitum* to the Obligation of submitting to condign Punishment. I am induced to think so, because first the *Perfect Right*, to which the *Debitum & Creditum* in Question relate, answers to the *Law of Nature*, or *Natural Right*, properly so called, of which the Author has spoken in his preliminary Discourse, § 8. Now one of the general Rules of that Law is, that *those who violate its Maxims, deserve to be punished*. See what I have said on § 10, Note 7. It is very probable therefore, that our Author, while he was enumerating the several Things which may be required in Rigour, would not forget the Punishment of Criminals. Secondly, because he elsewhere actually ranks *Debitum ex poena, or poenale* among those things, which we may demand of another in Rigour. B. III. Chap. XIII. § 1, 2. and makes a Right to punish belong to *Juslitia expletrix*, which is the Matter of *Perfect Right*. B. II. Chap. XX. § 12.

²⁸ This takes in all those Rights, natural or acquired, with which each Man is invested, independently of the Relation of a Citizen, or Member of the State. The Author produces Examples of this kind which are sufficient for making the Matter clear and intelligible. See what he says concerning Promises, B. II. Chap. XI. § 8. and Chap. XIII. § 20.

²⁹ Because the Design and Good of civil Society necessarily require, that the natural and acquired Rights of each Member should admit of Limitation several Ways and to a certain Degree by the Authority of him or them, in whose Hands the sovereign Authority is lodged.

³⁰ So that a Subject ought to obey his Prince preferably to his Father and his Master. And the Prince may allow a Father and a Master more or less Power over their Children, and Slaves, as he shall judge most conducive to the Public Good. See B. II. Chap. V. § 7, and 28.

³¹ This is the Observation of PHILO the Jew, who says: *Certainly Silver, Gold, and all other valuable Things, which Subjects treasure up, belong more to those who govern, than to those in Possession of them, πρὸς τοὺς ἀρχοντας* (of Noah's Planting.) p. 222. Edit. Paris. PLINY the younger declares, that a Prince, to whom the Possessions of every one of his Subjects belong, is as rich as all of them together. Paneg. Cap. XVII. And a little after: *What does CESAR see, that is not his own?* See JOHN OF SALISBURY in his *Polycrat.* Lib. IV. Cap. I. p. 335. Edit. Lugd. 1639. GROTIUS.

the Exigencies of the State require a Supply, every Man is more obliged to contribute towards it, than ³² to satisfy his Creditors.

VII. Aristotle calls *Aptitude* or *Capacity*, ¹ ἀξίαν ² *Worth*, or *Merit*: And Michael of Ephesus terms that which is called Equal or Right, according to that Merit, ^{VII.} τὸ προσέρομον ἢ τὸ πρέπον, *Fit and Decent*. ^{What Aptitude is.}

VIII. 1. 'Tis *expletive Justice*, Justice properly and strictly taken, which respects the Faculty, or *perfect Right*, and is called by Aristotle συναλλακική, *Justice of Contracts*, but this does not give us an adequate Idea of that Sort of Justice. For, if I have a Right to demand Restitution of my Goods, which are in the Possession of another, it is not by virtue of any *Contract*, ¹ and yet it is the Justice in question that gives me such a Right. Wherefore he also calls it more properly ἐπανορθωτική, ^{VIII. Of Expletive and Attributive Justice not properly distinguished by Geometrical and Arithmetical Proportions, nor is this conversant about Things common nor that about Things private.}

The latter Passage of PLINY is not rightly quoted or applied; for the Panegyrist says the direct contrary, in commendation of Trajan, Est quod Cæsar non suum videat, &c. That Cæsar sees something which is not his own; and that the Prince's Empire is now larger than his Patrimony. Cap. L. Num. 3. Edit. Cellar. Besides, there is somewhat extravagant, or at least too figurative, in the Expressions of the antient Writers, quoted by our Author, as well as in those of the Moderns, who imitate them. For, strictly speaking, the Goods of each Subject belong no more to his own Sovereign than to a foreign Prince. The whole Truth of the Matter is, that in case of a pressing Necessity, the Sovereign may, for the publick Advantage, dispose of the Goods of his Subjects, even against their Will, in the same Manner as if they were his own. But he then acts, not as Proprietor of such Goods, but as Head of the Society, in favour of which every one of its Members is engaged, either expressly or tacitly, to make such a Sacrifice. See what is said, B. I. Chap. III. § 6. Num. 4. B. II. Chap. XIV. § 7. and B. III. Chap. XX. § 7.

³² And consequently, the Sovereign may discharge a Debtor from the Obligation of paying, either for a certain Time, or forever, if the publick Good requires it. We have an Example of this in LIVY, Lib. XXIII. Cap. XIV. Num. 3. which is here produced by GRONOVIVS. After the fatal Battle of Cannæ; Marcus Junius Pera, the Dictator ordered publick Notice to be given, that he would pardon all who had been guilty of capital Crimes, and exempt from Payment all such as were in Chains for Debt, if they would list under him.

1. ¹ *Ἀξία*. The Philosopher uses this Word when he treats of *Distributive Justice*, by Virtue of which we are to give every one what is due to him, according to his Merit. *Ethic. Nicom. B. V. Chap. VI.* But I find that CICERO uses the Latin Word *Dignitas*, which answers to the Greek *Ἀξία*, in a large Sense, including both *perfect* and *imperfect Right*: His Words are, *Justitia est habitus animi, communi utilitate conservata, suam cuique tribuens DIGNITATEM.* De Invent. Lib. II. Cap. LIII. And the Author of a Treatise on Rhetorick, ascribed to that great Orator and Philosopher, makes Justice consist in rendering to every one his due, (*Jus*) according to his Merit, (*pro DIGNITATE cujusque*) Ad Heren. Lib. III. Cap. II. HUBER, in his Treatise De Jure Civitatis, and his *Prælect. in Institut. & in Pandect.* quotes these two Passages wrong, as if he had read *quæ cuique jus suum & dignitatem tribuit*; and on the sole Authority of this false Quotation, he pretends that CICERO expresses *perfect Right* by the Term *Jus*, and *imperfect Right* by *Dignitas*.

2 CICERO has given us an Example of several Degrees of *Merit* and *Fitness*, which confer more or less of this *imperfect Right*; which I shall here set down, translated from the Author's Note on this Place.

But if there be any Dispute or Enquiry, to whom we are obliged to render most Service, let our Country and our Parents, to whom we stand most indebted, hold the first Rank. Next to these are our Children, and our whole Family, who depend on us alone, and can have no other Refuge. In the next Place we must think of our Relations, with whom we live in a good Understanding, and whose Fortune is most commonly united with our own. The necessary Supports of Life are therefore principally due to those whom I have already mentioned. But living in Society, giving Advice, Conversation, Exhortations, Consolations, and sometimes even Reproofs, take Place chiefly in Friendship. De Offic. Lib. I. Cap. XVIII. See B. II. Chap. VII. § 9, 10. of this Treatise. SENECA, speaking of Wills, says, We look out for Persons of the greatest Worth, (or Merit, dignissimos) to whom we may leave our Estates: De Benef. Lib. IV. Cap. XI. See St. AUGUSTIN, De Doctr. Christ. Lib. I. Cap. XXVIII. and XXIX. GROTIUS.

1 Our Author's Criticism in this Place, has been justly censured, for the Word συναλλαγμα, according to ARISTOTLE'S Sense of it, expresses all Dealings Men may have one with another, and in which any Inequality appears that ought to be redressed by the Exercise of the Species of Justice in question. The Philosopher, (*Ethic. Nicom. Lib. V. Cap. V.*) distinguishes these συναλλάγματα into *voluntary*, by which he understands *Contracts* properly so called, as those of Sale, Loans, Bail, Trusts, Hiring, &c. and *Involuntary*, under which he comprehends all Sorts of Damage and Injuries done to another; either clandestinely, or by open Violence; in short, what the Roman Lawyers call *Delictum*, and which the learned GRONOVIVS improperly compares to *Quasi contractus*, which, according to them, *Non ex maleficio substantiam capiunt* INSTITUT. Lib. III. Tit. XXVIII. The same Commentator (in order to shew, that the Example of a Person in possession of another Man's Goods may relate to ARISTOTLE'S *Permutative Justice*) observes, that ever since the Establishment of Property, there has been a tacit Agreement among all Men, by which each of them is obliged to restore the Goods of another. This is a false Principle, laid down by our Author himself, B. II. Chap. X. § 1. in which he has been followed by PUFENDORF, B. IV. Chap. XIII. § 3. I have confuted them both, in my Note on the Passage of the latter, here referred to. I am not therefore surprized that GRONOVIVS grounds his Argument on it; for besides that he had a better Talent at commenting on the Thoughts and Expressions of others, than at examining and considering Subjects of this Nature, he thus found an Argument *ad hominem*, against GROTIUS, in favour of his dear ARISTOTLE. But it is very strange that he has not added a Remark, very proper for supporting his Criticism, and the more so, as it depends on a grammatical Nicety, viz. that the Word συναλλάγμα does

θεωρητικὴν ² *corrective Justice*. *Attributive Justice*, stiled by Aristotle διανεμητικὴ ³ *Distributive*, respects Aptitude or *imperfect Right*, the attendant of those Virtues ⁴ that are beneficial to others, as Liberality, Mercy, and prudent Administration of ⁵ Government. But whereas the same Philosopher says, that *Expletive Justice* follows ⁶ a simple Proportion, which he calls ἀριθμητικὴν *Arithmetical Justice*; but *Attributive*, which he terms γεωμετρικὴν ⁷ *Geometrical*, is regulated by a comparative Proportion, and which is the only Proportion ⁸ allowed by the Mathematicians, this may hold in some Cases, but not in all. Neither does *Expletive Justice* of itself differ from *Attributive* in such use of Proportions, but in the Matter, about which it is conversant, as we have said already. And therefore in a Contract of Society, ⁹ the Shares are made by a Comparative Proportion, and if only one ¹⁰ Person

does not signify the Foundation of the Obligation arising from the Justice under Consideration, but only the Object or Matter on which this Sort of Justice is employed, which ARISTOTLE therefore calls, Δικαιοσύνη, or Δίκαιον, τὸ ἐν τοῖς συναλλάγμασι διαθεώτικον, *Lib. V. Cap. V.* and τὸ διαθεώτικον, ὃ γίνεσθαι ἐν τοῖς συναλλάγμασι καὶ τοῖς ἐκαστοῖς, καὶ τοῖς ἀκαστοῖς. *Cap. VII.* that is, *corrective Justice in Mens Dealings one with another*, or barely *corrective Justice*, a Term which Interpreters should have done well to preserve, as much more expressive of the Philosopher's Sense than that of *commutative Justice*, which conveys a very different Idea. Thus when our Author says, it is not by Vertue of a *Contract*, (ἐκ συναλλάγματος) that the Possessor of another Man's Goods is obliged to restore them, it makes nothing against ARISTOTLE, according to whose Principles, συνέλλαγμα is here a Detention of what belongs to another; but the Obligation of restoring, is founded on an Inequality subsisting to the Prejudice of the Proprietor; an Inequality which the Justice under Consideration requires to be redressed. To which it may be added, that ARISTOTLE's *Corrective* or *Permutative Justice*, does no more answer exactly to our Author's *Expletive Justice*, than the *Distributive Justice* of the former does to the *Attributive Justice* of the latter, and that there is a wide Difference between those two Distinctions, both in regard to their Foundation, and the Extent of each particular Member. But all this is of little Consequence in the Main, and it would be better to leave the Philosopher with his Division, which besides that it is very defective, is useless at present, as several Authors have observed. See PUFENDORF, *B. I. Chap. VII. § 12.* Mr. THOMASIIUS's *Institutiones Juris Divini*, *Lib. I. Cap. I. § 106*: As also the *Principia Juris, secundum ordinem digestorum*; by Mr. WESTENBERG, Professor at Francker, *Lib. I. Tit. I. § 15, &c.*

² Ἐπανορθωτικὴ. *Ethic. Nicom. Lib. V. Cap. VII. p. 65. Edit. Paris. Vol. II.* Or, as ARISTOTLE more frequently calls it, διαθεώτικη.

³ It is not the same Thing. See *Note 1.* on this Paragraph.

⁴ For the Justice in question regulates the Exercise of those Virtues, which consist in doing such Things in favour of others, as cannot in Rigour be demanded, and directs a proper Application of the Acts of those Virtues, by a prudent choice of Persons the most worthy, to feel the Effects of them. See the second *Note* on *Paragraph 7th*, and what has been said in the *Preliminary Discourse*, § 10, and the Notes of that Place; as also our Author, *B. II. Chap. I. § 9. Num. 1.*

⁵ The Author has here in view, chiefly the Distribution of Rewards and publick Employments; for tho' the Prince on such Occasions ought to prefer Persons of most Merit, and greatest Abilities, no private Person can in Rigour demand this Preference. See PUFENDORF, *B. I. Chap. VII. § 11.*

So that *Catiline* made use of a very frivolous Pretence, in Justification of his Conspiracy, when he said, *Deprived of the Fruits of my Labour and Industry, I was not raised to a Post equal to my Merit. . . . I saw Men of no Worth promoted to Honours, and myself repulsed upon groundless Surmises.* SALLUST, *Bell. Catilin. Cap. XXXVI. Edit. Wafs.*

⁶ Simple Proportion, or *Arithmetical*, is found, according to ARISTOTLE, between three Quantities, the first of which exceeds, or is exceeded by the second, as much as the second surpasses, or is surpassed by the third; so that to reduce Things to a just Medium, in which Justice consists, we must take from or add to the first Quantity, as much as is added to or taken from the second. In this Place we are to add or take away what is agreeable or advantageous, and what is disagreeable or disadvantageous; which the Philosopher calls κέρδος *Gain*, and ζημία *Loss* or *Damage*; for we take away part of both from him who has too much of either, in order to give it to him who has too little of them. Thus supposing a Thing worth only six Crowns, has been fraudulently fold for nine, the Seller has three Crowns too much, and the Buyer three too little: Take away three Crowns from the former, and give them to the latter, and you come to an *Arithmetical Proportion* between 9, 6, and 3; because 9 exceeds 6 as much as 6 does 3. See *Ethic. Nicom. Lib. V. Cap. VII.*

⁷ This *Geometrical Proportion* subsists between four Quantities, the first of which contains or is contained in the second, as often as the third contains or is contained in the fourth; as when we say, *Six is to three as twenty-four to twelve*; or *Three is to six as twelve to twenty-four.*

⁸ CASSIODORUS calls it *Habitudinis comparatio*. HOMER gives a pretty good Description of this Sort of Proportion, which commonly belongs to *Attributive Justice*, when he says,

Ἐδωκε μὲν ἐδδλόν ἔδωκε χεῖρενα δὲ χεῖροσι δόσκειν.
He gave valuable Things to him who deserved most, and Things of less Value to him, who had less Merit. GROTIUS.

The Passage of CASSIODORUS is taken from his Treatise *De Dialecticâ*, p. 408. *Edit. Paris, 1589*, where he says, *In proportione non est similitudo, sed quædam habitudinis comparatio*. As for HOMER's Verse, it is not well supported. It occurs in the fourteenth Book of the *Iliad*, where Neptune taking his Advantage of a profound Sleep, into which Jupiter had been thrown at Juno's Entreaty, exhorts the Grecians to march against the Trojans; whereupon Diomedes, Ulysses, and Agamemnon ran from Rank to Rank, and made the Soldiers change their Arms, giving the best to the most valiant, and the worst to those that had less Courage. In Barnes's Edition therefore we read ἔδωκε he put on, instead of ἔδωκε he gave.

⁹ It has been justly remarked, that in *Geometrical Proportion*, by which *Distributive Justice* is regulated,

¹⁰ Person be found worthy of a Publick Office, a simple Proportion is all that is necessary in disposing of it.

2. Neither is that more true which some maintain, that *Attributive Justice* is exercised about Things belonging to the whole Community; and *Expletive* about Things belonging to private Persons. For on the contrary, if a Man would bequeath his Estate by Will, he does it commonly by *Attributive Justice*; and when the State repays out of the ¹¹ publick Funds what some of the Citizens had advanced for the Service of the Publick, it only performs an Act of *Expletive Justice*. This Distinction *Cyrus* learnt of his Tutor: For when *Cyrus* had adjudged the lesser Coat to the lesser Boy, tho' it belonged to another Boy of a bigger size; and so on the other side gave his Coat, being the bigger, to that bigger Boy. His Tutor told him; ὅτι ἐπὶ τε μὲν κατασάβειν τὴ ἀρετῇσι καὶ κληῖς, &c. That ¹² had he been appointed Judge of what fitted each of them best, he ought to have done as he did: But since he was to determine whose Coat it was, his Business was to have considered ¹³ which had a just Title to it, whether he who took it away by Force, or he who made it, or bought it.

IX. There

regulated, according to ARISTOTLE, the Merit of the Persons is compared with the Things themselves, so that the Quantity of what is given to one, is to the Quantity of what is given to another, as the Merit of one is to the Merit of the other. This evidently appears from *Ethic. Nicom. Lib. V. Chap. VI, & VII.* and particularly from a Passage where the Philosopher says, that in Affairs where *Corrective* or *Permutative Justice*, as opposed to *Distributive*, is concerned, (ὡς τοῖς συναλλάγμασι) an *Arithmetical Proportion* is to be observed; so that the Question is not whether a Man of a good or bad Character cheats, is cheated, or commits Adultery; but that the Law considers no other Difference than that of the Damage sustained, looking on them as equal in other Respects, *Lib. V. Cap. VII. p. 63. Edit. Paris.* An Opposition, which plainly insinuates, that in the other sort of Justice, a Regard is paid to the Quality of the Persons, as well as to the Advantage or Disadvantage arising to either of the Parties. So that in a Contract of Society, which belongs to ARISTOTLE's *Corrective* or *Permutative Justice*, according to him, no Regard is to be had to the Quality of the Person; and as GRONOVIVS observes, if the Prince of Orange puts 1000 Crowns, for Example, into the India Company's Stock, he receives no more Dividend than a private Person, who deposits the same Sum. Nor does our Author pretend he does; though his Commentator insinuates as much. All he means is, that in the Administration of *Corrective* or *Permutative Justice*, Men do not always observe such an *Arithmetical Proportion*, as ARISTOTLE describes; for upon dividing the Profits among several Proprietors, who have engaged in a Partnership in unequal Shares; it is certain, that *Geometrical Proportion* must be observed, and that the other is not sufficient. It is true, this is not a *Geometrical Proportion*, by which the Merit of the Persons is compared with Things; and that it is enough that the Things themselves are compared together, that is; each Person's Share with that of others, and with the Loss or Gain, of which each is to have his Part. It is also true, as PUFENDORF observes, *B. I. Chap. VII. § 9.* the Shares of the Partners may be equal; in which Case, there will be a perfect Equality in the Division of the Profits. But as they may be, and very frequently are unequal, it may justly be affirmed, that the Use of *Arithmetical Proportion* is not sufficient in Contracts, which is all our Author contends for.

¹⁰ Some reply, that the Case is not possible, but all that can be said with Certainty is, that it seldom happens. Others say, that *Geometrical Proportion* is observed even in that Case, because the Merit of that Person, who alone is capable of an Employment, is compared with the want of Merit in all the other Subjects. But then the Comparison is not

made between Things of the same Kind, and consequently, *Geometrical Proportion* cannot take Place here. In reality, the whole Dispute is of very little Importance; and how faulty soever ARISTOTLE's Division may be, our Author had better have proposed his own, than have given himself the Trouble of reconciling it with the other, as he has rectified it; for they are still very different at the bottom, as will easily appear on a careful perusal of that great Philosopher's Moral Treatises.

¹¹ I am inclined to think the Author here had in view a Passage of ARISTOTLE, where he says, that *Distributive Justice* always follows *Geometrical Proportion*. For, continues the Philosopher, upon a Distribution of the Publick Money, it must be made in Proportion to what each has contributed. *Ethic. Nicom. Lib. V. Cap. VII. p. 62.* I suppose the Philosopher designed to speak of the following Case. Several private Persons have furnished the State with Money for the Demands of the Publick, and that in different Sums; the proper Officers are inclined to reimburse them, but the Sum destined for that End, is not sufficient for the Payment of all the Creditors; so each receives in Proportion to what he lent. But this very Example may serve to shew, how little Justness there is in ARISTOTLE's Ideas. For, properly speaking, here is no Comparison between the Degree of the Merit of the Persons, and the Quantity of the Things, but only between what is advanced, and what is restored. If it be said that each Person deserves more or less to be reimbursed, as he had lent more or less, it may be easily shewn, that this Circumstance is but a very ambiguous Proof of more or less Merit; for it may, and often will happen, that those, who have furnished the largest Sums, have not lent so much in Proportion, as Persons of smaller Fortunes, who perhaps have very much streightened themselves to assist the Publick, whilst the former have suffered little or no Inconvenience, by depriving themselves for some Time of a Sum, very inconsiderable in comparison of what remained in their Hands. Now can it be doubted, that on this Supposition, they, who have expressed most Zeal for the publick Good, and have suffered most by promoting it, deserve to receive in Proportion to a larger Share of the Sum, which is not sufficient to discharge the whole Debt, than they whose Debt is in itself the most considerable? I reason here on the Principle established by our Lord JESUS CHRIST, in regard to Alms, in the Judgment he pronounces of a poor Widow's Charity, who gave only two small Pieces of Money for the Use of the Poor. MARK xii. 42, &c.

¹² *Cyropæd. Lib. I. Cap. III. § 14. Edit. Oxon.*

¹³ See the same Writer, *Lib. II. of the Cyropædia.*

IX Right
taken for a
Rule or
Law de-
fined and
divided in-
to Natural
and Volun-
tary.

IX. There is also a third Sense of the Word *Right*, according to which it signifies the same Thing ¹ as *Law*, when taken in its largest Extent, as being a *Rule of* ² *Moral Actions*, obliging ³ us to that which is good and commendable. I say, obliging: for ⁴ Counsels, and such other Precepts, which, however honest and reasonable they be, lay us under no Obligation, come not under this Notion of *Law*, or *Right*. As to *Permission*, it is not ⁵ properly speaking an Action of the Law, but a meer In-
action,

To the same Purpose God forbids the Judges of his People to countenance a poor Man in his Cause, or respect the Person of the Poor, in giving Judgment, EXOD. xxiii. 3. LEVIT. xix. 15. In truth, as PHILLO the Jew observes, the Merits of the Cause are to be considered in themselves, and abstractedly from any Regard to the contending Parties. Lib. De Judice, p. 720. Edit. Paris. GROTIUS.

I do not find in the second Book of XENOPHON'S *Cyropædia*, to which our Author refers his Readers, any one Passage, that can relate to the Matter before us, but the following Reflection of Cyrus. One of that Prince's Favourites proposed to him, that all his Soldiers should not equally share the Booty taken from the Enemy, but that it should be divided according to each Man's respective Merit, and Behaviour in the Time of Action. Cyrus thought the Proposal reasonable, but was of Opinion, that the Consent of the whole Army should be first asked. "Where is the Necessity of such a Condescension?" said Chrysanthes. "Is it not enough that you declare such is your Pleasure, and that the Distribution shall be made on that Foot? When you establish'd Combats for the Prize, did not you at the same Time regulate each Person's Reward?" To which Cyrus replied. *The Case is not parallel; for I imagine the Soldiers will look on all the Plunder that shall be made, as their own Property; whereas they are persuaded that the general Command of the Army belongs to me, and perhaps is even my Birth-Right. So that I believe they think I commit no Injustice, to any one, when I dispose of the Charges in the Army.* Cap. II. § 10, 11. Edit. Oxon.

¹ In this Sense HORACE says,

JURA inventa metu injusti fœtare necesse est.

Lib. I. Sat. III. v. 3.

and

JURA neget sibi nata.

Art. Poet. v. 122.

On which Words the Scholiast says, *Legum sit contemptor.* GROTIUS.

² See PUFENDORF, B. I. Chap. V. Where he explains the Nature and Foundation of moral Actions.

³ The Author's Expression in this Place seems to insinuate, that the Law obliges by its self, and merely as it is a Rule; whereas, all Laws derive their Power of obliging from a Superior, who makes them; that is, from some Intelligent Being, who has a Right of imposing an indispensable Necessity of submitting to his Direction, on those whose Liberty he restrains. To which may be added, that the Author reduces the whole Effect of the Law to the Obligation; whereas Permission ought to be joined to it, which he without Reason excludes.

⁴ See PUFENDORF, B. I. Chap. VI. § 1.

⁵ I cannot be of our Author's Opinion in this Point. Permission is as real an Effect of the Law, taken in its utmost Extent, as the strongest and most indispensable Obligation. The Superior, who gives Being to the Law, has a Right of positively directing either all the Actions of those who depend on him, or at least, all those of a certain kind: In regard of all those Actions, he has a Power of imposing a Necessity of acting or not acting in a certain manner. But no Superior exercises his Authority so extensively; there is always a considerable Number of Things

subject to his Direction, in which he leaves every one the Liberty of doing as he pleases. This is not a mere Inaction, or Negation of Action, as our Author pretends, but a real positive Act, though commonly tacit, by which the Superior or Legislator makes an Abatement of his Right. So that, as the Actions commanded or prohibited, are regulated positively by the Law, so far as it imposes an indispensable Necessity of doing the former, and forbearing the latter, the Actions permitted, are likewise positively regulated by the Law in their own Way, and according to their own Nature, so far as the Law either originally gives a Power of doing or not doing them at Pleasure, or confirms and leaves Men in Possession of a Liberty, which it might have taken away either entirely, or in Part. There is no manner of Necessity of an express Permission, which seldom takes place in Divine or Human Laws: The Silence of the Legislator sufficiently infers a positive Permission of whatever is neither enjoined nor prohibited. Thus when GOD, who alone can regulate all the Actions of Men, of what Nature soever they be, forbade the Jews the Use of certain Animals for Food, as he might, if he had pleased, extended the Prohibition to several other Kinds, by his only forbidding some Particulars, he actually and positively allowed them the Liberty of eating or not eating all others. As to human Laws, either they turn on Things already commanded or prohibited in some manner by Divine Law, natural or revealed; and in that Case, they give as much as in them lies, a Permission of doing several other Things of that Kind, where they are silent; which is a necessary Consequence of Impunity: Or they relate to Things otherwise indifferent in themselves; and then they of course permit whatever they do not forbid; there being an Infinity of Actions of such a Nature, that a Man invested with Authority may lay a Restraint on the Liberty of others, which the Law of Nature allows only so far as a lawful Superior does not think proper to bound it. In one Word, whoever fixes certain Limits, and declares no one shall be allowed to exceed them, does by that very Action express how far he grants Men Liberty to go, if they please. This Way of Reasoning is the more just, because, as our Author owns, the Permission which a Law gives to any one, lays an Obligation on others not to form any Obstacle to his acting, when he is disposed to do what the Law permits. Now this Obligation arises, and ought necessarily to arise from a Right inherent in him, to whom the Law gives a Liberty of acting as he pleases; for in all Obligations in which we stand engaged to others, there is some correspondent Right; and we have not a Right to require a Thing, because another is obliged to do it, but on the contrary, he is obliged to do it, because we have a Right to require it. Whence then arises this Right? It can certainly arise only from the Permission granted by the Law; a Permission, by virtue of which we are also empowered to resist those, who disturb us in the Enjoyment of this Right, and employ either the common Means of Justice, when we are in a Condition of having Recourse to the Protection of a proper Judge, or Force, if we have no other Way left of righting ourselves. In short, every one knows, that the Laws grant an express Permission, either to all

action, unless as it obliges every other Person not to hinder the doing of that, which the Law permits any one to do. I add moreover, that the Law obliges us *to that which is good and commendable*, not barely to that which is *just*: Because Right in this Sense does not belong to the Matter of Justice alone (such as I have before explained it) but also to that ⁶ of other Virtues; tho' otherwise, whatever is conformable to this Right, may also, in a larger Acceptation, be termed ⁷ *just*. Of this Right, thus taken, the best Division is that of ⁸ *Aristotle*, into *Natural* and *Voluntary*, which he commonly calls *Lawful Right*; the Word *Law* being taken in ⁹ its stricter Sense: Sometimes also ¹⁰ an *Instituted Right*. We find the same Difference among the *Hebrews*, who when they speak distinctly, call the Natural Right מִצְוָה ¹¹ Precepts, and the Voluntary Right חֻקִּים Statutes; the former of which the *Septuagint* call δικαιώματα, and the latter ἐντολὰς.

X. 1. NATURAL RIGHT is the Rule and Dictate of ¹ Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature ², and consequently, that such an Act is either forbid or commanded by GOD, the Author of Nature.

X. The Law of Nature defined, divided, and distinguished from such as are not properly called so.

2. The Actions upon which such a Dictate is given, are in themselves either ³ Obligatory or Unlawful, and must, consequently, be understood to be either commanded

all such as depend on the Legislator, or only to some in Particular. From all which it appears, in my Opinion, that the Author had no Reason for excluding *Permission* from the general Idea of the Law. To which may be added what I have said on this Subject against PUFENDORF, who is of the same Opinion with GROTIUS, B. I. Chap. VI. § 15. Note 2. By way of Supplement for this Omission, and some others, I am of Opinion that Law should be defined as I have already defined it, in a Note on the Abridgment of *The Duties of a Man and a Citizen*. B. I. Chap. II. § 2. of the last Editions: *The Will of a Superior sufficiently notified in some manner or other, by which Will he directs either all the Actions in general of those who depend on him, or at least all those of a certain Kind, so that, in Regard to such Actions, he either imposes on them a Necessity of doing or not doing certain Things, or leaves them at Liberty to act or not act as they shall judge proper.*

6 We have an Example of this in a Law made by *Zaleucus*, inflicting a Penalty on those, who should drink Wine against the Physician's Orders. GROTIUS.

This severe Law made the Offence capital, if we may believe *ELIAN*, *Var. Hist.* Lib. II. Cap. XXXVII. See PUFENDORF, B. I. Chap. VI. § 4. in the Text and Notes. To which we may add what *ELIAN* says of the *Lacedemonians* and *Romans*, Lib. III. Cap. XXXIV. with the Note of the late Mr. PERIZONIUS.

7 Thus we say: *It is just to acknowledge Favours, to have Compassion for the Poor, to be liberal to those who want our Assistance, to take a prudent Care of our Health and Fortune, &c.*

8 In his *Ethic. Nicom.* Lib. V. Cap. X. where he makes a Distinction between δικαιος φυσικόν, and δικαιος νομικόν, as making part of what he calls δικαίου πολιτικόν, *Civil Law*. So that his Division is not exactly the same with that of our Author. See my Preface to PUFENDORF, § 24. p. 97, 98. of the second Edition.

9 That is, for a Constitution absolutely depending on the Will of the Legislator.

10 Το εὖ τὰ δίκαια. The Philosopher makes use of this Expression, when speaking of Injustice. Ἀδικούντες γὰρ ἐν τῇ φύσει, ἢ τῷ νόμῳ. *Ethic. Nicom.* Lib. V. Cap. X. p. 68. Vol. II. Edit. Paris.

11 Thus *Maimonides*, in his *Guide to the Doubtful*, Lib. III. Cap. XXVI. GROTIUS.

See SELDEN, who also adopts this Rabbinical Remark, in his Treatise, *De Jure Nat. & Gent.*

secundum Disciplinam Hebræorum, Lib. I. Cap. X. p. 119, 120. But our Author here gives us to understand, that this Distinction is not always observed, as he expressly acknowledges in his Commentary on St. LUKE i. 6. See Mr. LE CLERC; on *Genesis* xxvi. 5. and in his Additions to Dr. HAMMOND's Notes on *Rom.* viii. 4.

X. (1) PHILO the Jew, in his Treatise, where he undertakes to prove that every good Man is free, speaks thus, *Right Reason is an unerring Law, not corruptible or lifeless, written by this or that mortal Man, on Papers or inanimate Pillars, but incorruptible, and engraved by an immortal Nature on an immortal Mind*, p. 871. Edit. Paris. Will you enquire where the Law of GOD is? says TERTULLIAN, when you have a common Law exposed to every one's View, and written on the Tables of Nature? De Coronâ Militis, Cap. VI. The Emperor MARCUS ANTONINUS declares, *The End to be proposed by all rational Creatures, is to follow the Reason and Laws of the most antient Commonwealth*, Lib. II. § 16. See a Fragment of CICERO's Treatise De Republicâ, Lib. III. quoted by LAC-TANTIUS, Lib. VI. Cap. VIII. St. CHRYSOSTOM has several fine Thoughts on this Subject, in his twelfth and thirteenth Homilies On the Statues. What THOMAS AQUINAS says, *Secunda Secundæ*, LVII. 2. and SCOTUS, III. Dist. 37. is not unworthy our Notice. GROTIUS.

2 Our Annotator adds the Words *ac Sociali, & Sociabile* in the Text of his Latin Edition, because his Author expresses himself in the same Manner, § 12. Num. 1. and in the following Chapter, § 1. Num. 3. He thinks it probable, that the Transcriber or Printer omitted those two Words; and that the Author overlooked the Omission, as he has done in several other Places.

3 *Actus debiti, aut illiciti per se*. The Author here supposes we should be under an Obligation of doing or not doing certain Things, even tho' we were not answerable to any one for our Conduct. We are not to be surprized that his Notions on that Subject are not entirely just, since we see at this Day not only the Generality of Philosophers and Scholastick Divines, but also some Authors, otherwise very judicious, and far from being Slaves to the Schools, strenuously maintain, that the Rules of the Law of Nature and Morality do in themselves impose an indispensable Necessity of conforming to them, independently of the Will of GOD. Some however, reason so as to make it seem a mere Dis-

manded or forbid by God himself; and this makes the Law of Nature differ not only from Human Right, but from a Voluntary Divine Right; for that does not command or forbid such Things as are in themselves, or in their own Nature, Obligatory and Unlawful; but by forbidding, it renders the one Unlawful, and by commanding, the other Obligatory.

3. But that we may the better understand this Law of Nature, we must observe, that some Things are said to belong to it, not properly, but (as the Schoolmen love to speak) by way of Reduction or Accommodation, that is, to which the Law of Nature

pute about Words. I shall endeavour to put the Question in a clear Light in a few Words, and shew the Foundation of the Negative, which I take against the Author. This Note may be joined to what I have said on the same Subject in my Preface to PUFENDORF, § 6. p. 36. Second Edition. The Question here is not whether we can discover the Ideas and Relations, from which all the Rules of the Law of Nature and Morality are deduced, abstractedly from the Will of an intelligent Being. It must be acknowledged with the Patrons of the Opinion which I oppose, that these Rules are really founded on the Nature of Things; that they are agreeable to the Order conceived necessary for the Beauty of the Universe; that there is a certain Proportion or Disproportion, a certain Fitness or Unfitness between most Actions and their Objects, which give a Beauty to some, and a Deformity to others. But it does not follow from this Concession, that we are, properly speaking, *obliged* to do or not to do such a Thing. The Fitness or Unfitness, which may be termed the *natural Morality* of Actions, is indeed a Reason for acting, or not acting; but then it is not such a Reason as imposes an indispensable Necessity, which is implied in the Idea of an *Obligation*. This Necessity can come only from a *superior*, that is, from some intelligent Being existing without us, who has a Power of restraining our Liberty, and prescribing Rules for our Conduct. If there were any Obligation independently of the Will of a Superior, it must be laid on us either by the Nature of the Things themselves, or by our own Reason. Now the Nature of Things cannot impose any Obligation properly so called. The Relation of Fitness or Unfitness between our Ideas, can of itself only oblige us to acknowledge such a Relation; something more is necessary for obliging us to make our Actions conformable to it. Nor can Reason of itself lay us under an indispensable Necessity of following those Ideas of Fitness or Unfitness, which it places to our View, as grounded on the Nature of Things. For, first, the Passions oppose these abstracted and speculative Ideas with sensible and affecting Ideas, they shew us in several Actions contrary to the Maxims of Reason, a Relation of Pleasure, Content, and Satisfaction, which attend them, as soon as we resolve to perform them. If our Understanding diverts us from such Actions, the Inclination of our Heart carries us toward them with much more Force. Why then should we comply with the former, preferably to the latter, if there is no exterior Principle that obliges us so to do? On this Supposition, are not the Inclinations of our Heart as natural as the Ideas of our Mind? Do they not arise from a certain Disposition in our Nature? You will say, Reason evidently shews us that we shall act more conformably to our Interest, by observing the Rules which she prescribes, than in being guided by our Passions. But the Passions will dispute this Advantage, and even pretend it lies on their Side, because the Satisfaction which they offer is present and certain; whereas the Interest to which Reason would engage our Attention, is future and

distant, and perhaps therefore to be looked on as uncertain. Even tho' we were convinced that, all Things well considered, it would be advantageous to us to listen to the Dictates of Reason, is not every one at full Liberty to renounce his Interest, while no other Person is concerned in his acting conformably to it, or invested with a Right of requiring he should consult it as much as is in his Power? How much soever a Man acts in contradiction to his real Interest, he will, on this Supposition, be only imprudent: He will be guilty of no Violation of any *Duty* or *Obligation*, properly so called. But secondly, what ought to be particularly observed, and which alone is sufficient for proving the Thesis here advanced, is that our Reason, considered as independent on the Being who endowed us with it, is at the Bottom nothing but *Ourselves*. Now no Man can impose on himself an indispensable Necessity of acting or not acting in such a particular Manner. The very Notion of Necessity implies, that it cannot cease at the Pleasure of the Person subject to it; otherwise it would be ineffectual, and reduced to Nothing. If then the Person obliged, and the Person who lays the Obligation be one and the same, he may disengage himself from it, when, and as often as he pleases; or rather there will be no real Obligation; as, when a Debtor succeeds to the Estate and Rights of his Creditor, the Debt ceases. In a Word, as SENECA very well observes, properly speaking, *No Man owes any thing to himself*. *The Word Owe takes Place only between two*. De Benef. Lib. V. Cap. VIII.

From all which I conclude, that how conformable soever the Maxims of Reason be to the Nature of Things, and the Constitution of our Being, they are by no Means obligatory, till this same Reason has discovered the Author of the Existence and Nature of Things, whose Will gives those Maxims the Force of a Law, and imposes an indispensable Necessity on us of conforming to them, by Vertue of his Right to restrain our Liberty, as he judges proper, and prescribe what Bounds he pleases to the Faculties we received from him. It is true, GOD can command nothing contrary to the Ideas of Fitness and Unfitness, which Reason shews us in certain Actions; but still the Obligation of regulating our Conduct by those Ideas proceeds only from his Will. The Question is not, Whether that Will be arbitrary or not? It is still that alone which, properly speaking, imposes the Necessity. If, supposing an Impossibility, we could reasonably persuade ourselves that the Divinity is such as he is represented by the *Epicureans*, a Being who does not interest himself in the Actions of Men, requires nothing at their Hands, has no Concern for their living well or ill; whatever Ideas we might entertain of Order, Fitness, and natural Justice, the Consideration of such a Divinity would not be sufficient for imposing an indispensable Necessity of taking those Ideas for our Rule, even tho' we believed he himself acted conformably to them, as far as the Perfection of his Nature requires; for Example is not in itself a solid Foundation of Obligation. In short, that

Nature is not ⁴ repugnant ; as some Things, we have now said, are called Just, because they have no Injustice in them ; and sometimes by the wrong Use of the Word ⁵, those Things which our Reason declares to be honest, or comparatively good, tho' they are not enjoined us, are said to belong to this Natural Law.

4. We must further observe, that this Natural Law does not only respect such Things as depend not upon Human Will, but also many ⁶ Things which are consequent to some Act of that Will. Thus, *Property* for Instance, as now in use, was introduced by Man's Will, and being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from any Man, against his Will, what is properly his own. Wherefore ⁷ *Paulus* the Civilian infers, that ⁸ *Theft is forbid by the Law of Nature* : *Ulpian*, that it is ⁹ *Dishonest by Nature* : And ¹⁰ *Euripides* calls it *Hateful to GOD*, as you may see in these Verses of *Helena*,

Μισεῖ γὰρ ὁ Θεός, &c.

5. As for the Rest, the Law of Nature is so unalterable, that ¹¹ God himself cannot change it. For tho' the Power of God be infinite, yet we may say, that there are some ¹² Things to which this infinite Power does not extend, because they cannot be expressed by Propositions that contain any Sense, but manifestly imply a Contradiction. For Instance then, as God himself cannot effect, that twice two should not be four ; so neither can he, that what is intrinsically Evil ¹³ should not

that the Will of GOD is the Source of all Duties appears from this Consideration, that when they who are in Possession of a Religion, practise the Rules of Virtue, and the Maxims of the Law of Nature, they ought so to do, not principally and precisely because they acknowledge such Rules conformable to the natural and invariable Ideas of Order, Fitness, and Justice ; but because GOD, their Sovereign Master, wills that they should follow them in their Conduct. And, in Reality, it would otherwise be unnecessary for GOD to give any Orders on that Head, because they would be already obliged to act in that Manner : The Will and Authority of GOD would, on this Supposition, be no more than a Sort of Accessory, which, at most, would only make the Obligation stronger. I have treated this Matter more at large in my Reflections on *The Judgment of an anonymous Author* ; or the late Mr. LEIBNITZ, printed in 1718, at the End of the fourth Edition of my Translation of the *Abridgment of PUFENDORF's Book Of the Duties of a Man and a Citizen*.

4 He speaks here of such Things as are neither commanded nor forbidden by the Law of Nature, in regard to which we are left to our Liberty to act as we judge proper, unless a lawful Superior makes some positive Law in that Point ; as it is in his Power ; which is agreeable to the Law of Nature only in the Manner here specified, not being immutable, as our Author observes elsewhere, *B. I. C. II. § 5. n. 1.* But it is evident from what I have said, *Note 5.* on the preceding Paragraph, that there is a *Natural Law of bare Permission*, as well as one which is *obligatory* ; and thus the Things which the Author means, may very well be considered as belonging to *Natural Law*, in the former Acceptation of the Term.

5 Our Author, in another Part of this Work, mentions *Concubinage, Divorce, Polygamy*, *B. I. C. II. § 6. n. 2.* the Action of a Person, who discovers to another, what he is not by the Law of Contract obliged to discover : (*B. II. C. XII. § 9. n. 2.*) The Care of declaring War in certain Cases, where it may be omitted without any Violation of Natural Law : (*B. III. C. III. § 6. n. 6.*) The Vow of *Celibacy, Second Marriages*, and the like, (*B. III. C. IV. § 2. n. 1.*) as so many Examples of

Things belonging to this Class. What we shall say on those Places, and on *B. I. C. II. § 1. n. 3.* will help to explain the Principle here laid down by our Author, and shew wherein he has misapplied or extended it too far. See also PUFENDORF, *B. II. C. III. § 22.*

6 See PUFENDORF, *B. II. C. III. § 15.* Note 5. and § 22, 24.

7 *Theft is a fraudulent taking of a Thing, for the Sake of making an Advantage either of the Thing itself, or of the Use or Possession of it : All which is forbidden by the Law of Nature.* Digest. *B. XLVII. Fol. 2.* De Furtis, *Leg. I. § 3.*

8 The Words of the Emperor *Julian* on that Subject are, *Besides that, by which we are all convinced, without Instruction, of the Existence of something Divine ; there is a second Law, sacred and divine by Nature, which orders us entirely to abstain from another Man's Property, and allows us not to make any Attempt on it, either by Word or Action, or even in our secret Thoughts, &c.* Orat. VII. p. 209. Edit. Spanheim. The Philosopher *CHRYSIPPUS*, as represented by *CICERO*, said, *There is no Injustice in seeking ones own Advantage ; but it is contrary to Equity to take away from another.* De Offic. Lib. III. Cap. X. GROTIUS.

9 *Theft and Adultery are in their own Nature Evil and Infamous.* Digest. Lib. L. Tit. XVI. De Verborum significatione, *Leg. XLII.*

10 *For the Deity abhors Violence : It is his Will that all Men should remain in quiet Possession of their own Goods ; but no Rapine is allowed. Riches unjustly acquired are to be renounced, for the Air and Earth are common to all Men, where, when they increase their Possessions, they are not to detain or take away what belongs to others.* Helen. V. 909, &c.

11 Compare this with what PUFENDORF says, *B. II. C. III. § 5.*

12 See Mr. LE CLERC's *Ontology*, C. XIV.

13 The Distinction of moral Good and Evil, of Virtue and Vice, being established on the necessary Congruity or Incongruity, which we perceive between certain Ideas, founded on the very Nature of Things ; to say that Good becomes Evil, and Evil Good, as long as the Things remain the same, implies a Contradiction. If therefore God should command a Thing in which we find a necessary Incongruity

not be Evil. And this is *Aristotle's* Meaning, when he says, ἕνα ἐνθὺς ἐνέμασαι, &c. ¹⁴ *Some Things are no sooner mentioned than we discover Depravity in them.* For as the Being and Essence of Things after they exist, depend not upon any other, so neither do the Properties which necessarily follow that Being and Essence. Now such is the Evil of some Actions, compared with a Nature guided by right Reason. Therefore God suffers himself to be judged of according to this Rule, as we may find, *Gen.* xviii. 25. *Isa.* v. 3. *Ezek.* xviii. 25. *Jer.* ii. 9. *Mich.* vi. 2. *Rom.* ii. 6. iii. 6.

6. Yet it sometimes happens, that in those Acts, concerning which the Law of Nature has determined something, some Sort of Change may deceive the Unthinking; tho' indeed the Law of Nature, which always remains the same, is not changed; but the Things concerning which the Law of Nature determines, and which may undergo a Change. As for Example: If my Creditor forgive me my Debt, I am not then obliged to pay it; not that the Law of Nature ceases to command me to pay what I owe, but because what I did owe ceases to be a Debt. For as *Arrian* rightly argues in *Epictetus*, οὐκ ἀρκεῖ τὸ δανείσασθαι πρὸς τὸ ὀφείλειν, ἀλλὰ δὲ προσεῖναι καὶ τὸ ἐπιμένειν ἢ τὸ τῶν δανείων, καὶ μὴ διαλελυθῆναι αὐτοῖς. *Non sufficit, &c.* ¹⁵ *To make a just Debt, it is not enough that the Money was lent, but it is also requisite, that the Obligation continue undischarged.* So when God commands ¹⁶ any Man to be put to Death, or his Goods to be taken away, Murder and Theft do not thereby become lawful, which very Words always include a Crime; but that cannot be Murder or Theft, which is done by the express Command of him who is the Sovereign Lord of our Lives and Estates.

7. There are also some Things allowed by the Law of Nature, not absolutely, but according to a certain State of Affairs. Thus, before Property was introduced, ¹⁷ every Man had naturally a full Power to use whatever came in his Way. And before Civil Laws were made, every one was at Liberty ¹⁸ to right himself by Force.

XI. That Natural Instinct does not make another distinct Law.

XI. But that Distinction, which we find in the Books of the *Roman* Laws, of immutable Right into such as is ¹ common to Men with Beasts, which they call in a strict Sense the *Law of Nature*; and that which is peculiar to Men, which they often style the *Law of Nations*, is of very little or no use; for nothing is properly susceptible of Right and Obligation, but a Being that is capable of forming ² general Maxims, as *Hesiod* has well observed,

Τέν δὲ γὰρ ἀνθρώποισι νόμον, &c.

³ Jupiter

congruity with the Nature of Things; and on the contrary, prohibit a Thing in which we discover a necessary Congruity with the Nature of Things; he would act in Contradiction to himself, because he is the Author of that Nature: Thus he would be wise and not wise at the same Time; he would have all Perfections, and yet want one of the greatest; which is such a manifest Contradiction as can never be the Object of the Divine Omnipotence. If it be said, that God can change the Nature of Things, the Proposition is unintelligible, and when closely examined, implies no less Contradiction. For either the Things would not be the same, tho' called by the same Names; as *Man*, for Example, would be no longer a rational and sociable Creature; or Things remaining still the same, they would no longer be endowed with the same Properties, and the same essential Relations, *i. e.* they would and would not be the same; for the Essence of a Thing, and the Thing itself, differ only in Name.

¹⁴ *Ethic. Nicom. B. II. C. VI.* The Application of this Passage is not entirely just. *Aristotle* is not here speaking of the Mutability or Immutability of Moral Evil. He means no more than that some Passions and Actions are of such a Nature, that they can be innocent in no Case, nor in what Manner soever they are admitted. Of this Sort are a

malicious Joy at our Neighbour's Misfortunes, Impudence, Envy, Adultery, Theft, and Murder; whereas some other Passions and Actions are Good or Evil, as a just Medium is observed, or as we depart from it, and give into either Extreme: Such are Fear, Confidence, Desire, Aversion, Anger, Compassion, Joy, Sorrow, the Actions of giving or receiving, of speaking or being silent, &c. But, whether the moral Evil, always inherent in the former Sort of Actions and Passions, and sometimes in the latter, is absolutely inseparable from them, even by the Will of God, is another Question, on which the Philosopher says nothing either directly or indirectly, which leaves us Room to suppose he had it in his Thoughts.

¹⁵ This Example is employed, *B. I. C. VII.* by way of Comparison, in relation to a very different Subject.

¹⁶ See *Preliminary Discourse*, § 49. *n. 3.* and *B. I. C. II.* § 2. *num. 1.* *B. II. C. VII.* § 2. *n. 3.* and *B. III. C. XI.* § 9. *num. 2.*

¹⁷ This is treated of in *B. II. C. II.* § 2.

¹⁸ See *B. I. C. III.* § 1, 2. and *B. II. C. XX.* § 8.

XI. (1) See *Pufendorf*, *B. II. C. III.* § 2, 3.

2 Brutes have not a Power of forming abstracted or general Ideas, as *Mr. Locke* has shewn in his *Essay on the Human Understanding*, *B. II. C. XI.* §

³ Jupiter has ordained that Fishes, wild Beasts, and Birds should devour each other, because Justice doth not take place amongst them: But to ⁴ Men he has prescribed the Law of Justice, which is the most excellent Thing in the World.

Cicero in his first Book of Offices ⁵ remarks, that we do not say *Horses and Lions have any Justice*. And Plutarch, in the Life of Cato the Elder, *νῆμα μὲν γὰρ, &c.* We by Nature observe Law and Justice, only towards Men. And Lactantius, in his fifth Book ⁶, *We find that all Animals, destitute of Wisdom, follow the natural Bias of Self-Love. They injure others to procure themselves some Advantage; for they know not what it is to hurt with a View of hurting, and with a Sense of the Evil that is in it. But Man, having the Knowledge of Good and Evil, abstains from hurting others, tho' to his own Detriment.* ⁷ Polybius having related in what Manner Men first engaged in Society, adds, when they saw any one offending his Parents or Benefactors, they could not but resent it, giving this Reason for it, *τὴ γὰρ γένεσι τῶν ἀνθρώπων ταύτῃ ἀξίον ἐστίν, &c.* For since human Kind does in this differ from other Animals, that they alone enjoy Reason and Understanding, 'tis very unlikely that they should (as other Animals) pass by an Action so repugnant to their Nature, without reflecting on, and testifying their Displeasure at it.

2. If at any Time ⁸ Justice be attributed to brute Beasts, it is improperly, and only on the Account of some Shadow or Resemblance of Reason ⁹ in them. But it is not material to the Nature of Right, whether the Act itself, on which the Law of Nature has decreed, be common to us with other Animals, as the bringing up of our Offspring, &c. or peculiar to us only, as the Worship of God.

XII. Now that any Thing is or is not by the Law of Nature, is generally proved either *a priori*, that is, by Arguments drawn from the very Nature of the Thing; or *a posteriori*, that is, by Reasons taken from something external. The former Way of Reasoning is more subtle and abstracted; the latter more popular. The Proof by the former is by shewing the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature. But the Proof by the latter is, when we cannot with absolute Certainty ¹, yet with very great Probability, conclude

XII. How the Law of Nature may be proved.

^{10, 11.} See also CICERO, *De Officiis*, B. I. C. IV. and SENECA, *Ep.* 124. Or if it be imagined, that by allowing Brutes Knowledge, it will be hardly possible to deny them some universal Ideas; it must be granted, at least, that they are not very extensive, and, according to all Appearance, are raised only by the Impressions of some particular Object which is present.

³ *Oper. & Dier.* V. 276, &c. Edit. Cleric.

⁴ Juvenal makes the same Observation, *Sat.* XV. v. 142, &c. "It is that which distinguishes us from Brutes. And it is also upon that Account that we only, of all Animals, have obtained a wonderful Capacity of apprehending divine Things, of inventing and exercising divers Arts. This Understanding we derive from Heaven, which the other Animals, whose Bodies are formed to look towards the Earth, are intirely deprived of. The common Creator of the Universe has given to them Souls endowed only with Sense; but to us he has moreover given Reason, that a mutual Affection might encline us to ask and give mutual Assistance, to unite together, and to form Notions, &c." St. Chrysostom says, *We ought not to transgress the Rules of Justice, even in regard to inanimate Beings, and such as are void of Sense.* On VII. C. of *Epist.* to the Romans. GROTIUS.

This Thought of St. Chrysostom seems, on the contrary, to suppose some Sort of Law common to Men and Brutes.

⁵ Nor does our Nature differ in any Thing more from that of Beasts, to which we attribute Strength, as a Horse and a Lion, but never Justice, Equity, or Beneficence; for they have neither the Use of Reason nor Speech. *De Off.* B. I. C. XVI. Our Author might have added a Passage from ARISTOTLE, where that Philosopher observes, that *We never say Beasts are temperate or intemperate*, but by a Metaphor, tho' one Species of Animals differs widely from

another, in the natural Desire of Generation, and Greediness in Eating. *Ethic. Nicom. Lib. VII. Cap. VII. p. 92.*

⁶ *Cap. XVII. Num. 30, 31. Edit. Cellar.*

⁷ (POLYB.) *Lib. VI. Cap. IV.* In regard to what the Philosopher says of Offences committed against Parents, we have an Example of that Kind in Ham, and the Punishment of his Crime, *GEN. ix. 22, &c.* St. CHRYSOSTOM observes, that *We are naturally inclined to join in our Indignation with those who have been injured; for, says he, we immediately become Enemies to the Offenders, tho' we have no Share in the Injury.* *Hom. XIII. De Statuis.* The Scholiast on HORACE, *Sat. III. Lib. I. v. 97.* remarks, that *Our Sentiments of Indignation upon hearing of a Murder, are different from those that arise in our Soul when we are inform'd of a Robbery.* GROTIUS.

⁸ PLINY, in his *Natural History*, *Lib. VIII. Cap. V.* speaks of a Sort of Sense of Justice in Elephants, which he terms *divinatio quædam Justitiæ*. The same Writer, *Lib. X. Cap. LXXIV.* tells us, on the Credit of another Author, that in Egypt, an Asp was known to kill one of its own Young, for having killed the Man's Son who entertained and fed him. GROTIUS.

⁹ SENECA says, that wild Beasts are not, properly speaking, *subject to Anger*, but have a Sort of blind Impetuosity in its stead. *Brutes*, says he, *are void of human Passions, but have certain Impulses resembling those Motions.* *De Ira. Lib. I. Cap. III.* ORIGEN also observes, that Beasts are not susceptible of Vice, properly so called, but that we find in them something that resembles Vice. *Contra Celsum.* The Peripaticks said, *The Lion seems to be angry.* PORPHYR, *De non esu Animalium*, *Lib. III. p. 309. Edit. Lugd. 1620.* GROTIUS.

XII. (1) This Way of proving the Existence of the Law

clude that to be by the Law of Nature, which is generally believed to be so by all, or at least, the most civilized, Nations. For, an universal Effect requires an universal Cause. And there cannot well be any other Cause assigned for this general Opinion, than what is called Common Sense.

There's a Passage in *Hesiod* to this Purpose, very much commended.

φήμη δ' ἔστις, &c.

² That which is generally reported amongst many Nations is not intirely vain.

Τὰ κοινῇ φαινόμενα πιστὰ ³. That is certain, which universally appears to be so ⁴, said *Heraclitus*, determining λόγον τὸν κοινὸν ⁵, Common Reason to be the surest Mark of Truth. And *Aristotle*, ⁶ κατέτισον πάντας, &c. 'Tis the strongest Proof, if all the World agree to what we say. *Cicero*, ⁷ The Consent of all Nations is to be reputed the Law of Nature. So *Seneca*, ⁸ What all Men believe must be true. Likewise *Quintilian*, We allow ⁹ that to be certainly true which all Men agree in. I with some Reason said, By the most civilized Nations; for as ¹⁰ *Porphyrus* well observes, τίνα τῶν ἐθνῶν, &c. Some People are savage and brutish, ¹¹ whose Manners cannot, with Truth and Justice, be reckoned a Reproach to human Nature in general. And *Andronicus Rhodius*, παρ' ἀνθρώποις, &c. That Law ¹² which is called the Law of Nature, is unchangeable, in the Opinion of all Men who are of a right and sound

Law of Nature is of little Use, because only the most general Maxims of that Law have been received by most Nations. Some Practices even contrary to the most evident of them, were long considered as indifferent in the most civilized Countries, as appears from the horrible Custom of exposing Children. See *Pufendorf*, B. II. Chap. III. § 7, 8. and what I have said in my Preface to that Author, § 4.

² *OPP. & DIER. vers. penult.* But the Passage is not well applied in this Place; for the Poet means only that we ought to endeavour at securing a good Reputation in the World, because false Reports always make some Impression, and prejudice the Person to whose Disadvantage they are spread. οὐ πάντων ἀπόλλυται, Are not entirely without Effect.

³ This is taken from *SEXTUS EMPERICUS*, *Adv. Mathem.* Lib. VII. § 134. p. 399. Edit. Fabric.

⁴ *ARISTOTLE* maintains, that *What all Men conceive in a certain Manner, is really such as it appears*; and that, *Whoever attempts to discredit such a Belief, will advance nothing much more worthy of Credit.* *Ethic. Nicom. Lib. X. Cap. II. p. 130. Edit. Paris.* *SENECA*, undertaking to prove that no Duty is more evident than that of Gratitude, gives the following Reason for it: *How different soever the Opinions of Men may be on other Subjects, they will all unite in declaring that a proper Return is to be made to those who have deserved well of us.* *Epist. LXXXI.* *QUINTILIAN* says, *I will therefore call the Consent of the Learned, the Standard of Language, and the Consent of good Men, the Rule of Life.* Lib. I. Cap. VI. To the same Purpose, *JOSEPHUS*, the Jewish Historian, *There is no Nation in which the same Customs are generally established: One City frequently differs from another in this Point, but Justice is equally proper for all Men, being extremely useful both to the Greeks and Barbarians. As our Laws have a strict Regard to that Virtue, they render us, if religiously observed, benevolent and friendly to all Men. This is what we are to require from Laws: Nor are others to profess an Aversion to them, on the Account of the Difference between their Institutions and ours, but rather to consider whether our Laws have a Tendency to promote Probity and Virtue; for this is the common Concern of all Mankind, and is of itself sufficient for maintaining human*

Society. *Antiq. Judaic. Lib. XVI. Cap. X.* *TER-TULLIAN* says, that *Whatever is equally received by great Numbers of People, is not an Error, but a real Tradition.* *De præscript. adv. Hæret. Cap. XXVIII.* *GROTIUS.*

None of these Quotations, except the two first, are to our Author's Purpose: That of *QUINTILIAN* seems rather to insinuate the contrary of what he would prove; for it is well known, that good Men were never the Majority; and that great Master of Rhetoric had a little before declared, that *Custom, if it received its Name from the Practice of the Majority, will give most pernicious Precepts, not only for forming a Stile, but also for regulating our Lives.* The Passage of *JOSEPHUS* comes to no more than this: That the Practice of Justice is equally useful to all Men; but there is nothing in it that insinuates that all Men entertain the same Ideas of that Virtue.

⁵ *SEXTUS EMPIRIC.* *Adv. Mathem.* Lib. VII. § 131, 133.

⁶ I know not whence this is taken; for I do not find it in any of those Books where it might be supposed that Philosopher has said any Thing of this Nature.

⁷ *TUSCULAN Quæst.* Lib. I. Cap. XIII.

⁸ *Epist. CXVII.*

⁹ *Instit. Orator.* Lib. V. Cap. X. p. 399. Edit. *Burman.* He instances in the Belief of a Divinity, and the Obligation under which Children lie of loving and obeying their Parents.

¹⁰ *Of Abstinence*, Lib. IV. p. 428. Edit. *Lugd.* 1620.

¹¹ *JUSTIN MARTYR* makes this Exception, *Except such as being possessed with impure Spirits, and corrupted by a bad Education, evil Customs, and unjust Laws, have lost their natural Ideas.* *Colloqu. cum Tryphone.* *PHILO* the Jew observes, that *It is surprizing any Man should be so blind, as not to perceive certain Properties of Things, which are as clear as the Sun.* In his Treatise proving all good Men to be free, p. 871. Edit. *Paris.* *St. CHRYSOSTOM* cautions us against forming a Judgment of Things from the Opinion of such as have a corrupt Mind. In his Homily on the Divinity of *JESUS CHRIST.* *GROTIUS.*

¹² *Ethic. Nicom.* Lib. V. Cap. X. Num. 2. Edit. *Heins.*

Mind:

Mind: But if it does not appear so to Men of weak and disturbed Judgments, it argues nothing to the Purpose; for we all allow Honey to be sweet, tho' it may taste otherwise to a sick Person. To which agrees that of Plutarch, in the Life of Pompey, φύσει μὲν, &c. ¹³ No Man either was or is by Nature a wild and unsociable Creature, but some have grown so by addicting themselves to Vice, contrary to the Rules of Nature; and yet these, by contracting new Habits, and by changing their Method of living, and Place of abode, have returned to their natural Gentleness. Aristotle gives this Description of Man, as peculiar to him, ἀνθρώπου ζῶον ἡμέτερον φύσει, ¹⁴ Man is by ¹⁵ Nature a mild Creature. And elsewhere, δὲ δὲ σκοπεῖν, &c. ¹⁶ To judge of what is natural, we must consider those Subjects that are rightly disposed, according to their Nature, and not those that are corrupted.

XIII. The other kind of Right, we told you, is the ¹ Voluntary Right, as being derived from the Will, and is either Human or Divine. XIII. Voluntary Right divided into Human and Divine.

XIV. We will begin with the Human, as more generally known; and this is either a Civil, a less extensive, or a more extensive Right than the Civil. The Civil Right is that which results from the Civil Power. The Civil Power is that which governs the State. The State is a ¹ compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit. The less extensive Right, and which is not ² derived from the Civil Power, though subject to it, is various, including in it the Commands of a Father to his Child, of a Master to his Servant, and the like. But the more extensive Right, is the Right of Nations, which derives its Authority from ³ the Will of all, or at least of ⁴ many, Nations. I say of many, because there is scarce any Right found, except that of Nature, which is also called the Right of Nations, common to all Nations. Nay, that which is reputed the Right or Law of Nations in one Part of the World, is not so in another, as we shall shew ⁵ hereafter, when we come to treat of Prisoners of War, and Postliminy or the Right of Returning. Now the Proofs on which the Law of Nations is founded, XIV. Human Right divided into a Civil Right, a less extensive, and a more extensive Right than the Civil: This explained and proved.

¹³ In the Life of Pompey, Vol. I. p. 633. Edit. Wech.

¹⁴ Topic. Lib. V. Cap. II. p. 228. Vol. I. Edit. Paris.

¹⁵ St. CHRYSOSTOM says the same in his eleventh Homily On the Statues. PHILO the Jew is larger on this Point. Nature, says he, when it produced the tamest of all living Creatures, made him sociable, and disposed to Concord. She also gave him the Use of Speech, for promoting an Harmony and a Conformity of Manners. On the Decalogue, p. 763. Edit. Paris. And in another Place, Man is the most tractable of Animals, being by Nature endowed with the Gift of Speech, by which the most savage Passions are charmed into Tameness. Of the Immortality of the World, p. 945. GROTIUS.

¹⁶ Polit. Lib. I. Cap. V.

XIII. ¹ This is usually called Positive Law. Its Objects are Things in themselves indifferent, or such as are not founded on the Constitution of our Nature, and consequently admit of different Regulations, as Time, Place, and other Circumstances require; all which depend on the Will of a Superior, which is the only Foundation of this Kind of Law, which is therefore called Arbitrary. See PUFENDORF, B. I. Chap. VI. § 18.

XIV. ¹ The Author follows ARISTOTLE in the Addition of this Epithet. That Philosopher considered Civil Society, as a perfect Society, ἀπολόγητος, containing all that is necessary for living commodiously and happily. Politic. Lib. I. Cap. I. See also Lib. III. Cap. VI. & Lib. VII. Cap. IV. The Definition of a State may be seen in PUFENDORF, B. VII. Chap. II. § 13; and the Note on that Place.

² For there were Parents and Children, Masters and Servants, &c. before there were Princes and Subjects. The Authority of a Father over his Child, that of a Master over his Servant, &c. is by no Means founded on the Will of the Civil Power, and the Obligations incumbent on Men as Members of a

State; but has a different Origin, as shall be shewn in the proper Place. The Sovereign in this Case can only lay a Restraint on that Authority, as far as the Publick Good requires.

³ This Positive Law of Nations, distinct from the Law of Nature, is a mere Chimera. See PUFENDORF B. II. Chap. III. § 23. with the Notes. I grant there are some Laws common to all Nations, or certain Things which ought to be observed by all Nations, in Regard to one another; and this may very well be termed the Law of Nations. But, besides that the Obligation to obey those Laws, does not arise from the Consent of Nations, which cannot take Place here; the Principles and Rules of such a Law, are in Reality the same with those of the Law of Nature, properly so called: The whole Difference consists in the Application which may be made in another manner, on the Account of the different Ways taken by Communities for determining Disputes. This is evident from the Example of Reprisals, which are founded on that general Maxim of the Law of Nature and Nations, that Damages ought to be repaired; for a Man in the State of Nature, cannot demand Satisfaction, for any Injury received from one who lives out of all Civil Society, of any of his Relations or Friends, who are really not concerned in the Affair. As to Customs received by the Generality of Nations, and concerning which the Law of Nature has given no Directions, if we are obliged to submit to them, it is not because they are obligatory in themselves, but because as soon as we know a Thing is generally practised, we are, and may be supposed to conform to such a Custom, while we give no Proof of the contrary. Thus the whole Obligation arises from this tacit and private Agreement, without which the Customs in Question have no Force.

⁴ See VASQUEZ, II. Controv. Illustr. LIV. 4. GROTIUS.

⁵ B. III. Chap. VII, IX.

are the same with those of the unwritten Civil Law, *viz.* continual Use, and the Testimony of Men skilled in the Laws. For this Law is, as *Dio Chrysostom* well observes⁶, *ἔργημα βίης καὶ χρόνου*, the *Work of Time and Custom*. And to this purpose eminent Historians are of excellent Use to us.

XV. The Divine Law divided into that which is universal, and that which is peculiar to one Nation.

XV. The *Divine voluntary Law* (as may be understood from the very Name) is that which is derived only from the ¹ Will of GOD himself; whereby it is distinguished from the Natural Law, which in some Sense, as we have said above, may be called Divine also. And here may take Place that which *Anaxarchus* said, as *Plutarch* relates in the Life of *Alexander*, (but too generally) that ² GOD does not *will* a Thing because it is just; but it is just, that is, it lays one under an indispensable Obligation, because GOD *wills* it. And this Law was given either to all Mankind, or to one People only: We find that GOD gave it to all Mankind at three different Times. First, Immediately after ³ the Creation of Man. Secondly,

6 Orat. LXXVI. *De Consuetudine*.

XV. (1) We have the following Passage on this subject in one of our Author's Epistles. "SALMASTIUS, in his Treatise *De Usuris*, frequently disputes about Words. Thus (p. 589, 685.) he spends much of his Time in opposing the Epithet *Voluntary*, which I have employed as a proper Term for characterizing and distinguishing non-natural divine Law. But he did not observe that CICERO calls a bad Action *Facinus voluntarium*, and opposes *voluntarius* to *necessarius*. God was at full Liberty not to create Man. The Moment he is determined to create Man, that is, a Nature endowed with Reason, and formed for a Society of an excellent Kind, he necessarily approves of such Actions as are suitable to that Nature, and as necessarily disapproves of those which are contrary to it. But there are several other Things which he commands or prohibits, because he thought fit so to do, and not because he could not act otherwise. I do not see what more proper Word could be found for expressing this Sort of Law, which is not invariably attached to the Nature of Man, and for establishing which the free Determination of the Divine Will intervenes." *Epist.* Part II. *Ep.* 429.

2 I have produced and explained the Passage of PLUTARCH, to which our Author here alludes, in my Remarks on PUFENDORF, B. II. Chap. III. § 4. n. 1.

3 I do not understand what positive Laws the Author means, which God delivered at the beginning of the World, and which are still obligatory, as soon as they are known. It is probable he understands by those Terms the several Sorts of Incest in the Collateral Line relating to the fourth of the six Commandments, which he, with the Rabbies, supposes were given to *Adam* and *Noah*, though they are only distinguished by the Name of the latter, as is also the Seventh, concerning Abstinence from Blood, which we find prescribed to *Noah*, GEN. ix. 4. See *Num.* 4. of the following Paragraph, and Chap. II. of this Book, § 5. *Num.* 5. B. II. Chap. V. § 13. *num.* 2, 5, 6; as also SELDEN, *De Jure Nat. & Gent. juxta disciplinam Hebræorum*, Lib. I. Cap. X. But all this is grounded only on a very uncertain Tradition, which can never have the Force of a general Law, duly promulgated; as will appear still more evidently from what I shall say on the Places here referred to. We shall shew in *Note* 1. on B. II. Chap. V. § 13. that the Consequence drawn from LEVIT. XVIII. 24. &c. is not well founded. Others, (as Mr. HOCHSTETER, Professor at *Tubingen*, in his *Collegium Pufendorffianum*, Exercit. III. § 19.) with more Reason refer this to the Prohibition given to our first Parents in regard to the *Tree of Knowledge*

of Good and Evil. GEN. ii. 16, 17. iii. 2, 3. But, tho' that positive Law would have been equally obligatory to their Posterity, had they remained in Paradise, yet as the Matter of the Prohibition was but of short Duration, and the Law could never take Place afterwards, it is to no Purpose to make it an Example of an universal positive Law. The same Author, and several others, after Mr. THOMASTIUS, who first reduced this Sort of Laws to a System, but afterwards ruined his own Edifice; those Authors, I say, place the Prohibition of Polygamy and Divorces among the universal positive Laws given to *Adam*; and pretend to find it in GEN. ii. 24. as also the Observation of the Sabbath, *ibid.* v. 3. the Authority of a Husband over his Wife, *ibid.* 16. the Use of Sacrifices, *ibid.* 3. But, first, tho' MOSES says, *A Man shall leave his Father and his Mother, and shall cleave unto his Wife; and they shall be one Flesh*. Nothing can hence be concluded either for or against Polygamy or Divorce. The Expression, *Shall be one Flesh*, in itself means no more than that there shall be the strictest Union between a Man and his Wife; but it does not imply that a like Tie cannot at the same Time subsist between a Husband and two or more Wives. And all that can be inferred from the same Text, in regard to the Dissolution of Marriage, is, that it ought not to be admitted rashly, and without some good Reason. The Word *Flesh*, according to the Hebrew Idiom, signifies all Ties, both of Affinity and Consanguinity, as Mr. LE CLERC has observed. Thus *Laban* says to *Jacob*, *Thou art my Bone and my Flesh*, GEN. xxix. 14. that is, I own you for one of my Relations. As therefore all the Relations of a Man are *his Flesh*; so, in the same Way of Speaking, a Man may be said to be *one Flesh* with several Wives. Secondly, In regard to the Sabbath, it is owned by the most judicious Divines, that when MOSES, after the History of the Creation, says, *GOD blessed the Seventh Day, and sanctified it*, he speaks by Anticipation, and only touches by the by on the Reason why GOD afterwards instituted the Feast of the Sabbath, so considerable among the *Jews*. Thirdly, When GOD says to *Eve*, *Thy Desire shall be to thy Husband, and he shall rule over thee*, the Penalty consists rather in the Necessity laid on Wives, in consequence of Sin, of obeying ill Husbands, than in any Right conferred on Husbands to command them in certain Cases, and to a certain Extent, that Right being grounded on the Law of Nature, and not barely on Divine Positive Law; as we shall see in the proper Place. Fourthly, The fourth Chapter of GENESIS gives us only one Example of Sacrifices offered by two Sons of *Adam*; but there is not the least Insinuation, that GOD had commanded them to render him that Kind of exterior Worship. It is not probable indeed, that Men

Secondly, Upon the Restoration of Mankind ⁴ after the Flood. And thirdly, Under the Gospel, in that more perfect re-establishment by ⁵ CHRIST. These three Laws do certainly oblige all Mankind, as soon as they are sufficiently made known to them.

XVI. Of all the Nations of the Earth, there was but one, to whom GOD peculiarly vouchsafed to give Laws, which was that of the *Jews*, to whom *Moses* thus speaks, *Deut. iv. 7. What Nation is there so great who hath GOD so nigh unto them, as the LORD our GOD is in all Things that we call upon him for? And what Nation is there so great, who have Statutes and Judgments so righteous, as all this Law, which I set before you this Day.* And the Psalmist, *cxlvii. 19, 20. He shewed his Word unto Jacob, his Statutes and Ordinances unto Israel. He hath not dealt so with any Nation, and as for his Judgments they have not known them.* Neither is it to be doubted, but that those *Jews* (among whom *Tryphon* also in his Disputes with *Justin*) do egregiously err, who think that Strangers too, if they would be saved, ¹ must submit to the Yoke of the *Mosaick Law*: For a Law obliges only those, to whom it is given. And ² to whom that Law is given, itself declares,

XVI. That the Law given to the Hebrews did not oblige Strangers.

Men should so soon have thought of it, without some Direction, as Mr. LE CLERC very well observes; but it does not thence follow, that GOD had then prescribed that Practice, in the Form of an universal and perpetual Law for all Mankind.

⁴ Of this Sort are usually said to be the Prohibition of eating Blood, *GEN. ix. 4.* and the Punishment of Murther, *v. 6.* But, *First*, The Prohibition of eating the Flesh of Animals, with their Blood or Life, was a Sort of symbolical Law, for diverting Men from Cruelty towards one another, at a Time when a Tenderness in that Particular was of the greatest Importance for the Multiplication of Mankind. See Mr. LE CLERC's Comment on the Place. Besides, we have not the least Insinuation, that any but the moral Part of this Law was to be obligatory at all Times, and in all Places; and such as pretend it not allowable, even under the Gospel Dispensation, to eat the Blood of any Animal, have been sufficiently confuted. *Secondly*, When GOD says, *Who so sheddeth Man's Blood, by Man shall his Blood be shed.* This is not a Law, properly so called, but a bare Declaration of the just Punishment which Murtherers are to fear, either from Man or from GOD, by an Effect of the Divine Providence and Vengeance. See the following Chapter, § 5. note 2. This is evident from the preceding Words, where God says, *At the Hand of every Beast will I require it: (the Life of Man) At the Hand of every Man's Brother will I require the Life of Man.* To which he adds, by way of Confirmation, *Who so sheddeth, &c. For in the Image of GOD made he Man.* From this Passage misunderstood, some Lawyers, as the late Mr. COCCEIUS, Professor of Law at *Francfort on the Oder*, (*Dissert. De Sacrosancto Talionis Jure, § 29, &c.*) infer that even at this Day no human Power can pardon a Murtherer. See a Dissertation of Mr. THOMASIVS, printed at *Hall*, in 1707, and entitled, *De Jure aggratiandi Principis Evangelici in causis Homicidii.* in which he opposes this Error. See also the following Chapter, § 5. num. 3.

⁵ See the following Chapter, § 6. num. 2.

XVI. (1) Some Commentators, as well Lawyers or Criticks as Divines, inveigh strongly against this Assertion of our Author; but they only copy the common Places of Scholastick Divinity. They need not have given themselves so much Trouble, had they but considered, that the Question concerning the Salvation of the *Pagans* ought not to be brought into this Dispute, as being nothing to the Purpose. For whether the Heathens could or could not be saved without some Knowledge of

JESUS CHRIST, either distinct or typical, it is still certain, that the Law of *Moses*, as such, laid no Obligation on the *Pagans*. This Law was undoubtedly directed only to the *Israelites*, as our Author observes; and an infinite Number of *Pagans*, who neither did or could know that there was such a People in the World, to whom GOD had given particular Laws, being therefore in an absolute Impossibility of having any Acquaintance with them, it cannot be reasonably said, they were under an Obligation of observing them. Thus supposing that the Efficacy of the Sacrifice of JESUS CHRIST cannot be extended to such as have not had the Assistance of Revelation, though through no Fault of their own, how moral soever they may live; they will not be condemned for not submitting to Laws of which they neither had nor could have any Knowledge; but for a Multitude of other Sins. Their being deprived of such a Means of Salvation, which GOD was not obliged to allow them, will be their Misfortune, not their Crime. As to those *Pagans* who lived in the Neighbourhood of *Judea*, and thus had it in their Power to embrace *Judaism*, as GOD did not forbid their being received when they offered themselves, so neither did he command them to be circumcised, to qualify themselves for sharing the Advantages of the *Mosaick Law*. GRONOVIVS was sensible of this, and even gives a Reason for it, which evidently shews the Laws of *Moses*, as such, did not oblige the *Pagans*. The Prophets, says he, *were not to encroach on the Functions of the Messiah, who alone was to unite the Nations, call all Men, and render the Church universal.* EUSEBIUS, in his *Evang. Demonstr.* says, *The Law of Moses was delivered only to the Jews, and that while they remained in their own Country.* Whence he infers, that *therefore there was a Necessity of another Prophet, and another Law.* Lib. I. Cap. I. See Mr. LE CLERC's *Prolegomena to the Eccl. Hist.* Sect. I. Cap. VIII. § 10.

² The learned GRONOVIVS objects, that the Laws of the Decalogue are universally obligatory, tho' the short Preface which ushers them in is addressed to *Israel*, whom GOD had brought out of *Egypt*. But, beside that the fourth Commandment, relating to the Observation of the Sabbath, was only for the *Jews*, as appears from the whole Tenor of the Words in which it is drawn up; and that the Reason of the Fifth, *that thy Days, &c.* evidently proves the same in regard to that; if the *Pagans* lay under any Obligation to practise the moral Parts of the Decalogue, it was not as they were a Set of Laws delivered from Heaven on Mount *Sinai*, but

declares, *Hear O Israel*; and we read every where that the *Covenant was made with them*, and that *they were chosen to be the peculiar People of GOD*, which *Maimonides* owns to be true, and proves it from *Deut. xxxiii. 4.*

But among the *Hebrews* themselves there always lived some Strangers, *εὐσεβείς ἢ σεβόμενοι τὸν Θεόν*, ³ *Pious Persons, and such as feared GOD*, as the *Syrophœnician Woman*, *Matt. xv. 22.* And *Cornelius*, *Acts x. 2.* one τῶν σεβομένων Ἑλλήνων of the devout Greeks, *Acts xvii. 4.* in the Hebrew, *אומות חסידו* the Righteous amongst the Gentiles; as it is read in the *Talmud*, *Title of the King* ⁴; and he who is such a one is called in the Law *בן רבנ* a Stranger ⁵ simply, *Lev. xxii. 25.* or, *גר ורושב* ⁶ a Stranger, and a Sojourner, *Lev. xxv. 47.* Where the *Chaldee Paraphrast* calls him; an *Uncircumcised Inhabitant*. These, as the *Hebrew Rabbins* say, were obliged to keep the Precepts given to *Adam* and *Noah*, to abstain from Idols and Blood, and from other Things, which shall be mentioned hereafter in their proper Place; but not the Laws peculiar to the *Israelites*. And therefore, tho' it was not lawful for the *Israelites* to eat of any Beast that died of itself, yet it was allowed ⁷ to the Strangers that dwelt among them, *Deut. xiv. 21.* There are only ⁸ some

as so many Precepts which all Men may learn from natural Reason. So that *ZIEGLER's* Criticism does not affect our Author, whom he impeaches of not distinguishing between the *Moral, Ceremonial, and Judiciary Laws*.

³ *Εὐσεβείς ἢ φοβέμενοι τὸν Θεόν*, not *σεβόμενοι*, as our Author, who has taken this from the Epithet given to *Cornelius* the Centurion, *Acts x. 2.* This Sort of Strangers are likewise called simply, *Οἱ σεβόμενοι Ἕλληνες*, *Greeks who feared or adored (GOD)* *Acts xvii. 4.* For nothing is more groundless than the Assertion of *GRONOVIVS*, who says, *They were so called in relation to their Conversion to Christianity, not in regard to their former State.* It is impossible to give into this Thought, if we read the Words of *St. LUKE* with ever so little Attention.

⁴ And *Tit. De Synedrio*, *Cap. XI.* *GROTIUS.* The Quotation of *Tit. De Rege* is false, as we are told by *BOECLER*, on the Credit of *WAGENSEIL*, *Not. p. 175.*

⁵ Of such Persons see also *Exod. xii. 45.* *GROTIUS.*

⁶ Such a Stranger is distinguished from a *Proselyte*, or circumcised Stranger; as appears from *NUMB. ix. 14.* *MAIMONIDES* talks much of these pious uncircumcised Persons, in his Treatise *On Idolatry*, *Cap. X. § 6.* The same Writer, in his *Com. on Mishnaoth*, and elsewhere, says, that such pious Gentiles will partake of the Happiness of the World to come. *St. CHRYSOSTOM*, in his Exposition of *ROMANS ii.* has these Words, *Of what Sort of Jews, and of what Sort of Greeks does he here discourse? Of those who lived before the Appearance of CHRIST; for he has not yet brought his Discourse down to the Times of Grace.* To which he adds, *He (the Apostle) here speaks not of the idolatrous Greeks, but of such of them as worshipped GOD, of Men who follow the Dictates of natural Reason, of Men, who except only that they do not observe the Jewish Ceremonies, practise all the Duties of Piety.* He instances in *Melchizedeck*, *Job*, the *Ninevites*, and *Cornelius* the Centurion. He afterwards repeats it, that by the Term *Greek*, the Apostle means not an *Idolater*, but a pious and virtuous Man, not subject to the Ceremonies of the Law. He pursues the same Ideas in explaining those Words of *St. PAUL*, *1 COR. ix. 21.* *To them that are without Law, as without Law.* And in his *XII. Homily De Statuis*, he observes, that the Apostle using the Word *Greek*, does not thereby mean an *Idolater*, but a Man who worships one GOD, without being tied down to the Observation of the Jewish Rites; such as Keeping

of the Sabbath, Circumcision, and the several Sorts of Purifications; but yet makes the Study of Wisdom and Piety appear through his whole Conduct. *GROTIUS.*

The Author, at his Entrance on this Note, seems to appropriate the Term *Proselyte* to those Pagans who had intirely embraced *Judaism*. But it is well known, that the other Strangers, settled among the *Jews*, were likewise called *Proselytes*; because, in Reality, tho' they were not subject to the Observation of the *Mosaic* Ceremonies, they were absolutely obliged to renounce Pagan Idolatry, and make a Profession of worshipping the one true GOD, the Creator, which was the great and fundamental Article of the *Jewish* Religion. These therefore were termed *Proselytes of the Gate*, to distinguish them from the *Proselytes of Justice*, or such as were naturalized. The learned *GRONOVIVS* is mistaken, when he tells us that *Cornelius* forbore making an open Profession of *Judaism*, for Fear of losing his Post in the Army. Nor, says that Commentator, could he have retained the Title of a *Roman Citizen*, which was a requisite Qualification for bearing Arms in the *Roman Troops*; or at least, for enjoying an honourable Employment in them. For, beside that we find nothing in the whole Account given of him, *Acts x.* which gives us any Room to suspect he was not publickly a *Proselyte of the Gate*, is not the Example of *St. PAUL*, who, tho' a *Jew* by Birth, was a *Roman Citizen*, of itself sufficient to defeat this Argument? And is it not surprising, that *GRONOVIVS* should entirely forget, or take no Notice of so well known an Example? See *Orbis Romanus*, by the late Baron *SPANHEIM*, *Exerc. I. Cap. XVII.* which affords a great Number of Instances and Authorities to this Purpose. See also what our Author says in the following Chapter, § 7. num. 5.

⁷ Here the learned *GRONOVIVS* replies, that this proves only, that GOD allowed these Strangers Liberty of Conscience; but it does not thence follow, that they were exempt from all Obligation of submitting to the whole Law. But, since GOD absolutely required they should observe certain Laws, as that against Idolatry; so that without a Compliance with that Prohibition, they were not permitted even to live in the Country, he plainly discharged them from the Obligation of submitting to the rest. This is insinuated in the Reason given in the Passage under Consideration: For, says GOD, *thou art an holy People, unto the LORD thy GOD.* That is, You *Israelites* ought not to eat of what is forbidden by the Laws, established for you in particular; but these Strangers are dispensed with

³ some Laws, where it is expressly declared, that they were given for the Strangers as well as for the Natives. It was also allowed to Strangers who came from Abroad, and ⁹ never submitted to the *Levitical* Law, to worship GOD in the Temple at *Jerusalem*, and to offer Sacrifices; but yet ¹⁰ they were obliged to stand in a particular Place, separate from that of the *Israelites*, *1 Kings* viii. 41. *2 Macc.* iii. 35. *John* xii. 20. *Acts* viii. 27. Nor do we find that ¹¹ *Elisba* signified to *Naaman* the Syrian, nor *Jonah* to the *Ninevites*, nor *Daniel* to *Nebuchadnezzar*, nor the other Prophets to the *Tyrians*, *Moabites*, and *Egyptians*, to whom they wrote, that there was any Necessity for them to receive the Law of *Moses*.

What I have here said of the whole Law of *Moses*, I would be understood to mean of Circumcision too, which was, as it were, the Introduction to the Law. There is only this Difference, that the Law of *Moses* obliged only the *Israelites*; but that of Circumcision obliged all the Posterity of *Abraham*. Whence we read in the *Jewish* and *Greek* Histories, that the ¹² *Idumeans* (the *Edomites*) were compelled by the *Jews* to be circumcised: Wherefore those People who, besides the *Jews*, were circumcised, (as there were many, according to ¹³ *Herodotus*, ¹⁴ *Strabo*, ¹⁵ *Phi-*

with in that Point, because those Laws were not given for them. So that it is surprising our Commentator should alledge those Words as a Proof of what he asserts, when they make directly against him.

8 Such as the Prohibition of working on the Sabbath Day, *Exod.* xx. 10.

9 To the Passages of Scripture produced by our Author, we may add the Testimony of *JOSEPHUS*. *De Bello Jud.* Lib. II. Cap. XXX. p. 809, 810. *Edit. Lips.* See Mr. LE CLERC on *ESDRAS* vi. 10. The learned *GRONOVIVS* pretends that GOD allowed Strangers to pray and offer Sacrifices in the Temple of *Jerusalem*, only with a view of rendering them in some Manner tributary to the *Jews*; as he permitted that People to carry off the Spoils of the *Egyptians*, and *Hiram* King of *Tyre* to furnish *Solomon* with Materials for building the Temple. But this great Critick did not observe *Solomon's* Words at the Dedication of the Temple, *1 KINGS* viii. Moreover, concerning a Stranger that is not of thy People *Israel*, but cometh out of a far Country for thy Name's sake. . . . Hear thou in Heaven, thy Dwelling-Place, and do according to all that the Stranger calleth to thee for; that all People of the Earth may know thy Name, to fear thee, as doth thy People *Israel*. From which it is evident, that GOD accepted of the Homage of Strangers, when offered with pious Dispositions, as *Solomon* supposes they might be; so that GOD had a very different View on this Occasion from what our Commentator pretends: Nor is the Passage quoted from *TACITUS*, for proving that the *Jews* were enriched by the Offerings and Presents of the *Pagans*, well applied, Every one of that detestable People sent their Tribute thither, in Contempt of the Religion of the respective Countries in which they lived; and thus the *Jews* grew rich. *Pessimus quisque, spretis Religionibus patriis, Tributa & Stipes illuc congebant; unde auctæ Judæorum res.* *Histor.* Lib. V. Cap. V. where *TACITUS* evidently speaks of the Money which the *Jews* themselves dispersed through several Parts of the World, transmitted every Year to *Jerusalem*; Money raised by the Sale of their First-Fruits. That this was their Practice, appears from the Passages of *PHILO* and *JOSEPHUS*, quoted by *JUSTUS LIPSIUS* in one of his Notes, which *GRONOVIVS* himself has inserted in his Edition of the *Latin* Historian, from whom the Passage is taken.

10 See *JOSEPHUS*, where he treats of *Solomon's* Temple. *GROTIUS*.

The Place allotted for Strangers, was called *The Court of the Gentiles*. The *Jewish* Historian, in several Parts of his History, speaks of a Prohibition against passing the Limits of it. See *Antiq. Jud.* Lib. XII. Cap. III. Lib. XV. Cap. ult. *De Bello Jud.* Lib. VI. Cap. XIV. *Contra APION*, Lib. II. There is no Mention of this Court in the *Old Testament*; but from *EZEKIEL* xlv. 7, &c. it may be inferred, that there was originally an Inclosure round the *Court of Israel*, where Strangers were allowed to enter, and perform their Devotions. See *SELDEN*, *De Jure Nat. & Gent. secund. Hebr.* Lib. III. Cap. VI.

11 We have a Reflection to the same Purpose in *St. HILARY*, on *MATT.* xii. *GROTIUS*.

Our Author, in his Treatise of *The Truth of the Christian Religion*, B. V. § 7. joins to these the Example of *Moses*, who did not exhort *Jethro*, his Father-in-Law, to embrace the Ceremonies of the Law, which he had delivered to the *Israelites* by Divine Direction. He likewise observes, in a Note on that Place, that some of the *Mosaic* Laws were impracticable to the Generality of other People; as those relating to the First-Fruits, Tenth, and solemn Feasts; which were to be observed in only one Place in *Judea*, where it was impossible for all the Nations of the World to convene.

12 See *JOSEPHUS*, *Antiq. Jud.* Lib. XIII. Cap. XVII. *PTOLOM.* Lib. I. *De Vita Herodis*, as quoted by *AMMONIVS* under the Word *Ἰδουμαῖοι*. *SELDEN*, *De Jure Nat. & Gent. secund. Hebr.* Lib. II. Cap. II. and my 19th Note on this Section.

13 That Father of Historians speaks of the *Egyptians* and *Ethiopians*, and the People of *Colebis*, Lib. II. Cap. XCI, CIV. He asserts that the Use of Circumcision was derived from the *Egyptians* to the other two Nations, as also to the *Phenicians* and to the *Syrians*, who inhabited *Palestine*; by whom he understands the *Jews*, who, according to him, acknowledge the Truth of this Account, as far as it relates to them. See also *DIODORUS* of *Sicily*, Lib. I. Cap. XXVIII. and Lib. III. Cap. XXXII. p. 17 and 115. *Edit. H. Steph.*

14 See his *Geography*, Lib. XVI. p. 771. *Edit. Paris.* where he treats of the *Creophagi*, a People of *Ethiopia*, and p. 776. in his Account of the *Troglodytes*, some of whom, he tells us, are circumcised after the Manner of the *Egyptians*, spoken of *Lib.* XVII. p. 824.

15 See his little Piece *On Circumcision*, p. 810, 811: *Edit. Paris.*

lo, ¹⁶ Justin, ¹⁷ Origen, ¹⁸ Clemens Alexandrinus, ¹⁹ Epiphanius, ²⁰ St. Jerom, and ²¹ Theodoret) were probably descended from Ismael, Esau, or ²² the Posterity of Keturah.

But of all other Nations that of St. Paul holds true, *Rom. ii. 14, 15.* Since the Gentiles, who have not the Law, do by Nature (that is by ²³ following in their Manners, the Rules which flow from the primitive Source, or from Nature, unless you had rather refer the Word *Nature* to what goes before, and so ²⁴ oppose the Knowledge which the Gentiles acquired of themselves, and without Instruction, to that which the Jews had by means of the Law, which they were taught almost from the Cradle) the Things contained in the Law; these having not the Law are a Law unto themselves, as shewing the Work of the Law written in their Hearts, their Consciences also bearing Witness, and their Thoughts the mean while accusing or

¹⁶ In his Dialogue with TRYPHON, where he speaks of the Idumeans.

¹⁷ In his Answer to CELSUS, *Lib. V.* where he observes, that the Egyptians, and the People of Colchis had not the same Reason for Circumcision, that obliged the Jews to the Practice of that Ceremony; and that the Jews themselves made a Distinction between their Circumcision and that used by the Ishmaelites of Arabia, tho' the People last mentioned were Descendants of Abraham, and Ishmael, the Founder of their Nation, had been circumcised by the Hands of that Patriarch, *Pag. 263. Edit. Cantab.*

¹⁸ That Father, in his *Stromata*, *Lib. I. Cap. XV. p. 354. Edit. Oxon.* says that Pythagoras, travelling into Egypt, was circumcised in that Country, in order to qualify himself for being initiated in the Mysteries of the Egyptians, and enabling him to learn the Philosophy of their Priests.

¹⁹ He says, *Hæres. XXX. § 30.* that the Egyptians, the Saracens, or Ishmaelites, the Samaritans, the Idumeans, and the Homerites, were circumcised as well as the Jews; but that most of these People used that Ceremony out of Custom, without assigning any Reason for it, and by no Means with a View of obeying the Divine Law which prescribed it: Hence we may observe, that tho' the first Persons who neglected Circumcision, and thus occasioned its being abolished among the Nations descending from Abraham, were to blame, yet the Law of Circumcision ceased to oblige their Posterity, who had no Knowledge of that Institution: So that the Action of Hyrcanus, who forced the Idumeans to be circumcised, must necessarily be considered as violent and unjust, and not authorized by him who is the sole Master of Men's Consciences. Besides, the same WAGENSEIL, mentioned in Note 4 of this Paragraph, observes, after BOECLER, that MAIMONIDES says the direct contrary of what our Author advances in this Place, viz. that all Abraham's Posterity were obliged by the Law of Circumcision, and that the Jews forced the Idumeans to observe that Ceremony.

²⁰ In his Commentary on JEREM. IX. *Vol. V. p. 287. Edit. Bas.*

²¹ In his third Question on *Exodus.*

²² Those Ethiopians whom HERODOTUS ranks among the circumcised, seem to have descended from the Posterity of Keturah: St. EPIPHANIUS calls them Homerites.

The Homerites were part of the Idumeans; and our Author does not remember that he himself said so, in his Notes on *The Truth of the Christian Religion*, *Lib. I. § 16. p. 60. Edit. Amsterd. Cleric.* He both there and here supposes the Truth of the common Opinion, in his Time concerning the Origin of Circumcision, viz. that it was derived from the Hebrews to all other Nations. But, could he have read what Sir JOHN MARSHAM and Doctor

SPENCER have written on that Subject, I imagine he would have changed his Opinion, and acknowledged, that Circumcision was practised among the Egyptians before GOD made it a Sign of his Covenant with Abraham, and his Descendants, to whom he prescribed that Ceremony in a different Manner, and with a different View than those which induced the Egyptians to use it. See Mr. LE CLERC on *Genesis xvii. 8, &c.*

²³ St. CHRYSOSTOM understands this of natural Inferences, *Τοῖς τῆς φύσεως λογισμοῖς.* To which he adds, *They are therefore the Objects of our Wonder, because they stood not in need of a Law. . . . Conscience, and the Use of Reason, are sufficient, instead of a Law.* TERTULLIAN asserts, that Before the Law of Moses, written on Tables of Stone, there was an unwritten Law, which was understood naturally, and observed by the Patriarchs. *Adv. Jud. Cap. II.* To these may be added, a Thought of ISOCRATES, *If Men would govern a State well, they ought not to fill the Portico's with Letters, but carve the Maxims of Justice on the Minds of the Citizens.* *Areopag. p. 148. Edit. H. Steph. GROTIUS.*

This Passage is a little too far fetched. For even positive Laws, and several other Things, not derived from natural Light common to all Men, may be carved on the Mind or Soul, by Force of Instruction and Practice: So that what the Grecian Orator says, rather supposes in itself that the Rules of Justice, tho' grounded on natural Reason, are but little known, and generally neglected.

²⁴ This is the Apostle's true Meaning, the Words *Nature* and *naturally* are often used by the Greek and Latin Authors, in Opposition to the Way of Instruction, which gives us the Knowledge of certain Things. We find St. PAUL, speaking of a Custom established in his Time, says, *Doth not Nature itself teach you, that if a Man hath long Hair it is a Shame unto him? But if a Woman hath long Hair it is a Glory unto her.* *1 COR. x. 14, 15.* This Exposition is justified by daily Observation; several Things are learnt without a Master, which are looked on as what we know naturally. Much more then may it be said, that the Gentiles, who were deprived of Revelation, did of themselves, and without that Assistance, know the Precepts of Morality, which the natural Light of Reason led them to discover, and which were the same with those prescribed by the Law of MOSES to the Jews; so that when a Pagan acted according to those Precepts, *He did by Nature the Things contained in the Law*, *Rom. xi. 14.* Which shewed the Work of the Law (that is, the moral Precepts of the Law) written in his Heart, or in his Mind, *v. 15.* that is, he could easily form such Ideas, and retain them in his Memory. See, concerning this last Expression, Mr. LE CLERC's *Ars Critica.* *Tom. I. p. 163, &c. Edit. 4.*

else excusing one another. And again, in the 26th Verse, *If the Uncircumcision keep the Righteousness of the Law, shall not his Uncircumcision be counted for Circumcision?* And therefore, *Ananias the Jew*, in the History of *Josephus*, did very well instruct *Izates Adiabenus*, (²⁵ *Tacitus* calls him *Exates*) that GOD might be rightly worshipped, and ²⁶ well pleased with us, tho' we were not circumcised. Now the Reason why so many Strangers were circumcised (*among the Jews*) and by that Circumcision obliged to keep the Law, (as *St. Paul* expounds it, *Gal. v. 3.*) was partly that they might be naturalized; for Proselytes (called by the *Hebrews* גֵּר צְדִיק *Proselytes of Righteousness*) ²⁷ enjoyed the same Rights and Privileges with the *Israelites*, (*Numb. xv.*); and partly, that ²⁸ they might be Partakers of those Promises which were not common to Mankind, but peculiar to the *Hebrews* only. Tho' I cannot deny, but that in latter Ages some entertained an erroneous Opinion, that there could be ²⁹ no Salvation without the Pale of the *Jewish Church*. Hence we may conclude, that we (*who are not Jews*) are obliged to no Part of the *Levitical Law*, as a Law ³⁰ properly so called, because all Obligation beyond that, arising from the Law of Nature, is derived from the Will of the Law-giver; but it cannot be made appear, that it was the Will of GOD, that any other People, beside the *Israelites*, should be bound by that Law; and therefore, as to us, it is by no Means necessary to prove the abrogating of that Law; for it cannot be said to be abrogated in respect to them whom it never bound. But the Obligation of it was abolished to the *Israelites*, as to the ceremonial Part, as soon as ever the Evangelical Law began to be published, which was manifestly revealed to *St. Peter*, *Acts x. 15.*; but as to the Rest, after that People ceased to be a People, by the Destruction of their City, and the utter Desolation of it, without any Hopes of Restauration. The Advantage which we who are Strangers have obtained by the Coming of CHRIST, does not then consist in being freed from the Law of *Moses*; but, whereas before, we had only very weak Hopes in the Goodness of GOD, we are now, by an express Covenant, assured thereof; and we, together with the *Jews*, (the Children of the Patriarchs) are made one Church; their Law, which as a Partition Wall divided us, being quite taken away, *Eph. ii. 14.*

XVII. Since then the *Mosaic Law* cannot directly oblige us (as I have already shewed) let us see of what other Use it may be to us, as well in regard to the *Right of War*, which we are to treat of, as in other like Cases. For the Knowledge of it may be necessary in many Points.

XVII. What Arguments Christians may fetch from the Judaical Law, and how.

First then, the Law of the antient *Hebrews* serves to assure us, that nothing is enjoined there contrary to the Law of Nature; for since the Law of Nature (as I said before) is perpetual and unchangeable, nothing could be commanded by GOD, who can never be unjust, contrary to this Law. Besides, the Law of *Moses* is called *pure and right*, *Psal. xix. 8.* and by the Apostle *St. Paul*, *holy, just, and good*, *Rom. vii. 12.*

I speak of its Precepts, for we must treat more distinctly of its Permissions. Now the *Permission*, positively granted by the Law, (for that which is of the bare Fact, and signifies the Removal only of Hindrances, on the Part of the Law,

²⁵ In the last Editions of this Historian, and in those which have the best Reputation among the Learned, we find *Tzates*, which was probably the true Name of that *Adiabenean Prince*, who was converted to *Judaism*, with his Mother *Helena*.

²⁶ *Tryphon the Jew*, making some Abatement in this Point, owns to *JUSTIN MARTYR*, that *If he persisted in that Manner of philosophizing, he had some Hopes left of a better State.* GROTIVS.

²⁷ Thus *JUSTIN MARTYR*, in his Dialogue with *Tryphon*, observes, that *A Proselyte, who receives Circumcision, and is ranked among the (Jewish) People, is considered as one of the same Country.*

²⁸ Such Proselytes were therefore admitted to the Celebration of the Passover. GROTIVS. See *Exod. xii. 19, 47, 48.*

²⁹ *St. PAUL* frequently argues against this Opinion, particularly in his Epistles to the *Romans* and *Galatians*.

³⁰ See what I have said in my second Note on this Paragraph.

XVII. (1) That is, which consists solely in the Silence of the Law. For Silence alone is not an incontestable Proof, that the Legislator approves of what he does not forbid. We can only infer from it, that he does not design to employ the Means in his Power for hindering Men from doing such Things. The only Case in which Silence can be taken for a Mark of Approbation, is when it clearly appears, that the Legislator designed to forbid whatever he judged to be evil. Now we have no Reason to believe that GOD designed to forbid, positively, by the Law of *Moses*, every Thing that is any way evil. On the contrary, it was even necessary, that he should not prohibit some such Things. In reality, when GOD gave written Laws to the *Jewish Nation*, he acted rather as the temporal Master and Sovereign of that People, than as the perfect Teacher of Mankind in general. For which

Law, is not to the present Purpose) is either *compleat*, and *without Reserve*, which gives us a Right to do something with an intire Liberty in all Respects; or *less compleat*, and *with Reserve*, which gives us only an Impunity with Men, and a Right to do a Thing, so as that no Man shall molest and hinder us. From the first of these Permissions, as well as from a positive Precept, it follows, that what the Law allows, cannot be contrary to the Right of Nature. But as to the latter,² the Case is entirely different: But it seldom happens that there is Occasion to draw that Consequence with Certainty³; for the Terms which express the Permission

which Reason all the Punishments, with which he threaten'd the Offenders, were of a temporal Nature. As therefore there is no Civil Society, whose Interest permits that every Thing contrary to some Virtue, or some Law of Nature, should be attended with some Penalty; GOD would have acted contrary to his own Wisdom, if, in Quality of Civil Legislator of the *Jews*, he had not left several Things in themselves evil unpunished, and consequently, been silent on such Articles, especially when he had to do with so gross and stubborn a People. Thus, for Example, Murder was punished with Death, *Levit. xxiv. 21. Numb. xxxv. 16, 17, 30.* And that with good Reason: A Civil Society, in which Men might kill one another with Impunity, could not subsist; but such Motions of Anger as tended only to do some Injury, were not prohibited; because if the Legislator had annexed a Punishment to a Thing so common among all People, and from which the *Jews*, in particular, would have much Difficulty to abstain, the Regulation would have produced more Harm than Good. See *MATT. v. 21, &c.*

² See *St. CHRYSOSTOM*, on the Close of *Rom. vii.* *GROTIUS*.

³ I should think that we ought to reason in a different Manner on *Divine* from what we use to do on *Human Laws*. The Permission granted by human Laws, however it may be given, never of itself implies any Approbation of the Legislator, but only supposes that he judges proper not to punish the Thing in Question. The Reason is, that the Design of Legislators, considered as such, is to make the best Provision in their Power, for the Regulation of each Man's exterior Actions, in order to secure the publick Safety and Tranquillity; and not, properly speaking, to make Men good. But the same Thing cannot be said of GOD. In what Manner soever he acts, he always proposes making Men virtuous; and consequently, all positive Permissions from him are certain Proofs of Approbation. He may indeed be silent in regard to certain Things which imply some Vice, and leave them unpunished in this World, for the Reason given in *Note 1.* on this Paragraph; and that the rather, because, on due Consideration, it will appear that the Evil of such Things may be easily discovered by Consequences drawn from their Conformity with what is expressly prohibited, or their Incompatibility with what is clearly commanded. But GOD cannot positively permit the least Thing evil in its own Nature, even when he acts as a temporal Monarch; for that Character does not divest him of his Sanctity, but he still may and ought to be thought to approve of every Thing, at least as innocent, which he permits either in express Terms, or by a necessary Consequence from some formal Law or Ordinance. These then, in my Opinion, are the Consequences which may be drawn from the Divine Permission, when the Reasons deduced from the Nature of Things, which must always be considered, appear doubtful. *First, When GOD permits a Thing in certain Cases, and to certain Persons, or in regard to certain Nations, it may be inferred, that*

the Thing permitted is not evil in its own Nature. For he would act in Contradiction to himself, if he authorized any Thing evil, in any Circumstances, or in Favour of any Person. For Example, *Exod. xxii. 2, 3.* Permission is given to kill a Thief in the Night, but not in the Day: Whence we may safely conclude, against the Opinion of some Doctors, too rigid on that Point, that when we resist an unjust Aggressor so far as to kill him, tho' he attempts only our Goods, this Defence is not criminal in itself, or contrary to the Law of Nature. GOD forbid the *Jews* to lend Money to one another on Interest; but he permitted that Practice in regard to Strangers, without excepting the Proselytes of the Gate: Therefore lending on Interest is not evil or unlawful in its own Nature, whatever some Divines and Lawyers may pretend. The Consequence is demonstrative, and sufficient to justify such Contracts, when reduced to lawful Bounds. The Law of MOSES, *Deut. xvii. 17.* forbids Kings to multiply Wives to himself, lest they should induce him to violate the Law: This Prohibition implies a tacit Permission, both for them and all other Men, to have more than one Wife, without which it would be superfluous: Polygamy therefore is not in its own Nature evil and unlawful. *Secondly, When GOD regulates the Manner of a Thing, or makes some other Regulation in regard to that Thing, which necessarily supposes it permitted; we are to enquire whether this is one single occasional Action, or a Thing, either by itself or by its Consequences, reduced to a Habit, and a continual Practice.* In the last Case, a Permission always implies a real Approbation of the Thing in Question, as in its own Nature lawful. Thus it is impossible that GOD should permit the Practice of Robbery, Piracy, Assassination, Duelling, &c. under any Sort of Conditions. When therefore we find him directing the Manner of Divorces, and regulating certain Cases which suppose the Permission of Polygamy, as in *Deut. xxi. 15.* we may very reasonably conclude, that neither Divorces nor Polygamy are essentially contrary to the Law of Nature. See our Author's Application of this Principle in the following Chapter, § 2. *num. 2.* in order to shew, that all Sorts of War are not in their own Nature unjust. But when it is one single Act; which does not intail a Series of Sins, the Permission may imply no more than Impunity, without any Prejudice to the Divine Sanctity. Of this Kind is the Permission granted by the Law of MOSES to the *Revenger of Blood*, that is, to the nearest Relation or Heir of a Person killed without any Malice or premeditated Design; this *Revenger of Blood* was allowed to kill such an involuntary Murderer, if he found him out of his Asylum, even tho' he had been declared innocent by the Judges; *He shall not be guilty of Blood, Numb. xxxv. 27.* But it does not follow, that GOD considered this Action as innocent before the Tribunal of Conscience, and conformable to the Law of Nature; but only, that he thought proper to grant an Impunity in that Case, before the Civil Judge, to a Man who had killed another

mission being equivocal, it is better to have Recourse to the Principles of the Law of Nature, in order to discover what Kind the Permission is of, than to conclude from the Manner in which the Permission is conceived, that the Thing permitted is conformable or not conformable to the Law of Nature.

The next Observation is not unlike this, *viz.* That Christian Princes may now make Laws of the same Import with those given by *Moses*, unless they be such Laws as wholly related either to the Time of the expected *Messias*, and the Gospel, not then published; or that CHRIST himself has either in ⁴ general, or in ⁵ particular commanded the contrary: For, excepting these three Reasons, no other can be imagined, why that which the Law of *Moses* formerly established, should now be unlawful.

The third Observation may be this; whatsoever was enjoined by the Law of *Moses*, which relates to those Virtues that CHRIST requires of his Disciples, ought now as much, if not more, ⁶ to be observed by us Christians. The Ground of this Observation is, because what Virtues are required of Christians, as Humility, Patience, Charity, &c. are to be practised in a ⁷ more eminent Degree, than under the State of the *Hebrew* Law, and that with good Reason too; because the Promises of Heaven are more clearly proposed to us in the Gospel. Wherefore the old Law, in comparison with the Gospel, is said to be neither perfect nor ἀμεμπτος faultless, *Heb.* vii. 19. viii. 7. And CHRIST is termed the *End* of the Law, *Rom.* x. 5. but the Law only our *Schoolmaster*, or Guide, to bring us unto CHRIST; *Gal.* iii. 24. Thus the old Law concerning the Sabbath, and ⁸ that relating to Tythes, shew, that Christians are obliged to set apart no less than the seventh Part of their Time for the Worship of GOD, nor no less than the tenth Part of their Income for the Maintenance of those who are employed in Holy Affairs, or for other Sacred and Pious Uses.

another through a Spirit of Revenge. This was one single Act, and the Person might be sensible of its Injustice, and repent of it, after the first Motion of his Passion was over: Besides, the Person thus killed was in fault, who might have been secure, had he not left his Asylum against the express Orders of GOD.

4 JESUS CHRIST, for Example, has abolished all the Laws in general, which related to the Distinction of Meats. If therefore any Civil or Ecclesiastical Power pretends to oblige Men to Abstinence from any Sort of Food, on a Principle of Religion, such an Attempt is an open Violation of the Christian Liberty, established by our Saviour. I suppose this done on a Principle of Religion; for the Case will be widely different, if the Use of certain Meats are prohibited for good Reasons, founded on the Interest of the State. The Sovereign has an undoubted Power to impose such Abstinence in that View; as he may be allowed to decline making the wisest political Regulations in the *Mosaic* Law his Model, when they are not suited to the Constitution of the State under his Government.

5 Thus JESUS CHRIST having repealed the Husband's unlimited Permission of putting away his Wife for any Cause whatever, and without any other Reason than his own Will; a Christian Prince can-

not make a Law, permitting Divorces in that Manner, only obliging the Husband to testify in a Writing delivered to his Wife, that he will have no farther Commerce with her.

6 Christian Liberty has done no Prejudice to Innocence; the Law of Piety, Sanctity, Humanity, Truth, Fidelity, Chastity, Justice, Mercy, Benevolence, and Modesty, remain intire. TERTUL. De Pudicit. Cap. VI. GROTIUS.

7 We ought to shew greater Degrees of Virtue, because we have now a plentiful Effusion of the HOLY SPIRIT, and the Advantages resulting from the Coming of CHRIST are very great. CHRYSOST. De Virginitate. XCIV. See the same Father, in his Discourse, tending to shew that Vice is occasioned by Negligence. De Jejunis III. And on *Rom.* vi. 14. vii. 5. As also St. IRENÆUS, Lib. IV. Cap. XXVI. The Author of *Synopsis Sacræ Scripturæ*, among the Works of St. ATHANASIUS, writing of MATT. v. observes, that our Lord enlarges the Extent of the Precepts of the Law. GROTIUS.

8 The same Use is made of this Law, in regard to Christians, by St. IRENÆUS, Lib. IV. Cap. XXXIV. And St. CHRYSOSTOM, on the Close of the last Chapter of 1 Cor. and on *Ephes.* ii. 10. GROTIUS.

CHAP. II.

Whether 'tis ever Lawful to make War.

HAVING viewed the Sources of Right, let us proceed to the first and most general Question, which is, Whether any War be Just, or, Whether 'tis ever Lawful to make War?

I. I. But

That to make
War is not con-
trary to the
Law of Na-
ture, proved
by Reasons.
Gel. xii. c. 5.

I. 1. But this Question, as well as those which follow, is to be first examined by the Law of Nature. Cicero learnedly proves, both in the third Book of *His Bounds of Good and Evil*, and in other Places, from the Writings of the *Stoicks*, that there are two Sorts of *natural Principles*; some that go before, and are called by the *Greeks* τὰ πρῶτα κατὰ φύσιν, *The first Impressions of Nature*; and others that come after, but ought to be the Rule of our Actions, preferably to the former. ¹ What he calls *The first Impressions of Nature*, is that Instinct whereby every Animal seeks its own Preservation, and loves its Condition, and whatever tends to maintain it; but on the other Hand, avoids its Destruction, and every Thing that seems to threaten it. Hence comes it, says he, that there's no Man left to his Choice, who had not rather have all the Members of his Body perfect and well shaped, than maimed and deformed. And that 'tis the first Duty of every one to preserve himself in his natural State, to seek after those Things which are agreeable to Nature, and to avert those which are repugnant.

2. After that follows, (according to the same Author) ² the Knowledge of the Conformity of Things with Reason, which is a Faculty more excellent than the Body; and this Conformity, in which *Decorum* consists, ought (says he) to be preferred to those Things, which mere natural Desire at first prompts us to; because, tho' the first Impressions of Nature recommend us to Right Reason; yet Right Reason should still be dearer to us ³ than that natural Instinct. Since these Things are undoubtedly true, and easily allowed by Men of solid Judgment, without any farther Demonstration, we must then, in examining the Law of Nature, first consider ⁴ whether the Point in Question be conformable to the first Impressions of Nature, and afterwards, whether it agrees with the other natural Principle, which, tho' posterior, is more excellent, and ought not only to be embraced when it presents itself, but also by all Means to be sought after.

3. This last Principle, which we call *Decorum*, according to the Nature of the Things upon which it turns, sometimes consists (as I may say) in an indivisible Point; so that the least ⁵ Deviation from it is a Vice: And sometimes it has ⁶ a large Extent; so that if one follows it, he does something commendable, and yet, without being guilty of any Crime, he may not follow it, or may even act quite otherwise: Just as in contradictory Things, one passes immediately from one Extreme to the other; a Thing either is or is not, there is no Medium: But be-

I. (1) CICERO gives this as the Opinion of the *Stoicks*, which he approves of, and confirms, *De Finib.* Lib. III. Cap. V. VI. VII. See also *Lib. V. Cap. VII.* and PUFENDORF, *B. II. Chap. III.* § 14.

² As every other Nature only then shews what is its real Good, when it is arrived to Perfection; so what makes the real Good of Man is not to be found in Man, till Reason is perfect in him. SENECA. *Ep. CXXIV.* GROTIUS.

³ That is most valuable in every Being, to which it is defined by Nature, and which makes its Excellence. What is most valuable in Man? Reason. SENECA, *Epist. LXXVI.* See also *Epist. CXXI.* and *CXXIV.* JUVENAL says, that, according to the Doctrine of ZENO, there are some Things which we ought never to do, even tho' our Life was at stake.

— Melius nos

Zenonis præcepta monent: Nec enim omnia, quædam Pro vitâ facienda putat —

Sat. XV. v. 106, &c. GROTIUS.

AULUS GELLIUS, quoted by our Author in his Margin, says, When we are reduced to that Strait, we are obliged to expose ourselves to suffer some exterior Inconveniency or Damage, rather than be wanting to the inviolable Rules of *Decorum*, *Lib. XII. Cap. V.*

⁴ See our Author's Application of this Principle to the natural Motions of Revenge, *B. II. Chap. XX. § 5. num. 1.*

⁵ Thus, for Example, it is never decent (*honestum*) nor, consequently, allowable by the Law of Nature, to fail in Point of Gratitude to a Benefactor; to take another Man's Goods, to which we have no Right; to break a valid Promise or Agreement; to prejudice any one's Honour; to deprive the Innocent of Life, &c. In all which there may be different Degrees of Turpitude, according to the Variety of Circumstances; and as the Ingratitude, the Robbery, the Failure, the Affront, or the Murder, are more or less heinous; but in regard to the Quality of the Actions themselves, the least Fraud, for Example, is not less contrary to the Rules of *Decorum*, and the Law of Nature, than the greatest.

⁶ The Author does not here speak of the Application of the general Maxims of *Decorum*, and the Law of Nature to particular Cases, as the Commentators on this Work have imagined, who instance in the several Manners of discharging the Duties of Beneficence, Liberality, Friendship, &c. referring to *B. II. Chap. I. § 5.* where he treats of the Extent of Time allowed for a just Defence of one's self. The Question in this Place turns on the Nature of Actions in general, as it appears from the Examples to which our Author himself applies his Principle. Thus, independently of any positive Law against Polygamy, it is commendable and decent, according to our Author, to be content with one Wife; but the Man who takes two, commits no Fault: That Action is not contrary to the first Sort of *Decorum*, to which the *Law of Nature*, properly so called, bears a Relation.

tween Things that are opposed after another Manner, as between Black and White, there is a Medium, which either partakes of both Extremes, or is equally removed from both. The last Sort of *Decorum* is most commonly the Subject of Laws both Divine and ⁷ Human, which by prescribing Things relating thereto, render them obligatory, whereas before they were only commendable. But the Matter in Question is concerning the first Sort of *Decorum*. For, as we have said above, when we enquire into what belongs to the Law of Nature, we would know whether such or such a Thing may be done without Injustice; and by *unjust* we mean that which has a necessary Repugnance to a reasonable and sociable Nature.

Among the first Impressions of Nature there is nothing repugnant to War; nay, all Things rather favour it: For both the End of War (being the Preservation of Life or Limbs, and either the securing or getting Things useful to Life) is very agreeable to those first Motions of Nature; and to make use of Force, in case of Necessity, is in no wise disagreeable thereunto; since Nature has given to every Animal Strength to defend and help itself. *All Sorts of Animals*, says *Xenophon*, ⁸ *understand some Way of Fighting, which they learnt no where but from Nature*. So, in a Fragment of *Ovid's* ⁹ *Halieuticon*: Or, *Art of Fishery*, *All Animals naturally know their Enemy, and how to defend themselves: They are sensible of the Force and Quality of their Weapons*, And in *Horace*, *The Wolves assault with Teeth, and the Bulls with Horns: Whence is it but from Instinct?* But *Lucretius* more fully, *Every Animal knows its own Power: A Calf is sensible of its Horns, even before they are grown, and* ¹⁰ *will push with its Head, when provoked*. Which *Galen* thus expresses, *We see every living Creature employ his strongest Part in his own Defence: The Calf pushes with his Head, tho' his Horns be not yet grown; the Colt kicks with his Hoofs, tho' yet tender; and the Whelp bites with his Teeth, as yet but weak*. And the same Author tells us, in his First Book *Of the Functions of the Members*, That Man is an Animal by Nature fitted for Peace and ¹¹ War; that he is not indeed born with Arms, but with Hands ¹² proper to make and to use Arms, so that we see the very Infants defend themselves with their Hands, without being taught. So ¹³ *Aristotle* says, Man has a Hand, instead of a Spear, a Sword, and other such Weapons; as being capable of grasping and holding every Thing else.

But Right Reason, and the Nature of Society, which is to be examined in the second and chief Place, does not prohibit all Manner of Violence, but only that which is repugnant to Society ¹⁴, that is, which invades another's Right: For the Design of Society is, that every one should quietly enjoy his own, with the Help,

⁷ The Emperor JUSTINIAN congratulates himself, on having given the Force of a Law to a Thing of this Nature, which the antient Lawyers had only advised, viz. That neither the Heir, nor any one under his Jurisdiction, should be admitted Witnesses to a Will. *Institut. Lib. II. Tit. X. De Test. ordinandis*, § 10. See the THEODOSIAN CODE, *Lib. III. Tit. VIII. De secundis Nuptiis*, Leg. II. With GODFREY's Comment on that Law, Vol. I. p. 285.

⁸ *De Cyri Institut. Lib. II. Cap. III. § 5. Edit. Oxon.*

⁹ This is very well explained by a Passage in PLINY. *For all Animals have this Understanding, and are sensible, not only of their own Advantages, but also of their Enemies Power to hurt them: They know the Use of their own Weapons, the proper Opportunities for an Attack, and the weak Side of their Adversaries*. *Hist. Nat. Lib. VIII. Cap. XXV.*

¹⁰ The same Observation is made by MARTIAL, *III. Epigr. 58. v. 2.*

Vitulusque incrimine fronte prurit ad pugnam.

PORPHYRY says, that Every Animal knows which Part of him is weak, and which strong: That he takes Care of the former, and makes use of the latter; as the Panther of his Teeth, the Lion of his Claws and Teeth, the Horse of his Hoofs, and the

Ox of his Horns. *De Abst. Animal. Lib. III. p. 268. Edit. Lugd. 1620. Irrational Animals*, says St. CHRYSOSTOM, *carry their Arms on their Bodies; thus the Ox has his Horns, the wild Boar his Tusks, the Lion his Claws: But GOD has given me Arms distinct from my Body, to shew that Man is a tame and sociable Creature, and that I am not to employ those Arms at all Times; for sometimes I quit my Dart, and at others I handle it: That I might therefore be free from Incumbrance, and not be obliged to carry my Arms always with me, he has made them separate from my Nature*. *De Statuis, Hem. XI.* This Passage agrees with that quoted from GALEN in the Text. GROTIUS.

¹¹ But so that he is designed by Nature rather for Peace than War. See PUFENDORF, *B. VIII. Chap. VI. § 2.*

¹² *As the Body of Man is formed in such a Manner, that he cannot, like other Animals, provide for his own Defence and Security, by Horns, Teeth, or Flight; Nature has given him a strong Breast, and Arms, that he might defend himself with his Hands, and by presenting his Body as a Shield*. CASSIODORE, *De Animâ*, p. 296. Edit. Paris. GROTIUS.

¹³ *De Partib. Anim. Lib. IV. Cap. X. p. 1034. Edit. Paris.*

¹⁴ See PUFENDORF, *B. II. Chap. V. § 1.*

and by the united Force of the whole Community. It may be easily conceived, that the Necessity of having Recourse to violent Means for Self-Defence, might have taken Place, even tho' what we call *Property* had never been introduced. For our Lives, Limbs, and Liberties, had still been properly our own, and could not have been, (without manifest Injustice) invaded. So also, to have made use of Things that were then in common, and to have consumed them, as far as Nature required, had been the Right of the first Possessor: And if any one had attempted to hinder him from so doing, he had been guilty of a real Injury. But since *Property* has been regulated, either by Law or Custom, this is more easily understood, which I shall express in the Words of ¹⁵ Tully, *If every Member of the Body was capable of Reflection, and did really think that it should enjoy a larger Share of Health, if it could attract to itself the Nourishment of the next Member, and should thereupon do it, the whole Body would of Necessity languish and decay: So if every Man were to seize on the Goods of another, and enrich himself by the Spoils of his Neighbour, human Society and Commerce would necessarily be dissolved. Nature allows every Man to provide the Necessaries of Life, rather for himself than for another; but it does not suffer any one to add to his own Estate, by the Spoils and Plunders of another.*

It is not then against the Nature of Human Society, for every one to provide for, and take Care of himself, so it be not to the Prejudice of another's Right; and therefore the Use of Force, which does not invade the Right of another, is not unjust; which the same ¹⁶ Cicero has thus expressed, *Since there are but two Ways of Disputing, the one by Argument, the other by Force; and the former being peculiar to Man, and the other to Beasts, we must not have recourse unto the last, but when the first cannot be employed.* And ¹⁷ again, *What can be opposed to Force, but Force?* And in Ulpian, ¹⁸ *To repel Force by Force is naturally lawful.* So in Ovid, ¹⁹

Armaque in armatos sumere jura sinunt.

The Laws permit us to take Arms against those who are armed to attack us.

II. Proved by History.

II. What I have said already, that every War is not repugnant to the Law of Nature, may be further proved from sacred History. For when *Abraham*, with the Assistance of his hired Servants and Confederates, had vanquished the four Kings which had plundered *Sodom*, GOD was pleased, by his Priest *Melchisedech*, to approve of his Action; for thus said *Melchisedech* to him, *Blessed be the most high GOD, who hath delivered thine Enemies into thine Hand*, Gen. xiv. 20. Yet had *Abraham*, (as appears from the History) taken up Arms without any special Warrant from GOD, but moved thereunto by the Law of Nature, being a Man not only very holy, but also very wise, as is testified of him even by Strangers, as ¹ *Berosus* and ² *Orpheus*. I shall not instance in the seven Nations, whom GOD delivered up to be destroyed by the *Israelites*, because they had a special Commission from GOD to execute this Judgment upon them, for their notorious *Abominations*. Wherefore those Wars in Holy Writ are called, in a literal Sense, *Battles of the LORD*, as being undertaken by the Command of GOD, and not the Will of

¹⁵ *De Offic.* Lib. III. Cap. V.

¹⁶ *De Offic.* Lib. I. Cap. XI.

¹⁷ *Epist. ad Famil.* Lib. XII. Ep. III.

¹⁸ *DIGEST.* Lib. XLIII. Tit. XVI. *De vi & de vi armata.* Leg. I. § 27.

¹⁹ *De Arte amandi*, Lib. III. v. 492.

II. (1) See *JOSEPHUS Antiq. Jud.* Lib. I. Cap. VIII. where he quotes the Passage of that profane Historian.

² Or rather an antient Poet, who assumed the Name of *ORPHEUS CLEMENT* of *Alexandria*, *Stromat.* Lib. V. p. 723. *Edit. Potter. Oxon.* And *EUSEB. Præp. Evang.* Lib. XIII. Cap. XII. have preserved this Fragment, to which our Author here alludes, and which he himself has quoted in a Note on his Treatise *Of the Truths of the Christian Religion*, Lib. I. § 16. p. 66. *Edit. 1717.* And in his Comment on *MATT.* v. 31.

³ Our Author found the Expression in this Sense, in *1 SAM.* xvii. 47. where *David* says to *Goliath*, *All this Assembly shall know that the LORD saveth not with Sword and Spear; for the War (Battle, E. B.) is the LORD's, and he will give you into our Hands.* But it is more natural to understand by these Words, *The War is the LORD's*, that the Success of the War depends on GOD; as *MR. LE CLERC* explains them. Nor does our Author produce any other Passage to the same Purpose; he even gives a different Exposition, at the Close of this Paragraph, to a Text which at first Sight might seem proper to be alledged in this Place. He was thinking of the Rabbinical Distinction between *commanded and voluntary Wars*. On which see *CUNÆUS, De Rep. Hebr.* Lib. II. Chap. XIX. *SCHICKARD, De Jure Regie*, Cap. V. and *SELDEN, De Jure Nat. & Gent. &c.* Lib. VI. Cap. XII.

Man.

Man. It is more to our Purpose to remark, that the *Israelites*, under the Conduct of *Moses* and *Joshua*, having by Force of Arms repelled the *Amalekites*, who attacked them, *Exod. xvii.* GOD approved the Conduct of his People, tho' he had given no Orders upon that Head before the Action.

And further, GOD himself prescribed to his People certain general and established Rules of making War, *Deut. xx. 10, 15.* thereby plainly shewing, that War might sometimes be just, even without a special Command from GOD; for there he makes a manifest Difference between the Cause of those seven Nations, and that of other People. And since he does not declare the just Reasons of making War, he thereby supposes that they may be easily discovered by the Light of Nature. Such was the Cause of the War made by *Jephtha* against the *Ammonites*, in defence of their Borders, *Judges xi.* and afterwards by *David* against the same People, for affronting his Ambassadors, *2 Sam. x.* And it is very remarkable, what the Author of the Epistle to the *Hebrews* records, that *Gideon, Barack, Sampson, Jephtha, Samuel*, and others, by Faith subdued Kingdoms, waxed valiant in Fight, put to flight whole Armies of the Aliens, *Heb. xi. 33, 34.* in which Place, (as we may gather from the Context) under the Notion of Faith, is included their assured Confidence, that what they did was pleasing to GOD: And upon this Account *David* is said, by a Woman distinguished for her Wisdom, To fight the LORD's Battles; that is, to make just and lawful Wars, *1 Sam. xxv. 28.*

III. What we have here proved from Holy Writ, may be also confirmed, by the Consent of all, or at least the wisest Nations. Every Body knows that fine Passage of *Cicero*, where treating of the Right of recurring to Force, in defence of one's Life, he renders this Testimony to Nature, ¹ *This (says he) is not a written, but a Law born with us, which we have not learned, received, or read, but taken and drawn from Nature itself; a Law to which we have not been formed, but for which we are made; in which we have not been instructed, but with which we are imbued; that if our Lives be brought into Danger by Force or Fraud, either by Robbers or Enemies, all Means that we can use for our Preservation, are fair and honest.* And again, *This Reason has taught the Intelligent, Necessity the Barbarians, Custom the Nations, and Nature herself the wild Beasts, at all Times to repel, by any Means whatsoever, all Force (or Violence) offered to our Bodies, our Members, or our Lives.* *Caius* the Lawyer says, ³ *Natural Reason allows us to defend ourselves against Danger.* And *Florentinus* the Lawyer, that ⁴ *It is but just, that whatever any one does in defence of his Body, should be held lawfully done.* ⁵ *Josephus* observes, *That it is a Law of Nature, fixed in all living Creatures, to be desirous of Life; and that we therefore look on them as our Enemies, who would openly deprive us of it.*

This Principle is founded on Reasons of Equity, so evident, that even in Beasts, which (as I said⁶ before) are not susceptible of Right, but have only some slight Resemblance of it, we distinguish between the Attack and the Defence. When *Ulpian*⁷ had said, that *An Animal*⁸ without Knowledge, that is, without the Use of Reason, is incapable of doing Wrong, he immediately adds, *When two Rams, or two Bulls fight, and one kills the other, it must be considered,* (according to *Q. Mu-*

III. (1) *Orat. pro Milone, Cap. IV. Ibid. Cap. XI.*

² *SENECA* says, *The most secure Means of Defence is always at hand; every Man being charged with the Care of his own Person.* *Ep. CXXI. p. 604. Edit. Gronov. Var.* *QUINTILIAN* lays it down as a Rule for an Orator, *To speak in his Client's defence, before he attempts to retort the Crime on the Accuser; because our own Safety is naturally preferable to the Destruction of our Adversary.* *Inst. Orat. Lib. VIII. Cap. II. p. 403. Edit. Obrecht.* *SOPHOCLES* therefore, speaking of *Hercules*, justly observes, that *Had he defended himself fairly and openly, (against Iphitus) Jupiter would have pardoned his killing him.* *Trachin. v. 281, 282. p. 341. Edit. Steph.* See also the Laws of the *Wise-goths*, *Lib. VI. Tit. I. Cap. VI.* *GROTIUS.* The Quotation from *SENECA* is not directly to the Purpose.

³ *Therefore if I kill your Servant, who is a Highwayman, and lays Wait for me, I shall be innocent; for natural Reason, &c.* *DIGEST. Lib. IX. Tit. II. Ad Leg. Aquil. Leg. IV.*

⁴ *DIGEST. Lib. I. Tit. I. De Just. & Jure, Leg. III.*

⁵ *De Bell. Jud. Lib. III. Cap. XXV. p. 852. Edit. Lips.*

⁶ See § II. of Chap. I.

⁷ *DIGEST. Lib. IX Tit. I. Leg. I. § 3, II.*

⁸ *SENECA* reasoning in the same Manner on another Occasion, says, that *Beasts, which are not supposed to understand what a Benefit is, or have any Notion of its Value, are gained by constant good Usage.* *De Benef. Lib. I. Cap. III.* See the whole Passage, and compare it with that of *PHILO* the Jew, quoted in a Note on § 7. of the Preliminary Discourse. *GROTIUS.*

tius)

tius) whether that which is killed was the Aggressor, or not; in the last Case, the Owner has an Action of Damage against the Master of the other Beast; but in the first he has no Action against him. Which may be explained by that of Pliny, ⁹ Lions, as fierce as they are, do not fight with Lions, nor do Serpents bite Serpents; but if Violence be offered them, there are none so tame but will exert their Anger, none so patient of Injury, but, upon receiving Hurt, will make an active and vigorous Defence.

IV. That War is not contrary to the Law of Nations.

IV. By the Law of Nature then, which may also be called the Law of Nations, it is plain, that every Kind of War is not to be condemned. History, and the Laws and Customs of all People, fully inform us, that War is not disallowed of by the Voluntary Law of Nations: Nay, ¹ Hermogenianus declares, that Wars were ² introduced by the Law of Nations, which I think ought to be interpreted somewhat different from what it generally is, viz. That the Law of Nations has established a certain Manner of making War; so that those Wars which are conformable to it, have, by the Rules of that Law, certain peculiar Effects: Whence arises that Distinction which we shall hereafter make use of, between a *solemn War*, which is also called Just, (that is, regular and compleat) and a *War not solemn*, which yet does not therefore cease to be just, that is, agreeable to Right. For tho' the Law of Nations does not authorize Wars *not solemn*, yet it does not condemn them, (provided the Cause be just) as shall hereafter be more ³ fully explained. By the Law of Nations, (says Livy) ⁴ it is allowed to repel Force by Force. And Florentinus ⁵ declares it to be allowed by the Law of Nations to repel Violence and Wrong, and to defend our Lives.

V. That the Voluntary Divine Law before Christ was not against it, proved; and the Objections answered.

V. There is a greater Difficulty concerning the *Voluntary Divine Law*: But let none here object, that the Law of Nature being unchangeable, GOD himself cannot decree any Thing against it; for it is true, as to those Things which the Law of Nature either positively forbids or commands, but not as to those that are barely permitted by the Law of Nature; for they, being properly ¹ without the Bounds of the Law of Nature, may be either prohibited or commanded, as shall be thought proper. The first Objection then against War, brought by some, is that Law given to Noab and his Posterity, Gen. ix: 5, 6. where GOD thus speaks, Surely the Blood of your Lives will I require; at the Hand of every Beast will I require it, and at the Hand of Man; at the Hand of every Man's Brother will I require the Life of Man. Whosoever sheds Man's Blood, by Man shall his Blood be shed; for in the Image of GOD made he Man. And here some take the Phrase of requiring Blood in a general Sense, and the other, that Blood shall be shed in its turn, to be a bare Threatening, and not an Approbation; neither of which Explications can I agree to. For the forbidding to shed Blood, reaches no further than that in the Law, Thou shalt not kill; which neither disproves Capital Punishments inflicted on Criminals, nor Wars undertaken by publick Authority. Therefore, both the

⁹ The first Clause only occurs in PLINY, *Hist. Nat. Lib. VII.* but I do not find the following Words in that Author: They probably belong to some antient Author, as far as I can judge by the Style. This Mixture was occasioned by our Author's taking the Quotation at second hand; for I believe I have discovered whence it was taken. MARCUS LYCKLAMA, in his *Membranæ*, a Book published some Years before this, explaining Law III. of the Title in the DIGEST. *De Just. & Jure*, and taking occasion to treat of the natural Right of Self-Defence, *Lib. VII. Eclog. 42.* quotes this Passage of PLINY, without specifying the Place, and subjoins what here follows in the Text of GROTIUS.

IV. (1) DIGEST. Lib. I. Tit. I. *De Justitia & Jure*, Leg. V.

² CORNELIUS NEPOS, in his Life of Themistocles, says, that General freely owned to the Lacedæmonians, that the Athenians had, by his Advice, secured their Temples and Houses with Walls, in order to defend them more effectually against the Enemy; an Action allowable by the common Law of Nations. Vita Them. Cap. VII. num 4. Edit. Cellar. GROTIUS.

³ See our Author, B. III. Chap. VI. § 27.

⁴ Lib. XLII. Cap. XLI.

⁵ DIGEST. Lib. I. Tit. I. *De Just. & Jure*. Leg. III. See what I have said on PUFENDORF, B. II. Chap. III. § 3. Note II. and § 23. Note 3. from which it appears, that FLORENTIN, in this Law, spoke of what our Author terms the *Law of Nature*, whether the Question concerns the *Law of Nature* or the *Law of Nations*, in the Manner used by the antient Lawyers in explaining that Distinction. The same is to be said of Law V. of the same Title, quoted by our Author, as the first, Note 1. for when the Lawyers refer War to the *Law of Nations*, they only mean, that whereas the natural Instinct, common to all living Creatures, prompts Man to defend himself in the best Manner he can; Reason, which is the Principle and Rule of the *Law of Nations*, forbids them to make War, even in their own Defence, without a just Cause, and directs them to keep within certain Bounds. See CUYAS on the Laws in Question. Vol. VII. p. 23, 29, &c. Edit. Fabrot.

V. (1) See Chap. I. § 9. Note 5.

Law of *Moses*, and the Law given to *Noah*, tend rather to explain and renew the Law of Nature, obscured, and, as it were, extinguished by wicked Customs, than to establish any Thing new: So that *the Shedding of Blood*, prohibited by the Law given to *Noah*, ought to be understood in that Sense which implies a Crime; as by Murder we understand not every Act whereby the Life of a Man is taken away, but the premeditated killing of an innocent Person. And that which follows, of *shedding Blood for Blood*, seems to me not so much to denote the bare Fact, or what shall happen, ² as the Right that Men have to put Murderers to Death.

I thus explain the Case. It is not unjust by the Law of Nature, that a Man should suffer himself as much Evil, as he has caused (to others); according to that which is called *The* ³ *Law of Rhadamanthus*.

To suffer what one has done, is Just and Right.

And *Seneca* the Father expresses it thus, ⁴ *It often happens that one suffers, by a most just Retaliation, in the same Manner that one had designed to make another suffer.* From a Sense of this natural Equity, *Cain*, guilty of Parricide, says of himself, *Gen. iv. 14. Whosoever finds me shall kill me.* But GOD in those early Days, either upon the Account of the Scarcity of Men, or because there being yet but few Examples of Murder, it was not so necessary to punish it, thought fit to prohibit what was naturally permitted; and ordered that all Intercourse with, and even the ⁵ Touching of Murderers should be avoided, but that their Lives should be spared. As ⁶ *Plato* also appointed in his Laws; and ⁷ *Euripides* informs us, that it was practised by the old Greeks, in these Verses,

καλῶς ἐθεύλο, &c.

Our Fathers, in antient Times, had wisely ordered, that whoever embued his Hands in the Blood of another; should not appear in the Sight of any one in the Country: Banishment was the Punishment inflicted on him for the Murder; but it was not permitted to take away his Life, as he had taken away the Life of another. To which we may refer that of *Thucydides* *, *It is probable, that in former Days heinous Crimes were slightly punished, but when in Time these Punishments came to be despised, they were changed into Death.* And *Lactantius* **, *As yet it was reputed a Sin to put even the greatest Offenders to Death.*

Their Conjecture of the Divine Will, grounded on that remarkable Instance (of *Cain*) passed into a Law; so that *Lamech* having ⁸ committed the like Fact, from this Example promised himself Impunity, *Gen. iv. 24.*

But

² See my 4th Note on § 15. of the same Chapter.

³ Quoted by ARISTOTLE, *Ethic. Nicom. Lib. V. Cap. VIII.* APOLLODORUS gives the Law of *Rhadamanthus* in this Manner, *Let him who takes his Revenge on an unjust Aggressor escape with Impunity.* Biblioth. Lib. II. Cap. IV. §. 9. Edit. Tb. Gale. GROTIUS.

⁴ Controvers. Lib. V. Præfat. p. 350. Edit. Gronov. 1672.

⁵ *Contactum ac commercium.* The Author here alludes to the Defilement or Uncleaness, which the Antients thought was contracted by touching a Man who had killed another, even innocently or lawfully. See PUFENDORF, *B. II. Chap. V. §. 16. Note 2.* And ELIAN, *Var. Hist. Lib. VIII. Cap. V.* with the late Mr. PERIZONIUS's 4th Note; as also EVERHARD FEITH, *Antiq. Homeric. Lib. I. Cap. VI.* But these confused and obscure Ideas were not in Being in *Cain's* Time.

⁶ *De Legib. Lib. IX. p. 864, &c. Vol. II. Ed. H. Steph.*

⁷ ORESTES, v. 511, &c.

⁸ In Lib. III. *De Bell. Pelopon.* § 45. Edit. Oxon. SERVIUS, on 1 B. of VIRGIL's *Æneid.* v.

136, 140, observes that *All the Punishments inflicted by the Antients were pecuniary*; which he concludes from the Phrase *Luere commissâ*, used in that Place. The same Inference is drawn from those of *Scelus expendere*, which occurs II. Lib. v. 229. and *Pendere pœnas*, B. VI. v. 20. alluding to the Practice of those early Times, when Money was delivered by Weight. PLINY tells us, that *The first capital Sentence was passed in the Areopagus*, Hist. Nat. Lib. VII. Cap. LVI. p. 478. Edit. Hack.

** This Passage is taken from his *Instit. Div.* Lib. II. Cap. X. Num. 23. Edit. Cellar. and is immediately preceded by these Words, *They* (the antient Romans) *used to forbid their Exiles the Use of Fire and Water; for as yet, &c.* For it was not their Custom to put a Citizen to Death, or even banish them in Form; they only laid a strict Prohibition against furnishing the Criminal with any of the Conveniencies or Necessaries of Life, and thus reduced him to a Necessity of quitting the Country.

⁸ Or rather, he had not then been guilty of such a Crime; but promised himself Impunity, on the Supposition of his committing it hereafter: For the

But as before the Flood, in the Times of the Giants, Murders were very frequent and common; that the same Licentiousness might not become customary, after the Restoration of Mankind, GOD was pleased to restrain it by more rigorous and effectual Means. Having then abolished the Indulgence of former Ages, he put Men in Possession of their natural Right; he expressly permitted what Nature dictated not to be unjust, and declared every Person ⁹ innocent that killed a Murderer. When Civil Tribunals were erected, that Permission, for very strong Reasons, was transferred solely to the Judges; yet so, that some Track of that antient Custom was to be seen, in the Right granted to him that was next of Kin to the Person killed, even after the Law of *Moses*; of which ¹⁰ I shall treat more largely hereafter.

We have the great *Abraham* to justify this Interpretation, who not being ignorant of the Law given to *Noah*, took up Arms against the four Kings, which he believed not repugnant to that Law. So *Moses* commanded the People of *Israel* to fight against the *Amalekites* that came to attack them, without any other Reason than the Law of Nature; for it does not appear that he particularly consulted GOD in this Case. Besides, capital Punishments were not only inflicted on Murderers, but also on other Sorts of Criminals, and that not only among the *Gentiles*, but even among the Patriarchs themselves.

They concluded from the Light of natural Reason, that it was consonant to the Divine Will, that the Punishment appointed for Murderers might, without Injustice, be inflicted on other most heinous Offenders; for there are some Things which we prize equally with our Lives; as Reputation, Virgin-Chastity, conjugal Fidelity; and those Things without which our Lives cannot be safe, as Reverence to our Sovereigns; against which those who offend are to be accounted as bad as Murderers.

Hither we may refer that antient Tradition among the *Hebrews*, that GOD gave more Laws to the Sons of *Noah*, which were not all recorded by *Moses*, as thinking it enough to include them afterwards in the peculiar Laws of the *Hebrews*. Thus it is plain from *Levit.* xviii. that there was an ¹¹ antient Law against incestuous Marriages, tho' not mentioned by *Moses* in its proper Place. Among those Commands of GOD to the Sons of *Noah*, they say ¹² this was one, that not only Murders, but also Adulteries, Incests, and Rapines should be punished with Death, which the Words of *Job* seem to confirm; and even the Law of *Moses* gives Reasons for these capital Punishments, ¹³ which Reasons suit no less with other Nations, than with the *Hebrews* themselves; and particularly it is said of Murder, that the Land cannot be cleansed but by the Blood of the Slayer. Besides, it would be absurd to think, that whilst the *Jews* were allowed to secure their publick and private Safety by capital Punishments, and to defend themselves by War, all other Nations and Powers should be denied the same Privilege; and yet that the Prophets should never have intimated to those Nations and Powers, that GOD condemned every Kind of War, and all Use of the Sword of Justice, as they frequently admonished them of other Sorts of Sins which they were guilty of.

the Words of MOSES will admit of that Sense. GROTIUS.

It does not fully appear that *Lamech* promised himself Impunity, by Virtue of GOD's Prohibition in relation to *Cain*, when he said, *Gen.* iv. 23, 24. *I shall slay, (I have slain) a Man to my wounding, and a young Man to my hurt. If Cain shall be avenged sevenfold, truly Lamech seventy and sevenfold.* I think it much more probable, that this Speech of *Lamech* is a mere Rodomontado, and a Boast of his Strength, by which he imagined himself able to take a Revenge for the least Injuries done to him, more extensive than the Punishment with which those who should kill *Cain* were threaten'd. On consulting Mr. LE CLERC's Comment on the Place, this will appear the most natural Explication of the Words; so that they are of no Use towards establishing the Consequence our Author would draw from them. It is sufficient for his Pur-

pose, that nothing can be inferred from them in favour of the Opinion he opposes, concerning GOD's Prohibition in relation to *Cain*; for even supposing that Prohibition extended to all other Cases of the like Nature, it was founded on a manifest Reason, on the Cessation of which, that is, on the Multiplication of Mankind, the Prohibition vanished of itself.

⁹ JOSEPHUS expresses it thus, *I command that Men abstain from Murder, and preserve themselves undefiled with Blood, and that those who kill be punished.* *Antiq. Jud. Lib. I. Cap. IV. p. 10. Edit. Leipf.* GROTIUS.

¹⁰ See *B. II. Chap. XX. § 8. Num. 8.*

¹¹ See *B. II. Chap. V. § 13.*

¹² See SELDEN, *De Jure Nat. & Gent. secund. Hebr. Disciplinam.*

¹³ I find nothing in or near these two Texts, relating to the Subject in Hand.

Nay,

Nay on the contrary, is it not most evident, that since the Laws of *Moses*, with respect to criminal Matters, carry so visible a Character of the Divine Will, the other Nations would have done very well to take them for a Model? It is even probable, that the *Greeks* at least, and particularly ¹⁴ the *Athenians*, did so: Whence proceeds so great an Agreement of the old *Attick* Law, and from thence of the *Roman* ¹⁵ in the *Twelve Tables*, with the *Hebrew* Laws. This is enough to prove, that the Law given to *Noah* is not to be taken in that Sense which they imagine, who would thence conclude all Wars to be unlawful.

VI. The Arguments brought out of the New Testament against War are more plausible; in examining which, I shall not suppose that, which others do, that there is nothing in the Gospel (except Points of Faith, and the Sacraments) but what is enjoined by the Law of Nature; for that, in the Sense that most Divines take it, I cannot think true.

VI. *Certain Cautions concerning the Question, whether War be contrary to the Law of the Gospel.*

1. This I freely grant, that there is nothing commanded us in the Gospel, which is not agreeable to natural Decorum; but I see no Reason to allow, that the Laws of CHRIST do not oblige us to any Thing but what the Law of Nature already required of itself.

2. And those, who are of that Opinion, are strangely embarrassed to prove, that certain Things which are forbid by the Gospel, as *Concubinage*, *Divorce*, *Polygamy*, are likewise condemned by the Law of Nature. Indeed these are such that Reason itself informs us it is more Decent to refrain from them, but yet not such, as (without the Divine Law) would be criminal. The Christian Religion commands, that we should lay down our Lives one for another; but who will pretend to say, that we are obliged to this by the Law of Nature. *Justin Martyr* says, ³ *To live only according to the Law of Nature, is to live like an Infidel.*

1 John iii. 16.

3. Neither shall I follow them, who supposing another Principle very considerable, if it were true, pretend that CHRIST, in the Precepts he gives in the fifth and following Chapters of *St. Matthew*, only interprets the Law of *Moses*. For those Words so often repeated, imply something else, (*You have heard it has been said to them of old: But I say unto you*) which Opposition, as also the *Syriack*, and the other Translations, plainly declare, that the Word *Veteribus* must be render'd to, and not by them of old; as *Vobis* is to, and not by you. Now those of old are certainly the Contemporaries of *Moses*; for what is there mentioned to be said to them of old, was not spoken by the Doctors of the Law, but by *Moses* himself, either in those very Words, or the same Sense, as *Thou shalt not kill. Whosoever killeth shall be in Danger of Judgment. Thou shalt not commit Adultery. Whosoever shall put away his Wife, let him give her a Writing of Divorcement. Thou shalt not forswear thyself, but shall perform unto the Lord thine Oaths. An Eye for an Eye, and a Tooth for a Tooth*, (that is, you may demand it in Justice). *Thou shalt love thy Neighbour* (that is, an *Israelite*) and hate thine Enemy, (+ that is, the seven Nations with whom they were forbid to make any League, or shew them any Mercy. To these are to be added the *Amalekites*, with whom the *Hebrews* are commanded to have an implacable War).

Ex. xx. 13.
Lev. xxiv. 21.
Numb. xxxv. 16, 17, 30.
Ex. xx. 14.
Deut. xxiv. 1.
Ex. xx. 7.
Numb. xxx. 2.
Lev. xxiv. 20.
Deut. xix. 21.
Lev. xix. 18.
Ex. xxxiv. 11, 12.
Deut. vii. 1.
Ex. xvii. 19.
Deut. xxv. 19.

¹⁴ See our Author's Treatise, *On the Truth of the Christian Religion*, Lib. I. § 15. with Mr. LE CLERC's Note, p. 28. Edit. 1717.

¹⁵ An ancient Lawyer has drawn a Comparison between the Laws of *Moses* and the *Roman* Law, under this Title, *Collatio Mosaicarum & Romanarum Legum*. PETER PITHOU published that Work for the first Time, at *Paris*, in 1572; of which we have lately been presented with a beautiful Edition, in the *Jurisprudentia Ante-Justiniana*, by Mr. SCHULTING, a learned Professor of Law at *Leiden*.

VI. (1) The Author, in a Note on this Place, quotes a Passage from *St. JEROM*, which I at present omit, because he gives it more at large on *B. II. Chap. V. § 9. Num. 4.*

2 This Instance is not altogether just. The Law of Nature, rightly understood, requires us in certain Cases to sacrifice our Lives for others, when a considerable Advantage may result from such an

Action to the Publick. Thus we find the wise Pagans thought it their Duty to die for their Country. The Christian Religion therefore, only furnishes us with much more powerful Motives for the Practice of this Duty, by proposing the certain Hope of a Life to come, which will make us ample Amends for the Loss of the present. It is the Will of JESUS CHRIST, that we suffer Death for the Gospel; but this is no more than an Extension or Application of the Law of Nature, because nothing is more advantageous to Society, than a sincere and judicious Profession of the Christian Religion, and consequently, than the courageous Resolution of such as sacrifice their Lives for the Interest of its holy Doctrines.

3 *Epist. ad Zenam*. We meet with a like Thought in *ORIGEN's Philocalia*. GROTIVS.

4 The famous Rabbi ABARBANEL, on *Deut. xxiii. 21.* says, the Law allowed the Jews to hate those People. GROTIVS.

4. But to understand the Words of CHRIST, we must carefully observe, that the Law delivered by *Moses* may be considered two Ways; either as to what it has in common with Laws merely human, that is, as it restrained the most heinous Crimes by the Fear of visible Punishments, and so maintained the Order of Civil Society amongst the antient *Hebrews*; in which Sense it is called *The Law of a carnal Commandment*, and *The Law of Works*. Or it may be considered as to what it has peculiar to Divine Laws, that is, as it also requires the Purity of the Mind, and some Acts, which may be omitted without the Fear of temporal Punishment; in which Sense it is termed *A spiritual Law rejoicing the Soul*, *Psal. xix. 8.* (which the *Latins* call the *xviiiith*). The Doctors of the Law and *Pharisees* contenting themselves with that first Part of it, (*the Carnal*) despised the other, (*the Spiritual*) which yet is the more excellent, and neglected to teach it the People; which appears plainly, not only from the Books of the New Testament, but also from *Josephus* and the *Rabbies*.

Heb. ii. 2.

Heb. vii. 16.

Rom. iii. 27.

Rom. vii. 14.

5. But even as to what relates to this second (*spiritual*) Part, we must know, that tho' the Virtues which are required of Christians, were recommended and in-joined to the *Hebrews*, yet it was not ⁵ in so high a Degree, nor with so great an Extension; and in both these Respects CHRIST opposes his Precepts to those of the Antients: Whence it is plain, that his Words imply more than a bare Interpretation. These Remarks not only serve to the Matter in Hand, but also to many other Subjects, wherein the Authority of the antient Law might be mis-employed.

VII. Arguments for the negative Opinion out of Holy Writ.

¹ Epist. ii. 1, 2, 3.

VII. 1. Therefore, omitting those Arguments of less Weight, the first and chief Testimony, whereby we may prove that the Right of making War is not absolutely taken away by the Law of the Gospel, is that of St. Paul to Timothy, *I exhort you, that above all Things, Prayers and Supplications, Intercessions and giving Thanks, be made for all Men; for Kings, and such as are in Authority, ¹ that we may lead a quiet and peaceable Life, in all Godliness and Honesty; for this is good and acceptable in the Sight of GOD our Saviour, who would have all Men to be saved, and to come to the Knowledge of the Truth.* Hence we are taught three Things, First, That it is pleasing to GOD that Kings should become Christians. Secondly, That being converted to Christianity they still continue Kings; which *Justin Martyr* thus expressed, ² *We pray, that Kings and Princes may, together with their Royal Power, be found to have wise and reasonable Sentiments.* And in the Book intitled, *The Constitutions of Clement*, the Church prays, * *χαρισιανὰ τὰ τέλη*, for Christian Magistrates. And Thirdly, That it is acceptable to GOD, that Christian Kings should contribute their utmost to the Quiet of others.

Rom. xiii. 4.

But how? He explains This in another Place: *He is the Minister of GOD to thee for Good; if thou do ill, be afraid, for he beareth not the Sword in vain; for he is GOD's Minister, an Avenger to execute Wrath upon them that do Evil.* Under the Right of the Sword, is figuratively comprehended every Sort of Punish-

⁵ See to this Purpose what has been said in the Close of the preceding Chapter. St. CHRYSOSTOM has a beautiful Passage on this Subject, *Formerly*, says he, *so great a Degree of Virtue was not enjoined. It was then allowable to take Revenge for Injuries received, and return Reproach for Reproach, and be solicitous for amassing Riches; to swear, provided it was done with a good Conscience; to take an Eye for an Eye, and hate an Enemy: Nor was there any Prohibition against living luxuriously, being angry, or putting away a Wife and taking another. Nay more, the Law permitted a Man to have two Wives at the same Time; in short, great Indulgence was granted in those and other Particulars. But since the Coming of CHRIST, the Way is become much narrower.* De Virgin. Cap. XLIV. In the same Work he says, *The same Degree of Virtue was not required from them (the Jews) that is expected from us.* Cap. LXXXIII. And in his Discourse on the Coequality of the Son to the Father, he affirms, that the Gospel contains a greater Number of Precepts, and those carried to a higher

Degree of Perfection. Vol. VI. Edit. Savill. GROTIUS.

Several of the Examples alledged by that Father, ought to be understood according to our Author's Distinction between the Spirit and the Letter of the Law.

VII. (1) SENECA, making an Apology for the true Philosophers, who were falsely accused of despising Kings and Magistrates, asserts that, *on the contrary, no Men are more faithfully obedient to Persons in publick Authority; because none have greater Obligations to them, than those who enjoy Ease and Tranquillity under their Protection.* Epist. LXXXIII. The whole Epistle is well worth reading; in which we have likewise this Observation, *Tho' all enjoy the Benefit of this Tranquillity, those who make a good Use of it, have a greater Share in the Blessing.*

² *Apol. I. p. 32. Edit. Oxon.*

* These Words may be interpreted a *Christian End*, or a *Death worthy of a Christian.* GROTIUS.

ment, as that Expression is ³ also taken, sometimes among the Lawyers; but yet so, that the true ⁴ and effective Use of the Sword, which is the principal ⁵ Part, be not excluded. The second *Psalms* may not a little help to explain this Place; which *Psalms*, tho' it was really verified in the Person of *David*, yet does it more fully and perfectly relate to CHRIST, as we may learn from *Acts* iv. 25. xiii. 33. and *Heb.* v. 5. Now that *Psalms* advises all Kings to kiss the Son with Reverence, that is, to shew themselves his Servants as Kings, as *St. Austin* rightly expounds it, whose Words relating to this Subject I shall here set down. ⁶ *In this Kings serve GOD, according to the Divine Command, as they are Kings, when they promote Virtue, and discourage Wickedness in their Kingdom, not only in Things that have Relation to human Society, but also in what regards Religion.* And in another Place, ⁷ *How then do Kings serve the LORD in Fear, unless by prohibiting, and punishing with a religious Severity, all Transgressions of the Commandments of the LORD? For he serves GOD one Way as a Man, and another as a King.* And a little after, *Herein Kings serve GOD as Kings, when they do for his Service what they could not perform unless they were Kings.*

2. That Place which I have before quoted in the thirteenth to the *Romans*, affords us a second Argument, where the higher Powers, such as Kings, are said to be of GOD; and the Apostle calls them likewise, the Ordinance of GOD: Whence he infers, that we ought to be subject to them, to respect and honour them, and that for Conscience sake; so that to resist them is to resist GOD himself. If by Ordinance we only understand what GOD only permits, as he does Acts that are sinful, then no Obligation would follow of Honour or Obedience, especially in regard to Conscience, and the Apostle had said nothing, when he so highly magnified and exalted this Power, but what he might have said of Thefts and Robbery. We must therefore understand this Power, as established with the Approbation of GOD: Whence it follows, (since GOD cannot will Things that are inconsistent) that this Power is not ⁸ repugnant to the Will of GOD revealed in the Gospel, and obligatory on all Men.

Neither does it prejudice our Argument, that the Sovereign Powers, at the Time when *St. Paul* wrote this, were not Christians. For first, this is not universally true; since *Sergius Paulus*, Vice-Prætor of *Cyprus*, had long before professed the Christian Faith; to say nothing of what is reported of the ⁹ King of *Edeffa*, perhaps intermixt with some Falsities, but which seems to be founded on some Truth. Besides, the Question is not about the Persons, whether they were Christians or Infidels; but whether that Function, exercised by Infidels, contained in it any Thing contrary to Piety; which we say the Apostle denies, where he says it is or-

³ See Mr. Noodt's Treatise, *De Jurisdictione & Imperio*, Lib. I. Cap. IV.

⁴ The Lawyers usually make this Distinction between the Right of the Sword, and the Power of punishing Criminals without putting them to Death: Thus, for Example, they say, *No Man can transfer to another the Power of the Sword which is given him, or that of inflicting any other Punishment.* DIGEST. Lib. L. Tit. XVII. *De Diversis Reg. Juris.* Leg. LXX.

⁵ Though this Proof, and several others which follow it, have a direct Tendency to shew only that Princes and Magistrates, even under the Gospel Dispensation, may, and ought to punish certain Crimes with Death; yet they are to his Purpose, not only for the Reason given at the End of *Num.* 10. of this Paragraph; but also for another more strong and direct, which he ought not to have omitted, viz. Because there can be no plausible Foundation for condemning War absolutely, but on a Supposition, that the Right of taking away a Man's Life, especially on the Account of some temporal Advantage, is incompatible with Christian Clemency. Now, if a Prince may and ought to put any of his Subjects to Death, when guilty of certain Crimes, which are sometimes prejudicial only in regard to some temporal Interest, Why may he not innocently take Arms against Strangers? Why should

he be more tender of the Lives of Strangers than of those of his own Subjects? See what our Author says farther on capital Punishments, B. II. Chap. XX. § 12, 13.

⁶ *Contra Grefcon. Grammatic.* Lib. III. Cap. LI.

⁷ *Ad Bonif. Ep. L.*

⁸ In order to compleat our Author's Argument, we must add what he himself says afterwards, that the Sovereign Power in itself, and according to the Practice of all Nations, includes the Right of making War, and that of punishing certain Crimes with Death. See my 5th Note on this Paragraph.

⁹ *Edeffa* is a City in *Ostroëne*; and the Name of *Abgarus* is very common in that Country, as appears from several Medals, from *TACITUS*, *APPIAN*, and from the Fragments of *DIO CAPITOLINUS*, lately published, (*Excerpt. Vales.* p. 476.) as well as from Pieces which have been long extant. *GROTIUS.*

This Story of *Abgarus's* Epistle to JESUS CHRIST, and our Lord's Answer, both produced by *EUSEBIUS*, *Hist. Eccl.* Lib. I. Cap. XIII. is no better than a mere Fable. See Mr. *DUPIN's* Preliminary Dissertation on the Bible, B. II. Chap. VI. § 2.

Acts xvi.

dained of GOD, even at that Time, and therefore to be honoured and respected, with regard to Conscience itself, which, properly speaking, is under the Dominion of GOD only : And therefore, the Emperor *Nero*, and King *Agrippa*, whom St. *Paul* so earnestly exhorted to turn Christians, might have become the Subjects of JESUS CHRIST, without being obliged to renounce, the one his Empire, or the other his Royalty ; which two Sorts of Sovereignty cannot be conceived without the Right of the Sword, and the Power of making War. As then the ancient Sacrifices were nevertheless holy, according to the Law, tho' offered by wicked Priests ; ¹⁰ so Civil Government is holy and sacred, tho' administered by a wicked Person.

(3.) Arg.

Luke iii. 14.

Matt. iii. 2,
4, 17.

Matt. xi. 12.

Mark i. 4.

Acts xi. 38.

Matt. iii. 8,

10.

Luke iii. 11.

Matt. xi. 13.

Mark i. 1.

Luke i. 77.

Matt. xi. 9.

Luke vii. 26.

— ii. 77.

— iii. 18.

Acts xix. 4.

John i. 29.

Matt. iii. 11.

Mark i. 8.

Luke iii. 16.

(4.) Arg.

3. The third Argument is taken from ¹¹ the Words of St. *John* the Baptist, who being asked by the *Jewish* Soldiers, (many thousands of whom served the *Romans*, as appears from *Josephus*, and other Writers) *What they should do to flee from the Wrath to come*, he did not bid them quit their Military Employment, which he ought to have done, if it had been GOD's Will, but only *to abstain from Extortion and Falshood, and to be content with their Pay*. But to these Words of the Baptist, which plainly allow of a Military Life, many object, that what the Baptist prescribed, did differ so much from what our Saviour commanded, that he seemed to preach one Doctrine and CHRIST another. But this I cannot agree to, for both *John* and our Saviour declare the Sum of their Doctrine in the same Terms, *Repent ye, for the Kingdom of Heaven is at hand*. And CHRIST himself says, the Kingdom of Heaven, (that is, the new Law, for the *Hebrews* used to call their Law by the Name of Kingdom) begun to suffer Violence from the Days of *John* the Baptist. *John* is said to preach the Baptism of Repentance for the Remission of Sins ; so are the Apostles said to do in the Name of CHRIST. *John* required Fruits meet for Repentance, and threatens Destruction to those that did not bring them forth. He also requires Works of Charity above the Law. The Law is said to continue unto *John* ; that is, from him a more perfect Law did begin. And the Beginning of the Gospel is reckoned from *John*. *John* is called greater than the Prophets, because he was sent to give Knowledge of Salvation to the People, and to preach the Gospel : Neither does *John* ever distinguish JESUS from himself by any Difference of Doctrine, (tho' what *John* declared more generally and indefinitely, and by Way of Elements, CHRIST, the true Light, delivered clearly and distinctly) but only by this, that JESUS was the promised Messias, that is, a spiritual and heavenly King, who should give the Power of the HOLY GHOST to those that believed on him.

4. The fourth Argument is this, which seems to me of no small Weight. If it were not permitted to punish certain Criminals with Death, nor to defend the Subject by Arms against Highwaymen and Pyrates, there would of Necessity follow a terrible Inundation of Crimes, and a Deluge of Evils ¹², since even now that Tribunals are erected, it is very difficult to restrain the Boldness of profligate Persons. Wherefore if it had been the Design of CHRIST to have introduced a new Kind of Regulation, as was never heard of before, he would certainly have declared in most distinct and plain Words, that none should pronounce Sentence of Death against a Malefactor, or carry Arms in Defence of one's Country, which we nowhere read that he did ; for what is brought to this Purpose, is either very general or obscure. But Equity itself, and common Sense, teaches us to restrain Words that are general, and favourably to explain those that are ambiguous, and even to recede somewhat from the Propriety and common Acceptation of the Words, in

¹⁰ St. CHRYSOSTOM makes this very plain in his Observations on this Text. GROTIUS.

¹¹ TESMAR, in his Notes, quotes two Passages from St. AUGUSTIN, where he employs this Example to shew that War is not absolutely condemned by the Gospel. In the first he reasons thus, *If all Wars were condemned by the Christian Doctrine, the Soldiers in the Gospel, when they asked Advice, for the Security of their Salvation, would rather have been commanded to lay down their Arms, and entirely renounce their Profession; whereas it is only said,*

Do Violence to no Man, neither accuse any falsely, and be content with your Pay. Now when they are commanded to be content with their Pay, they are not forbid to continue in the military Profession. Epist. V. The other Passage is taken from his CV. Epistle, where that Father reasons from the Example of DAVID, and the two Centurions.

¹² St. CHRYSOSTOM says, that *To this End Tribunals were erected, Laws made, Punishments appointed, and various Kinds of Penalties enjoined.* Serm. ad Patrem fidel. GROTIUS.

order to avoid that Sense which may bring along with it the greatest Inconveniences ¹³.

5. The fifth Argument may be this, that it cannot by any good Reason be proved, that the Laws of *Moses*, which regarded the Punishments of Crimes, were abolished, till the City of *Jerusalem* was destroyed, and with it the Form of the State, without any Hope of re-establishment. For neither is there in the Law of *Moses* any Term fixt to that Law; neither does CHRIST or his Apostles ever speak of the abolishing of that Law, unless so far as it may seem comprehended (as I said) in the Destruction of the *Jewish* Government. Nay, on the contrary, St. *Paul* says, that the High Priest (*at that Time*) was appointed to judge according to the Law of *Moses*. And CHRIST himself in the Preface to his Precepts, said, that he came not to destroy the Law, but to fulfil it; which is easily understood to refer to the ceremonial Part; for the Lines of a rough Draught are compleated, when the Picture appears in all its Perfection. But as to the *Judaical* Law, how can it be true, if CHRIST, as some imagine, abolished it at his Coming? And if the Obligation of that Law continued as long as the *Jewish* State subsisted, it follows, that the *Jews*, even such as turned Christians, if ¹⁴ they were called to the Magistracy, could not avoid it, nor judge ¹⁵ otherwise than *Moses* had prescribed.

(5) Arg.
Acts xxiii. 3.
Matt. v. 17.

Having thoroughly consider'd all Things, I cannot indeed find the least Reason, why any pious Man, that heard our Saviour pronounce those Words, should take them in any other Sense. I own, that before the Time of the Gospel, some Things were tolerated (either as to outward Impunity, or even in regard to Conscience, which I have not now Occasion or Leisure strictly to examine) which CHRIST did not allow to his Followers; as, for Instance, to put away a Wife for every Offence, and a Person injured to seek Reparation by Course of Law: But tho' between CHRIST's Precepts and those Permissions, there is a certain Difference, yet there is no Contradiction: For he that keeps his Wife, and he that parts with his Right of taking Vengeance, does nothing contrary to the Law, but acts most agreeably to ¹⁶ the Intention of the Law. It is quite otherwise in a Judge, whom the Law does not allow, but command, to punish a Murderer with Death; and if he neglect it, he shall be guilty before GOD. If CHRIST had forbid such a

¹³ To which add, that if the Gospel absolutely condemned War and capital Punishments, such Christians as observed the Precepts of their Religion with the greatest Exactness, would thereby be inevitably exposed to become a Prey to Villains and Usurpers; which is not agreeable to the Goodness and Wisdom of GOD.

¹⁴ Either there is some Omission in this Place, (tho' all the Editions agree) or our Author expresses himself improperly. If the Political Law continued in force, it follows indeed, that the *Jews*, when converted to Christianity, ought, if Magistrates, to judge according to those Laws; but it by no Means follows, that they could not on any Account, or for any Reason, decline the Magistracy. The Author probably means, that they cannot decline it merely because the Exercise of it was attended with the Obligation of passing Sentence of Death for certain Crimes. I find nothing, at least in the Books of the Old Testament, from whence it can be inferred, that every one called to the Magistracy was obliged to accept of that Charge. The *Jews* acknowledged no such Obligation, as appears from a Passage of the *Talmud*, quoted by BUXTORF, in his *Florileg. Hebraic.* p. 183. where it is said, that the antient Sages declined publick Offices, and excused themselves from undertaking the Function of a Judge, till they saw none else would accept of it; and that even then they did not take Place in the Council, but at the earnest Intreaty of the People and Elders.

¹⁵ The *Jew*: however in our Saviour's Time,

had not the Power of Life and Death, but were under a Necessity of obtaining the *Roman* Governor's Permission for executing a Criminal. See our Author's Commentary on MATT. v. 22. and on JOHN xviii. 31. So that they only declared, according to their Law, such or such a Person guilty of a capital Crime; which supposes, however, that JESUS CHRIST had not abolished the political Laws, and, consequently, is sufficient for our Author's Purpose, whatever that passionate and injudicious Divine OSTANDER may say.

¹⁶ For, besides that every one may renounce the Benefit of a Law, without doing any Thing contrary to that Law; the Design of that Law which allowed of Divorces, was not to put Men on dismissing their Wives, but to provide for the Security of the Wife, who would have been exposed to very bad Treatment, among such a People as the *Jews* were, if a Husband had not been at Liberty to dismiss her when she became disagreeable to him. So that the Intent of the Legislator was to prevent the greater Inconvenience; and nothing would have been more pleasing to him than to see Husbands keep their Wives, while they gave no just Cause for a Separation. This is what the Spirit or nobler Part of the Law required, tho' that Part was least studied by the Generality of the *Jews*. The same is to be said of the Law of the Satisfaction allowed to the Injured, for hindering private Persons from doing themselves Justice by violent Means, to which the *Jews* were strongly inclined:

Person

Person to put a Murderer to Death, he would have ordered something directly contrary to the Law, he would have *abolished the Law*.

(6.) Arg. 6 The sixth Argument is taken from the Example of *Cornelius the Centurion*, who received the HOLY GHOST (an infallible Sign of Justification) from CHRIST, and was baptized into the Name of CHRIST, by the Apostle *St. Peter*, yet we no where find that he laid down his Commission, or was ever advised to it by *St. Peter*. But some may answer, that being instructed in the Christian Religion by *St. Peter*, he may be supposed at the same Time to have been exhorted to quit his Employment. Indeed if it were certain, and could be proved, that War was forbid among the Precepts of CHRIST, they would say something to the Purpose; but since that appears no where else, it would have been proper to have said something of it, at least in this Place, that future Ages might not be ignorant of the Rules of their Duty. Neither does *St. Luke* use (where the Quality of the Persons required a special Change of Life) to pass such a Thing over in Silence, as we may see in several Places, particularly *Acts* xix. 19.

(7.) Arg. 7 The seventh Argument like to this, is taken from the Example of *Sergius Paulus*, which I have already alledged; for in the Account of his Conversion, there is no Mention made of his quitting his Government, or of his being advised to do it. Now Silence, in regard to Things which it was natural for one to mention, and very necessary not to omit, implies, as I have just said, that they never were.

(8.) Arg. 8 The eighth Argument is drawn from the Conduct ¹⁷ of *St. Paul*, when he understood that the *Jews* lay in Wait for him; he immediately acquainted the Commander of the *Roman* Garrison with it, and when the Commander had sent Soldiers to convoy him safe to *Cæsarea*, he did not refuse it, neither did he in the least insinuate, either to the commanding Officer or the Soldiers, that it was displeasing to GOD to repel Force with Force; and yet this is that *St. Paul*, who neglected no Opportunity himself, of warning Men of their Duty, or to blame the Neglect in others, 2 *Tim.* iv. 2.

(9.) Arg. 9 The ninth Argument is, because the proper End of any Thing that is honest and obligatory, must also be honest and obligatory: To pay Tribute is honest; and also a Precept obliging the Conscience, as *St. Paul* expresses it; and the End of Tribute is, ¹⁸ to enable the Sovereign Powers to protect the Good, and restrain the Wicked. ¹⁹ *Tacitus* speaks appositely to this Purpose, *Nations can have no Peace without Arms, no Arms without Pay, and no Pay without Taxes*. To which agrees that of *St. Austin*, ²⁰ *For this Cause we pay Tribute, that Soldiers may have Money to buy them Necessaries*.

Rom. xiii. 3,
4, 5, 6.

¹⁷ The Council of *Africa* makes use of this Passage, to justify the Resolution of imploring the Assistance of the temporal Power against the Factious; *Against whose Fury we may call for such Defence as is not unusual, or disallowed by the Scripture; since the Apostle Paul, as we read in the Book of Acts, secured himself against a Conspiracy of factious Men by a military Force*. And *St. AUGUSTIN* frequently urges this Example, as in his *Lth. Epistle to Boniface*, and in *CLIVth. to Publicola*, where he says, that *If the Soldiers, who guarded St. PAUL, had fallen on his factious Enemies, the Apostle would not have thought himself guilty of the Effusion of their Blood*. And *Epist. CLXIV.* he observes, that *St. PAUL took care to provide himself with a strong Guard for his Defence*. *GROTIUS*.

The second of these Passages of *St. AUGUSTIN* may be found in the *Canon Law, Caus. XXIII. Quæst. V. Can. VIII.*

¹⁸ *Tributorum autem finis est, &c.* The Design of raising Taxes is, &c. Here some Commentators charge our Author with advancing an inconclusive Reason; for, say they, Taxes are raised, not only for supporting War, but also for defraying several other necessary Expences in Time of Peace. This is certain, nor does our Author himself deny

it, or say it is the only Design of imposing Taxes. It is sufficient that this is one, and even one of the most considerable Ends proposed. Mr. *BARBEYRAC* therefore translates the Words thus, *Mais quel est le but de ces sortes de charges imposées aux Sujets? N'est ce pas, entr'autres, que les Puissances ayent de quoi fournir aux Depenses, &c.* But with what View are such Burthens laid on the Subject? Is it not, among other Considerations, that the Powers may have wherewithal to defray the Expences, &c. To which he adds, that this Version, made conformably to the Author's Thought, leaves no Room for Criticism; and that Mr. *VANDER MUELEN* has done Justice to the Author in this Place.

¹⁹ The Historian puts this Speech in the Mouth of *PETILIUS CEREALIS, Hist. Lib. IV. Cap. LXXIV. Num. 2.*

²⁰ *Contra Faust. Lib. XXII. Cap. LXXIV. p. 299. Tom. VI. Edit. Eras. Basil. 1528.* This Passage (in which our Author writes *propter necessaria militi*, instead of *propter bella necessario militi*, as the Words stand in the Edition here specified, which probably he used) is quoted in the *Canon Law, Caus. XXIII. Quæst. I. Can. IV.* but not exactly in the same Terms, and among some short Extracts of what goes before, or follows.

10. The tenth Argument is taken from that Place of the *Acts*, where St. *Paul* pleads ^{(10.) Arg.} thus, *If I have wronged any Man, or done any Thing worthy of Death, I refuse* ^{21 Acts xxv. 11.} *not to die*. Whence I conclude, that St. *Paul* did believe, that even after the publishing of the Evangelical Law, there were some Crimes which Equity allowed, and even required, to be punished with Death: Which also St. *Peter* teaches. ^{1 Pet. ii. 19,} But if it had then been GOD's Will, that capital Punishments should be no longer ^{20.} used, St. *Paul* might indeed have cleared himself; but he ought not to leave such an Opinion in the Minds of Men, as if to punish Offenders with Death had been now no less lawful than formerly. But having proved that capital Punishments were justly inflicted after the Coming of CHRIST, I think it also proved, that some Wars may be lawfully made, as against a Multitude of armed Offenders, who are to be overcome by Arms ²², before they can be brought to a Trial. Indeed the Forces of Criminals, and the Boldness wherewith they resist, may have some Weight, in considering whether it be proper to pursue them with the utmost Rigour; but still that lessens nothing of the Right itself.

11. The eleventh Argument is, that ²³ in the *Revelation* of St. *John*, some ^{(11.) Arg.} Wars of the Righteous are foretold, with manifest Approbation, *Chap. xviii. 6.* and elsewhere.

12. The twelfth Argument may be this, that the Law of CHRIST did only ^{(12.) Arg.} abolish the Law of *Moses*, in regard to those Things which separated the *Jews* from the *Gentiles*; but what Things were accounted honest by the Law of Nature, or by the tacit Consent of civilized Nations, it was so far from abrogating, that it comprehends them under the general Precept *to think on every Thing that is honest and vertuous*. Now the Punishment of Crimes, and repelling Injuries by Arms, are by Nature reputed laudable, and referred to the Virtues of Justice and Beneficence. And here, by the by, we may observe the Error of them, who pretend that the *Israelites* had a Right to make War, only because GOD had given them the Land of *Canaan*. Indeed this is a just Cause, but not the only one. For even before those Times, holy Men did make War by following the Light of Reason; and also the *Israelites* themselves afterwards, upon other Occasions, as *David*, for the affronting of his Ambassadors. Besides, what every Man possesses, by Virtue of human Laws, is not less his own, than if GOD had (immediately) given it to him; and that Right is not taken away by the Gospel. ^{Eph. ii. 14.} ^{Phil. iv. 8.} ^{1 Cor. xi. 14.}

VIII. Let us now see the Reasons for the contrary Opinion, that the pious Reader may more easily judge which are the most weighty.

1. First they alledge the Prophecy of ¹ *Isaiah*, who foretold, *That the Nations should beat their Swords into Plow-Shares, and their Spears into Pruning Hooks. Nation shall not lift up Sword against Nation, neither shall they learn War any more.* But this Prophecy is to be understood, either conditionally, as many others are, as that should be the State of Affairs, if all Nations would ² submit to the Law of

CHRIST,

²¹ The same Apostle says elsewhere, *There was no Cause of Death in me, that is, I had done nothing worthy of Death.* *Acts xxviii. 18.* JUSTIN MARTYR makes this Declaration in his second *Apology*; addressed to the Emperor, the Senate, and the whole Body of the Roman People, *But we desire that such as do not live conformably to the Precepts of JESUS CHRIST, and are only nominal Christians, may be punished, even by your Authority.* GROTIUS.

²² The Author here alludes to a Passage in TACITUS, relating to PRISO, as the learned GRONOVIVS has observed on this Place. *Petitum armis Rempubliam; utque reus agi posset, acie victum.* *Annal. Lib. III. Cap. XIII.*

²³ This eleventh Argument occurs both in the first Edition of the Work before us, and in that of 1632, which the Author assures us he had carefully revised. I make this Observation, because it is omitted in several Editions, which was probably the Printer's Fault, who skipped over two Lines, being misled by the Resemblance of the Words *Undecimum* and *Duodecimum*. This Article was

wanting in the Edition of 1642, the last published in the Author's Life Time; but it had been restored before my Edition appeared.

VIII. (1) St. CHRYSOSTOM explains this Prophecy of the universal Peace established by the Foundation of the Roman Empire at the Time of our Saviour's Birth. *It is foretold*, says that Father, *not only that this Religion shall be well established, and immoveable, but also that it shall bring much Peace on the Earth; that the several Aristocracies and Monarchies shall be destroyed; and that there shall be one Kingdom raised above all the others, the greatest Part of which shall enjoy Peace in a more perfect Manner than before: For formerly Artificers and Orators bore Arms, and went to the Wars. But since the Coming of CHRIST, that Practice has been abolished, and military Employments are confined to a particular Rank of Men.* *Discourse on the Divinity of CHRIST.* We have exactly the same Explication in EUSEB. *De Præp. Evang. Lib. I. Cap. X. p. 8.* Edit. Rob. Steph. GROTIUS.

² In Reality, as JUSTIN MARTYR observes, Christians have no Enemies among themselves to fight

VIII. The Arguments out of Scripture for the Affirmative answered. (1.) Arg. Isa. ii. 4.

CHRIST, and live up to it, whereunto there should nothing be wanting on GOD's Part; for it is certain, if all were Christians, and lived like Christians, there would be no Wars: Which ³ *Arnobius* expresses thus, *If all Persons who look upon themselves as Men, not so much from the Shape of their Bodies, as because they are endowed with Reason, would lend an Ear to his salutary and peaceable Lessons, and not presumptuously follow their own Fancies rather than his Exhortations, the whole World would long since have enjoyed profound Peace, and lived in perfect and indissoluble Union. Iron would have been employed for gentler Purposes, and converted into less dangerous Instruments than what it has hitherto served for. And* ⁴ *Lactantius* thus, *What would be the Consequence, if all Men would unite in Concord? Which certainly might be done, if banishing their deadly and impious Rage, they would resolve to live innocently and justly.* Or this Place is to be understood literally; and then, it is plain that this Prophecy is not yet fulfilled; but that the Accomplishment of it, and of the general Conversion of the *Jews*, is yet to be expected. But take it which Way you will, there can be nothing hence inferred against the Lawfulness of War, as long as there are those who will not suffer others to live in Quiet, and who insult such as love Peace.

Several Arguments are drawn from the fifth of *St. Matthew*, to judge of which it is necessary, that we remember what was said a little before, *viz.* If CHRIST had intended to have abolished all capital Punishments, and the Right of (*making*) War, he would have done it in most plain and exact Terms, on Account of the great Importance and Novelty of the Thing; and so much the more, because none of the *Jews* could imagine but that the Laws of *Moses*, concerning Judgments and other political Affairs, ought to preserve their Force in regard to the *Jews*, as long as their Government subsisted. After this general Remark, let us examine these Places in order.

(2.) Arg.
Ex. xi. 13.
Matt. v. 38,
39.
Acts vii. 27.

2. The second Argument brought to defend their Opinion is out of those Words. *You have heard it has been said, an Eye for an Eye, and a Tooth for a Tooth; but I say unto you, resist not Evil, (לרשע* which answers to the Greek Word τῷ ἀδικῶντι him that injures thee); *but if any Man strike thee on the one Cheek, turn to him the other also.* From hence some infer, that no Injury is to be repelled or revenged, either publickly or privately; but this the Words do not imply; for CHRIST does not here speak to Magistrates, but to those that are injured; nor of all Injuries neither, but of slight ones, as a Box on the Ear, for the Words following limit those that go before, however general they may at first appear. So in the following Precept, *If any Man will sue thee at the Law, and take away thy Coat, let him have thy Cloak also.* ⁵ Our Saviour does not forbid absolutely to have Recourse to Law, or to take Arbitrators in order to decide a Difference. This is evident from the Interpretation of *St. Paul*, who does not prohibit every Kind of Law-Suit, but only would have Christians not go to Law with one another before the Heathen,

1 Cor. vi. 4.

fight with, Ὅτι πολεμῶμεν τοῖς ἐχθροῖς. Which is exactly what *PHILO* the Jew said of the *Essenes*, *You can find among them no Artist who makes Favellins, Darts, Swords, Helmets, Cuirasses, Shields, or any Sort of Armour or Machines.* In his Treatise proving every good Man is free, p. 877. Edit. Paris. *St. CHRYSOSTOM* likewise says, *If Men loved one another as they ought to do, there would be no capital Punishments.* GROTIVS.

³ *Adversus Gentes*, Lib. I. p. 6. Edit. Lugd. Salmaf.

⁴ It is where he reproaches the Pagans with the Deification of their Conquerors; on which Occasion he reasons thus, *If Immortality can be acquired only by shedding Blood, Who will have Gods, if an universal Concord was established in the World? And this certainly might be effected, if Men would lay aside their pernicious and impious Rage, and become innocent and just. Will no one be worthy of Heaven, on this Supposition? Will Virtue lose its Existence, merely because Men are not allowed to give a Loose to their Passions, and destroy one another?* Instit. Div. Lib. I. Cap. XVIII. Num. 16. Edit. Celler.

⁵ *St. CYPRIAN* explains the Text thus, *JESUS CHRIST commands you, not to demand the Restitution of what is taken from you.* De Patientia. And *St. IRENÆUS* says, that our Lord here commands us, *not to be sorrowful, like Men who cannot bear to be defrauded; but to be chearful, as if we had freely given what is taken from us.* And if any Man shall compel thee to go a Mile, go with him two. That is, says the same Father, *that you should not follow him like a Slave, but go before him like a Freeman.* Lib. IV. Cap. XXVI. *LIBANIUS*, who had read the Gospels, commends those who did not go to Law for the Recovery of a Coat or a Cloak, *Orat. de Custodiâ Reorum.* *St. JEROM* says, that *When any Man would sue us, and take away our Coat by litigious Chicanry, the Gospel directs us to grant him our Cloak also.* Dialog. I. Adv. Pelag. Tom. II. p. 274. Edit. Basil. GROTIVS.

The Passage of *St. CYPRIAN*, here quoted by our Author, is in his Treatise *De Bono Patientiæ*, p. 216. Edit. Fell. Brem. But it does not fully appear, that that Father designed it as an Explanation of the Words of the Gospel that follow.

and that from the Example of the *Jews*, amongst whom it was a received Maxim, that *He that brings the Cause of an Israelite before Strangers, profanes the Name of GOD*; but CHRIST, to exercise our Patience, would not have us dispute for Things that may be easily recovered, as a Coat, or a Cloak with a Coat, if one run a Risque of being deprived of both; nor prosecute our Right according to Law, however well founded it may be. *Apollonius Tyanæus* ⁶ said, *It was not like a Philosopher to sue for a little Money. The Prætor* (said *Ulpian* ⁷) *does not disapprove the Action of a Man, who had rather lose his Substance than be engaged in a Multiplicity of Law-Suits, for the Recovery of it; for this Aversion to Suits of Law is not to be condemned.* What *Ulpian* here says to be approved of by good Men, is what CHRIST himself commands, chusing the Subject of his Precepts from Things most honest and commendable: But we cannot justly infer from hence, that a Parent or Tutor ought not to defend by Law, when he is forced to it, what his Child or Pupil cannot subsist without. For a Coat or Cloak is one Thing, and one's whole Maintenance another. In *Clement's Constitutions*, it is said of a Christian, if ⁸ he have a Suit depending, *Let him endeavour to make it up, tho' it be somewhat to his Loss.* What therefore uses to be said of moral Things in general, may be applied here, that they do not consist in an indivisible Point, but have in their way a certain Extension.

So in that which follows, *If any Man shall compel thee to go with him one Mile, go with him two*: Our Lord did not say a hundred Miles, which might draw one too far from his necessary Business, but *one*, and if occasion be, *two*, which is only a kind of a Walk, and the Trouble and Hindrance occasioned by it almost nothing at all. The Meaning then is, that in Things which will not incommode us much we must not insist with Rigour upon our Right; but rather ⁹ yield more than is desired, that our ¹⁰ Patience and good Nature may be known unto all.

Our Saviour adds, *Give unto him that asks of thee*, ¹¹ *and from him that would borrow of thee, turn not away.* If these Words were understood without any Restriction, it would indeed be very hard. He that takes not care of his own Family is worse than an Infidel, says *St. Paul*. Let us then follow the Explication of *St. Paul*, the best Interpreter of his Master's Law, who exhorting the *Corinthians* to ^{1 Tim. v. 8.} Charity towards the Poor at *Jerusalem*, says, *Not that others should be eased and you be burthened; but that by an Equality*, ¹² *your Abundance should supply their Wants*; that is, (to use *Livy's* Words on a like Occasion) ¹³ *That out of your Plenty, you may relieve the Necessities of others.* As ¹⁴ *Cyrus* did towards his Friends, according to *Xenophon*. Let us use then the same Equity in explaining the Precept we have just now mentioned, *viz. Resist not Evil; but if any Man, &c.* ^{2 Cor. viii. 13.}

As the Law of *Moses* allowed the Liberty of a Divorce, to prevent the Cruelty of Husbands towards their Wives; so also to obviate all private Revenge, to which the *Israelites* were extremely inclined, it allowed the injured Person to avenge him-

⁶ *Vit. Apol. Tyan. Lib. II. Cap. XV. (XXXIX. Edit. Olear.)*

⁷ *DIGEST. Lib. IV. Tit. VII. De alienat. judicii, mutandi causâ factâ. Leg. IV. § 1.* This Law considered in itself, does not relate to the Action of sacrificing some Part of our Property, rather than engage in a Suit of Law. The Case is widely different; for the Person here supposed to avoid the Multiplication of Law-Suits, is in Possession of the Goods of another Man, who sees the Proprietor disposed to recover them into his own Hands. See *Mr. Noodt's* excellent Commentary on the first Part of the *DIGEST. p. 203, 204*; for I should be too long in this Place, if I undertook to give the Grounds of this Explication, which supposes an Acquaintance with the Niceties of the *Roman Law*.

⁸ *Lib. I. Cap. XLV.*

⁹ *CICERO* recommends making large Abatements of our Right, and avoiding Law-Suits and Quarrels, even sometimes to our own Prejudice. *De Offic. Lib. II. Cap. XVIII.*

¹⁰ *JUSTIN MARTYR* says, that our Saviour's Design in laying down this Precept, is to engage

us to the Practice of Patience and Civility to all Men, and to avoid Passion. *Apol. II. GROTIUS.*

¹¹ The same Father explains this of that Cheerfulness with which we ought to divide our Substance with the Indigent; and the Care we ought to take to avoid Ostentation in all our Actions. *Apol. II.* And in another Place, communicating our Goods to every needy Person. *St. CYPRIAN* says, *We are to refuse our Alms to no one.* *Testim. Lib. III. Cap. I. GROTIUS.*

¹² *I will give to the Indigent*, says *SENECA*, but so as not to reduce myself to Poverty. *De Benef. Lib. II. Cap. XV.* *St. CHRYSOSTOM*, on the Passage of the Epistle to the *Corinthians* here quoted, observes, that *GOD* requires of every one according to his Abilities only. And to explain himself more fully, he adds, that *The Apostle* commends the *Thessalonians* for giving more than they could afford; but does not oblige the *Achaïans* to do the same. *GROTIUS.*

¹³ *Lib. VI. Cap. XV. Num. 9.*

¹⁴ *Cyropæd. Lib. VIII. Cap. II. § 11. Edit. Oxon.*

self, not indeed by his own Hand, but by the Law of ¹⁵ Retaliation before the Judge; which ¹⁶ the Law of the Twelve Tables afterwards established, *He that breaks a Limb, let him suffer the like.* As CHRIST required of his Disciples an higher Degree of Patience, he was so far from approving this Demand of Revenge in the Person injured, that he does not allow some Injuries to be repelled by Force, or Law. But what Sort of Injuries? Such as might be easily born; ¹⁷ not but that it is praise-worthy to suffer even grievous Injuries without demanding Satisfaction; but that he is contented with a more limited Patience: Therefore he proposes the Example in a Box on the Ear, which does not indanger Life, nor maim the Body, but only declares a certain Contempt of us, which diminishes nothing of our Merit. Seneca, ¹⁸ in his Book of the Constancy of a wise Man, distinguishes an Injury from an Affront, *The former (said he) is by Nature more grievous, the other more light, and is hard to digest only for those that are very delicate; it offends, but does no hurt. Such is the Weakness and Vanity of our Minds, that some Men think nothing more insupportable; thus you will find a Slave, who had rather be scourged than take a Box of the Ear.* And the same * Author in another Place, *An Affront is less than an Injury, which we may complain of, rather than revenge; and which the Laws have not judged worthy of any Punishment.* So one in Pacuvius, ¹⁹ *I easily bear an Injury, so it be without an Affront.* So another in Cæcilius, ²⁰ *I can easily bear Misfortune, if not the Result of an Injury done me; and even an Injury, unless accompanied with an Affront.* And in Demosthenes, ²¹ *Blows, tho' a Grievance to a free Man, are so chiefly when given as a Mark of Contempt.* And the same Seneca a little lower says, ²² *That Grief (arising) from an Affront, is a Passion moved by a Meanness and Narrowness of Mind, affected by some disobliging Action or Word.*

Therefore in such a Case, CHRIST enjoins Patience; and lest any one should object the trite Proverb, ²³ *By bearing an old Injury you invite a new one;* he adds, we should also rather ²⁴ bear a second Injury than repel the first: Because from thence no Hurt comes to us, but what consists ²⁵ in a false Imagination. *To turn the Cheek*, is a *Hebraism* for to bear a Thing patiently, as appears from *Is. l. 6.* and *Jer. iii. 3.* *To turn the Face*, is used by ²⁶ Tacitus and ²⁷ Terence in the same Sense.

(3.) Arg.

Matt. v. 43, 44

3. The third Argument is usually taken from the following Words in St. Matthew, *You have heard it has been said, thou shalt love thy Neighbour, and hate thine*

¹⁵ This was not literally a Punishment of Retaliation; for no Criminal was to lose an Eye or a Limb, according to the Law of MOSES, which only imposed a Fine on such as wounded any one, if Death did not ensue. *An Eye for an Eye, a Tooth for a Tooth*, are therefore only proverbial Expressions; the Sense of which is, that every Man should be punished by the Judges, according to the Enormity of his Crime. See Mr. LE CLERC on *Exod. xxi. 24.* and *Deut. xix. 21.*

¹⁶ This Law ordered a strict Retaliation, unless the Criminal could prevail with the Person injured, to come to an Accommodation. See A. GELLIVS, *Noct. Attic. Lib. XX. Cap. I.* and FESTUS on the Word *Talio*.

¹⁷ See St. CHRYSOSTOM in the Place quoted Note 12. GROTIUS.

¹⁸ *De Constantiâ Sapientis. Cap. V.*

* *Ibid. Cap. X.* GROTIUS.

¹⁹ In his *Peribæa*.

²⁰ These Words are taken from a Piece intitled *Fallacia*, and are quoted by NONIUS MARCELLUS, page 430. *Edit. Paris. Mercer.* as well as those of the preceding Note. GRONOVIVS conjectures, that the last Words should be read *Nisi constat Contumeliæ*, instead of *Nisi constat Contumelia*.

²¹ Oration against MIDIAS, p. 395. *Edit. Gen.* This Passage is quoted by the Roman Lawyers, DIGEST. B. XLVIII. Tit. XIX. *De Pœnis. Leg. XVI. § 6.*

²² *De Constantiâ Sap. Ch. X.*

²³ *Veterem ferendo injuriam, invites novam.* This is one of PUBLIUS SYRUS's Sentences, preserved by AULUS GELLIVS, *Noct. Atticæ, Lib. XVII. Cap. XIV.* It is the 753d in GRUTER's Collection: On which see his Notes, published at Leyden in 1708.

²⁴ *It is a glorious Victory*, says St. CHRYSOSTOM, *to give the Offender more than he requires, and exceed the Bounds of his vicious Desires, by the Greatness of our own Patience.* In VII. ad Romanos. GROTIUS.

²⁵ The same Father says in another Place, that *An Affront either subsists or falls to the Ground, according to the Disposition of those who suffer, not according to the Intention of those who offer it.* Orat. I. *De Statuis.* GROTIUS.

²⁶ *Mox ut præberi ora contumelis, &c.* Hist. Lib. III. Cap. XXXI. Num. 5. and *Os & offerre contumeliis.* *Ibid. Cap. LXXXV. Num. 6.* LIVY says, *Præbere ad contumeliam os.* Lib. IV. Cap. XXXV. Num. 10.

²⁷ *Sa. Qui potui melius, qui hodie usque os præbui?*

Adelph. Act. II. Scen. III. Vers. 7. See also CICERO's first Epistle to Atticus, page 145. Vol. I. His Oration for Sextus Roscius, Ch. XLIX. page 205. And against Verres III. page 32. *Ed. Grævii*; where the same Expression is used in the same Sense.

Enemy; but I say unto you, love your Enemies, bless them that curse you, and pray for them that despitefully use you, and persecute you. There are some who think both capital Punishments and Wars repugnant to this Love and Kindness (to be shewn) to our Enemies and Persecutors. But that is easily answered, if we consider well the Words of the Law of *Moses*, to which our Lord opposes this Precept. The *Hebrews* were commanded to love their Neighbour; that is, those²⁸ of their own Nation; for so is the Word Neighbour to be understood, as appears from *Lev. xix.* by comparing the 17th Verse with the 18th. Nevertheless, the Magistrates were commanded to put to Death Murderers, and other notorious Offenders: Notwithstanding this likewise, the eleven Tribes justly made War upon the Tribe of *Benjamin* for their horrid Crime. So also *David*, who fought the²⁹ LORD's Battles, did recover by Arms the Kingdom promised him from *Ishbosheth*.

Judges xx. 21.

But let the Word *Neighbour* more largely extend to all Men whatsoever; for all are received into common Grace; no People are now condemned by GOD to utter Destruction; yet what was formerly lawful against the *Israelites*, will still be as lawful against all Men: Since it was then commanded to love them, as it is now to love all Men. But if you urge, that under the Evangelical Law there is required a greater Degree of Love; this may also be granted; provided also it be allowed, that all are not to be³⁰ equally loved, but a Parent (for Instance) more than a Stranger: Thus also we are to prefer the Good of the Innocent to that of the Guilty, and a publick Good before a private one, by the Law of a well regulated Charity. Now out of Love to the Innocent, arise capital Punishments and pious Wars. See the moral Sentence which is in *Prov. xxiv. 11.* CHRIST's Precepts then of loving and promoting the Good of every one, are to be obeyed, unless a greater and juster Love interpose: It is a known old Saying,³¹ that *To spare all is as cruel as to spare none.* Besides, we are commanded to love our Enemies from the Example of GOD himself, who makes his Sun to rise upon the Wicked; but the same GOD does even in this Life punish some wicked Persons, and will do it very severely in the next. By which at the same Time are solved all the Arguments that use to be drawn from the Meekness that is prescribed to Christians: For tho' GOD is called gentle, merciful, long-suffering, yet Holy Writ does every where declare his Wrath against³² obstinate Sinners, that is, his Design to punish them; and the Magistrate is appointed to be the Minister of this Wrath. *Moses* is famed for his extraordinary Meekness, yet he punished Offenders, and that capitally. We are frequently commanded to imitate the Mildness and Patience of CHRIST; but yet it was CHRIST who³³ grievously punished the rebellious *Jews*, and will condemn the Wicked at the Day of Judgment for their Crimes. The Apostles imitated their Master's Gentleness,³⁴ yet they used the Power given them from GOD in the Punishment of heinous Sinners.

Ex. xxxiv. 6.
Jonah iv. 2.

Numb. xiv. 13
Rom. ii. 8.
— xiii. 4.
Matt. xxii. 7.
1 Cor. iv. 21.
— v. 5.
1 Tim. i. 20.

The

²⁸ The *Profelytes* were placed on the Level with the *Hebrews* in this Particular, and the Laws which prohibited doing an Injury to another, were also extended to those uncircumcised Inhabitants, of whom we have spoken, Chap. I. § 16. This is acknowledged by the *Talmudists*. GROTIUS.

²⁹ See § 2. of this Chapter, Num. 3. at the End.

³⁰ TERTULLIAN says, *The first Degree of Goodness is that exercised toward Relations: The second, That employed on Strangers.* Against *Marcion*. B. IV. Chap. XVI. St. JEROM having acknowledged himself obliged by the Divine Precept to love his Enemies, and pray for his Persecutors; asks, Whether it is just that he should love them like his near Relations? And that no Difference should be made between an Enemy and a bosom Friend? Against *Pelag.* Dial. I. Vol. II. page 274. Edit. Basil. GROTIUS.

³¹ These are SENECA's Words, *Nam tam omnibus ignoscere Cruditatis est quam nulli.* De Clementia. Lib. I. Cap. VII. St. CHRYSOSTOM, speaking of human Punishments, says, *These Things are not done by Men out of Cruelty, but out of Humanity.* In I. ad Cor. iii. 12, &c. And St. AUGUSTIN, to the same Purpose, *As there is sometimes*

a punishing Compassion; so there is also a tender Cruelty.— Ep. LIV. to *Macedonius*. The Emperors VALENTINIAN, THEODOSIUS, and ARCADIVS, in the third Law of the *Theodosian Code*, *De defensoribus civitatum*, speak thus, *Let all Protections be removed, which by favouring the Guilty, and assisting the Criminal, encourage the Growth of Wickedness.* (This Law occurs in almost the same Terms, under the same Title, in the *Justinian Code*, Leg. VI.) TOTILA declared, that *To commit a Crime, and screen the Guilty from Punishment, were Actions equally culpable.* PROCOPIUS. Gothic. Lib. III. Cap. VIII.

³² See St. CYRIL on this Subject, in his fifth Book against *Julian*, Page 173, &c. Edit. Spanheim. GROTIUS.

³³ See likewise MATT. xxi. 41. LUKE xix. 12, 14, 27. St. CHRYSOSTOM, having enumerated the Calamities which befel *Jerusalem*, adds, *And to shew you that CHRIST himself did all this, bear him foretelling it, both in Parables, and in clear and express Terms.* In *Romans* xiv. See also his second Oration against the *Jews*, where he has something to the same Purpose.

³⁴ Shall I kill? Shall I cut off a Limb? For there

The fourth Objection is taken from *Rom. xii. 17.* *Render to no Man Evil for Evil: Provide Things honest in the Sight of all Men: If it be possible, as much as lies in you, live peaceably with all Men: Dearly beloved, ³⁵avenge not yourselves, but rather give Place unto Wrath; for it is written, Vengeance is mine, I will repay, saith the LORD: Therefore, if thine Enemy hunger, feed him; if he be a thirst, give him Drink; for in so doing thou shalt heap Coals of Fire upon his Head. Be not overcome of Evil, but overcome Evil with Good.* But here also we may give the same Answer as to the former Passage; for when ³⁶GOD said, *Vengeance is mine, I will repay*, at the very same Time capital Punishments were in Use, and there were written Laws touching Wars. We find likewise an express Command to do Service to one's Enemies, that is, to those who were of the same Nation; without Ex. xxiii. 4, 5. Prejudice however to the Right of inflicting capital Punishments, even on the *Israelites* themselves, and taking up Arms against them for just Reasons, as we have said above. Wherefore neither can the same Words now, or the like Precepts, tho' taken more largely, be wrested to such a Sense; and the less, because the Division of Chapters was not made by the Apostles, or in their Time, but ³⁷much later, for the Convenience of Readers; and for the more easy quoting of the Places: And therefore, what now begins the thirteenth Chapter, *Let every Soul be subject to the higher Powers*, and what follows, was formerly joined to those Precepts of not taking Revenge.

But in this Discourse St. Paul says, that the publick Powers are GOD's Ministers, and *Revengeurs to execute Wrath* (that is, Punishment) upon those that do Evil: Most plainly distinguishing thereby, between the Revenge that is exercised in GOD's Stead, for the publick Good, and that ought to be referred to the Vengeance which GOD has reserved to himself; and that *private Revenge* which is intended only to satisfy the Resentment of an Injury, and which the Apostle had a little before forbid. For if we would comprehend even that Revenge which is required for the Sake of the publick Good in that Prohibition, What would be more absurd than, when he had bid them abstain from capital Punishments, to add immediately, that the publick Powers were ordained by GOD to this End, to execute Punishment in GOD's Stead?

(5.) Arg.
2 Cor. x. 3.

5. The fifth Place, which some alledge is, *Tho' we walk in the Flesh, we do not war after the Flesh; for the Weapons of our Warfare are not ³⁸carnal, but mighty, through GOD, to the pulling down of strong Holds, &c.* But this Place makes nothing to the Purpose; for both what goes before, and what follows, shews that by the Word *Flesh* St. Paul there meant the weak State of his Body, as to outward Appearance, upon which Account he was contemned. To this St. Paul opposes his own Weapons, that is, the Power given to him as an Apostle, to punish the Refractory, which he used to *Elymas* the Sorcerer, the incestuous *Corinthian*, *Hymenæus*, and *Alexander*. He therefore denies this Power to be carnal, that is, weak; nay, on the contrary, he affirms it to be most strong. What is this to the Right of capital Punishments, or of War? Nay, on the contrary, because the Church at that Time was destitute of the Assistance of the publick Powers, GOD raised up that miraculous Power for its Defence; which began to cease almost as soon as the Church had Christian Emperors; as the Manna ceased as soon as the *Israelites* were come into a fruitful Country.

there is a Spirit of Lenity, and a Spirit of Severity. CHRYSOST. 1 Cor. iv. 21. See likewise St. AUGUSTIN, *De Sermonibus Domini in Monte.* Lib. I. and others quoted by GRATIAN. Cause XXIII. Quest. VIII. GROTIUS.

³⁵ The Vulgate reads *defendentes* in this Place; but that Word is frequently used by Christian Writers for *revenging*. TERTULLIAN, in his Treatise *Of Patience*, Chap. X. against *Marcion*, B. II. Chap. XVIII. The Passage of St. PAUL, here under Consideration, is well explained by St. AUGUSTIN in the following Manner: *We are therefore forbidden to resist Evil, that we may not be delighted with Revenge, which feeds the Mind with the Damage sustained by others.* Ep. CLIV. GROTIUS.

³⁶ See *Levit. xix. 8.* and *Deut. xxxii. 35.* where we have the Sense of the Words.

³⁷ The present Distinction of Chapters is attributed to *Hugo de Sancto Charo*, a Cardinal, who lived in the thirteenth Century; or to others not much earlier. Before that Time there was a much more antient Division, made towards the Close of the fourth Age. See Dr. MILLS's *Prolegomena*, Num. 905, &c. Edit. Kuster. According to that, the twelfth, thirteenth, and fourteenth Chapters in our Editions make but one; as may be seen in the said Doctor's beautiful Edition.

³⁸ St. CHRYSOSTOM is of Opinion, that by *carnal Weapons* in this Place, are understood *Riches, Glory, Power, Eloquence, Address, Intrigue, Flattery, and Hypocrisy.* GROTIUS.

6. The sixth Place produced is, *Put on the whole Armour of GOD, that ye may be able to stand against the Wiles of the Devil; for we wrestle not against Flesh and Blood, (add only, after the Manner of the Hebrews) but against Principalities, &c.* ^{(6.) Arg. Eph. vi. 11, 12.} He speaks of that Warfare which Christians have, as Christians, not of that which they may have in common with other Men upon certain Occasions.

7. The seventh Place that is brought is, *From whence come Wars and Fightings among you? Come they not hence, even from your Lusts, that war in your Members? Ye lust; and have not: Ye envy, and desire to have, and cannot obtain: Ye fight and war, and yet ye have not, because ye ask not; ye ask and receive not, because ye ask amiss, that ye may consume it upon your Lusts.* ^{(7.) Arg. James iv. 1, 2, 3.} This contains no general Maxim, which absolutely condemns the Use of Arms; it only says, that those Wars and Fights with which the dispersed Jews were at that Time miserably harassed among themselves (part of which History we meet with in *Josephus*) did arise from wicked Causes; and that the Case is the same still, we know, and lament. That of *Tibullus* has a Meaning not unlike this Passage of St. James. ³⁹ *Gold is the Cause of so many Quarrels: There were no Wars whilst People drank out of wooden Goblets.*

And we find it remarked ⁴⁰ often in *Strabo*, that those Nations ⁴¹ lived most innocently, whose Diet was most simple. What ⁴² *Lucan* says is agreeable to this, — *O profuse Luxury, that is never satisfied with small Provision! Ambitious desire of Dishes, every where searched for, by Sea and by Land! Vain Pomp of splendid Tables! Learn, how little is sufficient for Life; how small a Portion Nature is contented with. Rich and old Wines cannot raise the Sick; it is not necessary for them to drink out of Gold or Porcelain Cups. It is fair Water that restores Health. A good Fountain, together with Bread, is enough for Men. Wretched Mortals! Why then do they go to War? To which we may add that of ⁴³ *Plutarch*, in *The Contradictions of the Stoicks*, *There is no War among Men, but what arises from Vice; one from the Desire of Pleasures,**

39 *Divitis hoc vitium est auri; nec bella fuerunt, Faginus adstabat quum scyphus ante dapes.*

Lib. I. Eleg. XI. v. 7, 8. Edit. Brockhuys.

40 See, for Example, B. VII. p. 300. Edit. Paris. B. XIV. p. 656. and B. XV. p. 713.

41 PHILO the Jew makes the same Remark, in his Treatise *Of a contemplative Life*, p. 892. Edit. Paris. upon quoting that Verse of HOMER, *Iliad*. B. XIII. v. 6.

Γλακτοφάγων, ἀβίωντε, δικαιοτάτων ἀνθρώπων.

Men who live on Milk, and in great Poverty; but are remarkable for their Probity. JUSTIN, having told us that the Scythians made a Profession of *Despising Gold and Silver as much as other Men idolized them*, observes, that *The Innocence of their Morals and Freedom from Avarice proceeds from this excellent Disposition*; FOR, says he, *where the Use of Riches is known, there Covetousness is found.* B. II. Ch. II. Num. 8, &c. NICEPHORUS GREGORAS says something like this of the same People, B. II. The Passage is worth reading. PLUTARCH, in his *Life of Alexander the Great*, p. 698. Vol. I. Edit. Wechel. introduces *Taxiles*, an Indian King, speaking thus to that Prince, *What Necessity is there of Fighting and Wars between us, if you neither come to deprive us of our Water, nor necessary Food; for which only reasonable Men are obliged to take Arms?* DIOGENES the Philosopher said, that *Robbers and Warriors were not to be found among such as lived on Water-gruel.* PORPHYRY looks on a *simple and cheap Diet, as what contributes very much towards establishing Piety, and making it common among Men.* Of Abstinence from Animal Food, B. II. p. 144. Edit. Lugd. 1620. GROTIUS.

In the Verse quoted from HOMER, at the Beginning of this Note, our Author, following the

common Explanation, takes Ἀβίων for an Epithet; whereas it is the proper Name of some of the ancient Scythians, as the Author of the short *Scholia* observes, tho' he has given Occasion to this false Interpretation. Upon consulting STRABO's *Geography*, B. VII. p. 296, 300. Edit. Paris. ARRIAN's Account of *Alexander's Expedition*. B. IV. Ch. I. Q. CURTIUS, B. VII. Chap. VI. Num. 11. And STEPHANUS, *De Urbibus*, under the Word Ἀβιοί, it will appear, that the Poet here speaks of the Abians, as a particular People; and it is surprising, that Madam DACIER is the first Translator of HOMER, who hath not made a Mistake in this Place; for not only WETSTEIN's small Edition, but also Mr. BARNES's large and beautiful Edition, are here conformable to those which had appeared before. In the latter the Printer has omitted the whole Greek Scholium on the sixth Verse, which the Editor has not observed, tho' he assures the Publick, he has placed it in better Order than it ever was in before. The Saying of DIOGENES, which our Author produces, without telling us where he found it, may be seen in PORPHYRY, B. I. p. 94. I am the more willing to make this Observation, because this Saying is one of those which have escaped the Enquiries, not only of Mr. STANLEY, in his *Philosophical History*, written in English; but also those of the late Mr. OLEARIUS, who when he translated that excellent Piece into Latin, undertook to make the necessary Supplements to it.

42 *Pharsal*. Lib. IV. v. 473, &c.

43 Page 1049. Vol. II. Edit. Wech. This is a very just Observation, but little regarded. It will not be improper to confirm it by some other Passages, as beautiful as those already quoted. The Philosopher ATHENÆUS, in a Greek Epigram, *Mortals, why take you so much Pains for evil Things, and engage*

Pleasures, another from Covetousness, and a third from Ambition. ⁴⁴ Justin commending the Manners of the Scythians, says, *It were to be wished that the rest of Mankind practised the like Moderation, and were as scrupulous of grasping at other Men's Goods and Possessions. We should not then see so many continual Wars carried on in all Ages, and in all Countries; nor would the Sword carry off greater Numbers than die of a natural Death.* ⁴⁵ Cicero says, *Disorderly Passions give Birth to Hatred, Dissentions, Discord, Seditions, and Wars.* ⁴⁶ Maximus Tyrius, *All Places are now full of War and Injustice; for irregular Passions are every where let loose, and inspire all Mankind with a Desire of adding to their Possessions.* And ⁴⁷ Jamblichus, *For nothing but an excessive Concern for the Body, and the Passions which direct making an extravagant Provision for it, are the Causes of Wars, Seditions, and Quarrels; for Men engage in War, for the sake of procuring what is pleasant and advantageous to them.* But what was said to St. Peter, *All they that take the Sword, shall perish with the Sword;* not belonging to War, in its common Acceptation, but properly to the Use of Arms between private Persons, (for CHRIST himself gives this Reason of his forbidding or neglecting his Defence, because *His Kingdom was not of this World*) shall be treated of in its ⁴⁸ proper Place.

Matt. xxvi. 52

John xviii. 36.

IX. The Opinion of the primitive Christians concerning this, examined.

IX. Whensoever there is any Dispute about the Sense of what is written, the Practice afterwards established, and the Authority of the Judicious, uses to be of great Weight; which is also to be observed in Holy Scripture. For it is not probable, that the Churches, which were founded by the Apostles, should suddenly, or all at once, fall off from the Maxims which the Apostles had briefly given them in Writing, and more largely explained by Word of Mouth, or had even reduced into Practice. But they who condemn all Kind of War without Exception, use

engage in Quarrels and Wars, at the Instigation of an insatiable Desire of Gain?

Ἀνθρώποι, μοχθεῖτε τι χεῖρονα, ἢ διὰ κέρδους
Ἀπληστον νεικῶν ἀρχεῖτε ἢ πολέμων.

DIAGEN. LAERT. B. X. § 12. Edit. Amst.

FABIANUS PAPIRIUS, an antient Rhetorician, writes thus, *We see Armies drawn up in Battle Array, where often fellow Citizens and Relations are ready to engage one with another: The Hills on both Sides are covered with Cavalry, and soon after the whole Country is covered with dead Bodies, or Plunderers. Should it be asked, What forces Man to commit this Crime on Man? Since even the wild Beasts do not make War one with another; and if they did, Would the same Conduct become Man, that peaceable Animal, and most nearly resembling the Divinity? What excessive Rage actuates you, who are one Family, and of the same Blood? Or what Fury animates you to shed one another's Blood? By what Chance, or by what Fatality, has so pernicious a Practice been introduced among Mankind? Must Parricide be committed, with a View of making splendid Entertainments, and adorning Palaces with Gold? No Doubt those Things must be great, and worthy of Commendation, which induce us to admire our sumptuous Tables, and rich Cielings, rather than retain our Innocence, and live in the open Air. Ought we not to desire to enslave the whole World, that we may have it in our Power to indulge our Appetites and Passions without Restraint? In fine, Why are pernicious Riches sought for with so much Eagerness, but with a Design of leaving them to our Children?* SENECA, *Controvers. B. II. Controv. IX. p. 153.* Edit. Elziv. *Doth the Love of Riches, of a Woman, of Glory, or any Thing else that affords Pleasure, prove the Cause of small and common Evils? Doth not this divide the nearest Relations, and convert their natural Affection into irreconcilable Hatred? Is it not for this that large and populous Countries are reduced to so many Desarts, by domestick Seditions? Is it not this that daily fills both*

Sea and Land with new Calamities, by Means of Fleets and Armies? The Wars of the Grecians and Barbarians, either with one another, or among themselves, which are described by the Tragick Writers, are all derived from one Source, the Desire of Riches, Glory, or Pleasure. PHILO the Jew, on the Decalogue, p. 765. Edit. Paris. PLINY observes, that *The Magnificence of Riches has a Tendency to promote enormous Crimes, Destruction, and War.* Hist. Natural. Lib. II. Cap. LXIII. The Philosopher DIOGENES says, that *Tyranny, the Ruin of Cities, foreign and intestine Wars, are not owing to a Desire of purchasing a simple Diet of Herbs and Fruit; but to a Fondness for exquisite Food and Dainties.* St. JEROME, *Adv. Jovinian. B. II. p. 77.* Edit. Basil. St. CHRYSOSTOM observes, that *If mutual Love was maintained among all Mankind, no one would injure another; Murthers, Quarrels, Wars, Seditions, Rapines, insatiable Desires, and all other Vices, would be banished out of the World.* In 1 Cor. xiii. 3. and in another Place, he asks, *Are not they (the Rich) the Authors of Seditions, Wars, the Destruction of Cities, Slavery, Captivity, Murder, and an Infinity of other Calamities?* Orat. ad Patrem fidelem.

CLAUDIAN says, *If Men would be content with the little Nature requires, we should not hear the Sound of the Trumpet, nor be exposed to Sieges.* In Rufin. Lib. I. v. 206, &c.

AGATHIAS maintains, that *The Minds of Men, wholly addicted to Injustice, and insatiable Desires, fill the World with War and Confusion.* Histor. Lib. I. Cap. I. I shall conclude all the fine Passages I have quoted, with a Saying of POLYBIUS, *When one knows how to be contented with the Necessaries of Life, one needs no other Philosophy or Master.* Apud SUIDAM, VOC. Ἀυλόμενα.

⁴⁴ Lib. II. Cap. II. Num. 2, &c.

⁴⁵ De Finib. Bon. & Mal. Lib. I. Cap. XIII.

⁴⁶ Dissert. XIII. p. 142. Edit. Davis.

⁴⁷ Cap. XIII. p. 142.

⁴⁸ In the next Chapter, § 3.

to alledge some Passages of the primitive Christians; against which I have three Things to say.

First, That from those Passages nothing else can be gathered, than the private Sentiment of some Persons, not the common Opinion of the Churches. Besides, most of them who are cited, affected to be singular, and to teach something more sublime; such as, for Example, *Origen* and *Tertullian*, who are not always consistent with themselves. For the same *Origen* says, that Bees were given as a *Pattern* by GOD, of ¹ *the just and regular Method that Men ought to take in making War, when there is a Necessity for it.* And the very same *Tertullian*, who in another Place seems to disapprove of capital Punishments, said, ² *No Body denies but it is* ³ *good to punish the Guilty.* And he is at a Stand about Wars; for in his Book *Of Idolatry*, he ⁴ says, *The Query is, Whether the Faithful may be allowed to take up Arms; and whether military Persons may be admitted into the Christian Church?* And in that Place, he seems to incline to that Opinion which is against War. But in his Book *Of the Soldier's Crown*, after he had made some Reflections against War, he presently distinguishes between them who were Soldiers before their Baptism, and those who list themselves after Baptism. ⁵ *Their Condition* (says he) *is plainly different, who were Soldiers before their Conversion to the Faith; as those whom John admitted to Baptism, or as those most pious Centurions, one of whom* Matt. viii. 9. Acts x. *CHRIST approved of; and another St. Peter instructed: ⁶ Provided that having embraced the Faith, and being sealed (by Baptism) they either presently quit their Employment, as many have done; or be particularly careful that they do nothing to offend GOD.* He then was sensible that they continued Soldiers after Baptism, which certainly they would not have done, if they had understood War to have been forbidden by CHRIST; no more than Soothsayers, Magicians, and ⁷ other Professors of unlawful Arts, were allowed after Baptism to practise their Art. In the same Book, commending a certain Soldier, and him a Christian, he cries out, ⁸ *O Soldier, glorious in GOD!*

The second Observation is, That Christians did often disapprove or avoid War, on account of the Circumstances of the Times, which would scarce permit the bearing of Arms, without committing some Actions contrary to the Laws of Christianity. In *Dolabella's* Letter to the *Ephefians*, which is extant in *Josephus*, we find the *Jews* ⁹ desire to be exempted from all military Expeditions, because mixt with Strangers, they could not well perform the Rites of their own Law; and because they were forced on the Sabbaths to bear Arms, and make long Marches; and the same Historian tells us, that for the same Reasons the *Jews* got Leave ¹⁰ of *Lentulus* to

IX. (I) Πρὸς τὸ δικάζειν, ἢ τεταγμένους πολέμους, εἰπότε δέοι, γίνεσθαι ἐν ἀνθρώποις. Our Author quotes only these Words, without specifying the Place whence he took them.

² *Bonum esse, quum puniuntur Nocentes, nemo negat.* Thus our Author cites the Passage, but does not tell us in what Treatise it is to be found. It is in the nineteenth Chapter of his Book *De Spectaculis*, where it is delivered in a more energetical Manner, *Bonum est, quum puniuntur nocentes. Qui hoc nisi Nocens, negabit?* It is good to punish the Guilty. *Who, but a Criminal, will deny this?*

³ The same Father says elsewhere, that, according to St. PAUL, *Human Justice does not bear the Sword in vain; and the Severity of Punishment is advantageous to Mankind.* *De Animâ. Cap. XXXIII.* He addresses himself to the Proconsul *Scapula*, in the following Terms, *We do not attempt to terrify you, nor are we afraid of you. But I wish we could save all Men, by exhorting them not to fight against GOD. You may both exercise your Jurisdiction, and be mindful of the Duties of Humanity; even on this Consideration, that you yourselves are under the Power of the Sword.* *Cap. IV. GROTIUS.*

⁴ *De Idolatria, Cap. XIX.*

⁵ *Cap. XI.*

⁶ TERTULLIAN applies this Distinction to Marriage, in his Treatise *Of Monogamy*, and in his Ex-

hortation to Chastity. GROTIUS.

⁷ TERTULLIAN says, *Such Persons are not received into the Church, as exercise Professions not allowed of by the Law of GOD.* *De Idolatria, Cap. V.* The primitive Christians admitted neither Prostitutes, Stage-Players, nor Persons of any other infamous Professions, to the Sacraments of the Church, till they had renounced such criminal Engagements. As we learn from St. AUGUSTIN, *De Fide & Operib.* Chap. XVIII. See an Example of this Discipline, in regard to a Comedian, in St. CYPRIAN, *Epist. LXI.* (2d Edit. Oxon.) in regard to the Gladiators, infamous Promoters of Debauchery, and such as traded in Cattle for Sacrifices; in TERTULLIAN, *De Idol.* Cap. XI. of a Charioteer in the publick Games, in St. AUGUSTIN. GROTIUS.

⁸ *De Coronâ militis, Cap. I.*

⁹ Alexander, the Son of Theodore, deputed from Hyrcanus, High Priest, and Prince of the Jewish Nation, has declared to me, that his Countrymen cannot engage in the Army, because they are not allowed to bear Arms or March on the Sabbath Day, and will not easily be able to observe the Distinction of Meats, and other Customs belonging to that People. *Antiq. Jud. Lib. XIV. Cap. XVII. pag. 488. Edit. Leipf.*

¹⁰ This Account immediately follows the Passage quoted in the last Note.

be discharged ; and in another Place he relates, when the *Jews* were commanded to depart from the City of *Rome*, ¹¹ some lifted themselves Soldiers, others were punished for refusing to do it in Reverence to the Laws of their Country ; namely for the Reasons mentioned before ; to which there was sometimes added a third, because they would be obliged to fight against their own Countrymen, *but to bear Arms against their Nation was unlawful* ; that is, when their Countrymen were in danger for observing the Laws of their own Country. But as often as the *Jews* could avoid these Inconveniencies, they served in the Wars, even under foreign Kings, but yet ¹² *continuing to observe the Laws of their Country, and to live according to them*, which they first stipulated, as *Josephus* testifies. Very like to these Dangers were those, which *Tertullian* objects to the Men of the Sword in his Times ; as in his Book of Idolatry, ¹³ *The Oath of Fidelity to GOD, and that to Man, the Banners of CHRIST, and those of the Devil, are things inconsistent with one another* : Because the Soldiers were obliged to swear by the Pagan Gods, *Jupiter, Mars, and others*. In his Book of the Crown of a Soldier, he says, ¹⁴ *Shall he (a Christian) stand Centry before the Temples which he has renounced ; and shall he sup where he is forbid by the Apostle ? Shall he guard those (Demons) by Night, which he has exorcised in the Day ? And afterwards, ¹⁵ How many other Military Functions are there, which ought to be looked on as Sins ?*

The third Observation is this, that the Christians of the Primitive Times aspired with so much Ardor to the highest degree of Perfection, that they often took the divine Counsels for Precepts of an indispensable Obligation. *Christians* (says ¹⁶ *Athenagoras*) *do not sue at Law those that rob them*. *Salvian* ¹⁷ said it was commanded by CHRIST that we should rather abandon those things that are contested than engage in a Law Suit. But this taken so generally, ¹⁸ seems to be design'd rather

as

¹¹ *Antiq. Jud.* XVIII. Cap. V.

¹² This is what *JOSEPHUS* says of *Alexander the Great*, who proposed their serving him on these Conditions. *Antiq. Jud.* Lib. XI. Cap. ult.

¹³ *De Idolol.* Cap. XIX.

¹⁴ *De Coronâ Militi*, Cap. XI.

¹⁵ *Ibid.*

¹⁶ *Legat. pro Christian.* Cap. I. p. 10. *Ed. Oxon.* 1706.

¹⁷ *De Gubernat. Der.* Lib. III. p. 74. *Edit. Paris.* 1645. *St. BASIL the Great* pretends that going to Law is expressly forbidden by the Gospel. *Homil. de Legend. Grecor. Lib.* § 7. *Edit. Oxon.* 1694.

¹⁸ Without entering into Theological Disputes, I shall only make some Remarks, which, in my Opinion, will be sufficient for shewing how little Grounds there are for what has been formerly and still is said in many Places, concerning those pretended *Evangelical Counsels* ; and at the same Time discovering what gave Occasion to the Distinction between them and *Precepts*. First, then, I say, if there were really any divine *Counsels*, properly so called, they must necessarily relate to such things as on one hand are always commendable, excellent, and in their own Nature agreeable to GOD : And on the other, left entirely to the Liberty of every Man ; so that they can in no Case be obligatory. Now, upon a careful Examination of the very Examples, here alledged by our Author from the ancient Fathers, which are the most considerable of those made to regard the *Evangelical Counsels*, it will appear that they turn on things, which either are neither good, nor evil in their own Nature, or are really obligatory in relation to certain Persons, and in certain Circumstances. 1. Let us begin with *second Marriages and Celibacy* in general, which our Author elsewhere ranks in this Class. *B. III. Chap. IV. §. 2. numb. 1.* It is certain that whether a Person marries or lives single, he does neither Good nor Evil in that, considering the thing in itself. As the married State does not necessarily engage to Vice, so

neither is an unmarried Life an infallible Means for practising Virtue.

A Man may be good or bad in a married State ; as he may likewise be either in Celibacy. It is but too evident from Experience that those, who have made a Vow of Celibacy, or laid themselves under the same Tie in regard to a second Marriage, have generally fallen into one of these two Inconveniencies, viz. either they have not lived chastly, or have not proved less subject to other Passions and Vices very unworthy of a Christian, such as Anger, Covetousness, Hatred, Pride, the Spirit of Domination, Sloth, &c. even though a Man's Constitution will easily allow him to forego Marriage, if while he lives in Celibacy, he does not for that Reason become more useful to Society, and more capable of discharging his Duty, the Matter is then entirely indifferent. But if one has good Reason to believe he shall be able to employ his Time better, and do the Publick more Service in a single Life (which depends on the Condition and Circumstances of each Person, of which they must judge for themselves) he is then under an indispensable Obligation not to marry, supposing he believes himself entirely secure from Temptations of Impurity ; or not to marry a second Time, especially when he may thus make a better Provision for his Family. 2. In regard to forbearing Law Suits, and chusing rather to lose one's Property, than sue the Person, who has taken it from us or detains it unjustly ; it is a general Maxim, that we are obliged to make some Abatement in our Right, whenever that can be done without great Prejudice to ourselves, or occasioning any other Inconvenience. The View of promoting Peace, and Prudence equally require such a Cession. So that Law-Suits bring commonly so many pernicious Sources of Hatred, Animosities, Divisions, Discontent, Perplexities, Expences, &c. we are to avoid them as much as possible, and expose ourselves to a slight Loss rather than engage in all unhappy Consequences, which attend the pursuit of our most just Rights. This is not a Counsel, but a real Precept,

cept, both the Gospel, and the Law of Nature, especially when certain particular Circumstances demand such a Moderation. This was the Case in the Infancy of Christianity, when, to avoid giving an ill Opinion of that Religion, and its Votaries, it was highly improper for Christians to go to Law in the Courts of *Pagan Judges*. See what our Author says, Paragraph 8. of this Chapter, *num.* 4. But, if no such Inconvenience to ourselves or others is to be apprehended, and some considerable Interest is at Stake, it is so far from being a very commendable Action, quietly to permit our Property to be taken away, or detain'd, that it would even be a bad one; for thus ill-designing Men would be encouraged to do evil; and such a Moderation would be the more blameable, as it might add to the Inconveniences of one's self or one's Friends. So that Patience in the Case before us, is either useless or prejudicial; and then it cannot deserve Commendation; or it is a real Duty. Almost the same may be said of declining War. Thirdly, when the primitive Christians refused the Edileship or Prætorship, it was, according to *GRONOVIUS*, because those who accepted of these Posts were obliged to exhibit publick Shews for the Entertainment of the People, in which there was some Mixture of Idolatry. But the extravagant Ideas they had of several other things, give us room to believe, that many of the antient Doctors of the Church condemn'd all in general, who fought for or accepted of Honours and Dignities. In regard to the thing its self, the Honours in question are either vain Titles and frivolous Distinctions, which suppose no Merit in the Persons who receive them, and have no Tendency to promote the Good of Society: Or it is requisite that they, on whom they are conferred, should be possess'd of certain commendable Talents and Qualities, for the worthy Discharge of the Functions annexed to them. There is no great Virtue in neglecting or rejecting the former: And as there is great Danger they will inspire us with Sentiments of Pride, even that ought to be a Reason for avoiding them. In regard to the latter, either the Candidate is possess'd of the Qualifications requisite for acting in a publick Character, or he is not. If not, or even if there are other Candidates who are possess'd of them, in a much greater Degree, he commits a Fault in pursuing, or even barely accepting of the Dignities in Question, for which a Man can never be too well qualified. But if one is convinced not only in one's own Opinion, in which one may deceive himself; but also by the impartial Judgment of understanding Persons, that one is much more capable of acquitting one's self of an honourable Employ, to which one is called, than others who aspire at them, it would be either Sloth or false Modesty to decline it, and it could not be reasonably done, but when the Person is engaged to do by some stronger Obligation, or knows he has great Reason to apprehend the Influence of Temptations to Vanity, which might prompt him to frequent Abuses of the Power and Privileges with which he would be invested. Fourthly, *LACTANTIUS* does not allow a Christian to trade by Sea. *For why should he go to Sea,* says that Father, *or what should he seek for in a foreign Country, when his own furnishes him with all Necessaries?* Lib. V. Cap. XVII. But the Apostle St. *JAMES* manifestly supposes it lawful to go from Coast to Coast for the sake of Traffick and Gain. Chap. iv. v. 13, 14. The thing therefore is in itself indifferent; so that as we may Trade either innocently, or in a manner contrary to some Virtue; to abstain from trading, unless it be with a View of avoiding an insatiable Avidity of Gain, to which a Man finds himself disposed, or some other dangerous Temptation, has nothing in it deserving Commendation. In this Case it is no lon-

ger a pretended Counsel of extraordinary Perfection, but an indispensable Obligation incumbent on every Christian. Fifthly, taking an Oath is sometimes indispensibly necessary, as when things which regard the Glory GOD, or the Good of Mankind are concerned; or when the Magistrate for just Reasons requires it. As to these Cases, where our Interest only is concerned, and where the Distinction of *Counsels* and *Precepts* might take Place most, we are to judge of them by the Principles already laid down in regard to Law-Suits. Sixthly, to all these Examples given by *GROTIUS*, let us add one alledged by Dr. *HAMMOND*, who, out of respect to Ecclesiastical Antiquity, had likewise adopted the Distinction of *Counsels* and *Precepts*, as appear from his long Note on *Colos.* ii. 23. It is taken from St. *PAUL's* Generosity, in preaching the Gospel without receiving any Salary. *1 Cor.* ix. 15, 18. But on a close Examination of the Matter, we shall find nothing in it relating to a *Counsel* properly so call'd. Though the Apostle glories in not having made use of his Power of demanding a Salary, and *expects to be rewarded* for his Conduct, it does not thence follow that the said Act was entirely free in regard to him; and had no relation to his Duty. He himself clearly gives us to understand the contrary, when he says, that if he had not made use of his Power, it was *that the Gospel might be without Charge*. In Reality, it was a Matter of the last Importance, that the first Preachers of the Gospel should carefully avoid all that could give the least Suspicion of their publishing the Christian Religion for their own Profit and Advantage: And it may be said in general that all who undertake to instruct others in that holy Religion, can never appear too disinterested, or be too humble. Thus, though the Persons to whom the Apostles preached, could with no shew of Reason require them to do it without some Salary; and that, strictly speaking, St. *PAUL* was not obliged to do it; yet as soon as he was persuaded his Ministry would by that Means prove more efficacious (which probably he had room to conclude from some particular Reason unknown to us; and he seems elsewhere to insinuate that he had one, *2 Cor.* xi. 9, 10, 11, 12, 13.) he lay under a real Obligation so to do; an Obligation founded on the general Engagement, which requires every Man to seek and employ all Means necessary for acquitting himself of an important Charge, in the best manner he is able. However, as in such Cases Persons make an Abatement of their Right in Favour of those with whom they have to do; and therefore a greater Stock of Virtue is requisite for resolving on such a Sacrifice, than barely refusing to take what others have in Rigour a Right to demand, we have likewise more Reason to congratulate ourselves on so happy a Disposition, and may expect from the Divine Goodness a greater Recompence. Besides, the Apostle here considers the Disinterestedness, for which he applauds himself, as a Duty, not formally enjoin'd him by particular Order from Heaven, or at least not necessarily join'd with the Exercise of the Evangelical Ministry, in Opposition to the Necessity imposed on him of preaching the Gospel, v. 16. for which he had received an express Command from our Lord *JESUS CHRIST*, *Acts* xxii. 14, 15. See what *GROTIUS* himself has said on this Point, in his Notes on *LUKE* xvii. 10. And this leads us to what gave Occasion to this false Distinction of *Precepts* and *Counsels*, which comes now to be consider'd. The Apostles made use of the Word *Counsel*, when speaking to *Christians* of the Conduct they ought to observe in certain Circumstances, in regard to things either indifferent in themselves, or concerning which they had neither any particular Order from *JESUS CHRIST*, nor any general Rule in the Gospel, imposing an evident

and

as good Counsel, ¹⁹ and tending to a more sublime Life, but not as an absolute Precept. Thus many of the Primitive Fathers condemn'd ²⁰ all Oaths, without any Exception; whereas ²¹ St. Paul himself did swear in Matters of Consequence. A Christian in *Tatian* said, *I refuse the Pretorship*. In *Tertullian*, *A Christian is not* ²² *ambitious of the Ædile's Office*. *Lactantius* maintains, that a just Man (such he would have a Christian to be) should not make War; ²³ but at the same time says, that he should not go to Sea. How many of the Primitive Fathers dissuade Christians from second Marriages? All which, as they are commendable, excellent, and highly pleasing to GOD, so they are not required of us by the Necessity of any Law. These Remarks will suffice to answer all Objections founded on Ecclesiastical Antiquity.

X. Now to confirm our own Opinion, first we want not Writers, and even more ancient ones than those that are oppos'd to us, who believed that the Practice of inflicting capital Punishment, and that of making War, the Innocence of which depends on the Justice of the former, are not inconsistent with Christianity: *Clemens Alexandrinus* says, that a Christian, if he be called to the Government, should be

and indispenfible Obligation of acting or not acting in such or such a manner. Thus St. PAUL, 1 Cor. vii. treating of Marriage, and considering the Afflictions and Persecutions, to which *Christians* were then expos'd, says, that in Reality such as are not favour'd with the Gift of Continnence might, and even ought to engage in that State, and that married Persons ought not to refuse one another the Marriage Debt, unless it be done by mutual Consent; nor separate, even though one of the Parties were not a Christian, But that he had rather those who had never been married, and those whose conjugal Tie had been dissolved by the Death of one or the other, should remain as they are. He declares, however, that *he has no Commandment of the Lord*, concerning that Matter; but that *he gives his Judgment, or Counsel, as one who hath obtain'd Mercy of the Lord to be faithful, and who hath the Spirit of the Lord*, v. 25. 40. that is as a good Interpreter of the Will of GOD, in determining what was to be done in regard to the Circumstances of those Times. In which, however, he could not avoid laying down some general Rules, which each Person was to apply for his own Use and Direction, according to his State and Condition, v. 17. so that as he was oblig'd to leave the Matter to each Man's Judgment and Conscience, he therefore calls his Exhortations bare *Counsels*, or *Advice*. He does the same, when he admonishes the *Corinthians* to practise Liberality to the Poor, the Exercise of which Virtue ought to be voluntary and proportion'd to each Man's Abilities, 2 Cor. viii. 10. Hence some have, without sufficient Grounds, taken Occasion to imagine there are some things, which, though of an excellent Nature, and in themselves highly agreeable to GOD, are left to every one's Liberty, so that there is no evil in the neglect of them, nor any Reason to be apprehensive of Punishment for such Omission; but if any Man forms the noble Design of aspiring to them, he arises to an extraordinary degree of Perfection, and performs such Acts of Virtue as merit a singular Reward. Another Reason, not unlike this, which may have given Birth to the Distinction under Consideration, is, that as GOD requires of Men more extensive Duties and in greater Number, in Proportion to their Knowledge and Assistance on the Practice of them; these are certain virtuous Acts, and even certain Virtues, not expected from great Numbers, because there are but few in Circumstances will oblige them to such Practices. It has been particularly observed that GOD requires greater Sanctity from *Christians*, than he demand'd of the *antient Jews*. But it ought to be consider'd that, if any one, under the *Jewish* Dispensation, had by Force

of Meditation and Reflection, acquired as exact and extensive a Knowledge of his Duties, as that to be found in the Gospel, which might have been done by a careful Examination of the Principles, dispers'd through the Writings of MOSES and the other Prophets; such a *Jew* would then have been oblig'd to as regular and holy a Conduct, as that of true *Christians*. Lastly, it is to be observed that the Distinction of *Counsels* and *Precepts*, is so far from having any Tendency toward making Men virtuous, that in certain Cases, it may divert them from the Practice of Virtue. As Men are fond of the Wonderful, and of every thing that flatters their Vanity; they are in great Danger of being dazzled with the pompous Ideas of an imaginary Perfection, which raises them above the common level; and, while in pursuit of such Chimeras, neglecting several Branches of their real Duty, the Practice of which their Passions sometimes render more difficult, than the Sacrifice they make by abstaining from Things permitted. It is even possible for Man, under Pretence of extraordinary Sanctity, to deceive himself grossly in regard to plain and common Duties, and imagine himself excus'd the Practice of them, to make himself Amends for the Violence committed on his Inclinations; by this Abstinence from certain Things. Experience shews the Truth of this Reflection in such as make Vows of Celibacy and Poverty. See Mr. LE CLERC's Addition to Dr. HAMMOND's Note, already cited; as also his Notes on the second Epistle of SULPICIOUS SEVERUS. *Edit. Leipsic.* 1709.

¹⁹ The fourth Council of *Carthage* forbids Bishops to go to Law for temporal Concerns, even though actually attacked. See St. AMBROSE, *de Offic.* Lib. II. Cap. XXI. and GREGORY the Great, Lib. II. Ind. XI. Epist. LVIII. GROTIUS.

²⁰ See our Author's Notes on MAT. v. 34. and TILLOTSON's XXII. Sermon.

²¹ In *Rom.* i. 9. 2 *Cor.* i. 18. 23. *Gal.* i. 20. *Philip.* i. 8. 1 *Thes.* ii. 5.

²² *Apolog.* Cap. XLVI.

²³ *For why should he (the just Man) go to Sea, or what should he look for in a foreign Country, who is supplied with all he wants in his own? Why should he go to War, and engage in other Men's mad Quarrels, whose Soul is always at Peace with all the World?* Instit. Divin. Lib. V. Cap. XVII. num. 12. *Edit. Cellar.*

X. (1) Our Author's Thoughts were probably on what that antient Doctor says in his *Stromata*, Lib. I. Cap. XXVI, XXVII. p. 420. and of *Edit. Oxon.* where we meet with the Sense, but not express'd in the same Words.

(as *Moses*) a living Law to the Subjects, reward the Good, and punish the Bad. And in another Place, ² describing the Habit of a Christian, he says, it would become him to go *barefoot*, unless he should happen to be a Soldier. In the Constitutions, intitled, *The Constitutions of Clemens Romanus*, we ³ read, *Not that all Killing is unlawful, but only that of the Innocent; provided that this Right of putting to Death be reserved to the Magistrate alone.*

But setting aside private Opinion, let us come to the publick Authority of the Church, which ought to be of the greatest Weight. I say then, that Soldiers were never denied Baptism, or Excommunicated by the Church, (*because they were Soldiers*) which yet ought to have been done, and would have been done, if the military Profession had been repugnant to the Conditions of the new Covenant. In the aforesaid Constitutions, the same Writer treats of those who formerly used to be admitted to Baptism, and those who used to be rejected, ⁴ *Let a Soldier that desires to be baptized, be exhorted to abstain from Wrongs and Oppressions, to be content with his Pay: If he complies with these, let him be admitted.* Tertullian in his Apology, speaking in the Person of Christians, says, ⁵ *We go to Sea, and fight together with you.* He had said a little before, ⁶ *We are but of a few Days standing, and yet we have filled all your Empire, Islands, Castles, Towns, Councils, and your very Armies.* In the same Book he had ⁷ told that Rain had been obtained in favour of the Emperor *Marcus Aurelius*, by the Prayers of his Christian Soldiers. In his Book *Of a Crown*, he says, that the Soldier who had thrown away the Garland, was more brave than the rest of his Fellows; and he ⁸ informs us, that he had many Christian fellow Soldiers.

We may add, that some Soldiers that had suffered Torments and Death for the Sake of CHRIST, received from the Church the same Honour with other Martyrs; among whom are recorded ⁹ three of St. Paul's Companions: *Cerialis*, who suffered Martyrdom under *Decius*; *Marinus*, under *Valerian*; fifty under *Aurelian*; *Victor*, *Maurus*, and *Valentinus*, a Lieutenant-General under *Maximian*: About the same Time, *Marcellus* the Centurion, *Severian* under *Licinius*. *Cyprian* concerning *Laurentius* and *Ignatius*, both *Africans*, says, ¹⁰ *They also were once Soldiers in the Armies of this World, but were truly the Soldiers of GOD in the spiritual Warfare, whilst they vanquished the Devil by the Confession of CHRIST, and obtained by their Martyrdom, the Palms, and glorious Crowns of the LORD.* Hence it is plain, what the common Opinion of the primitive Christians was concerning War, even before the Emperors were Christians.

If the Christians in those Times did not willingly appear at ¹¹ Trials for Life, it ought not to be thought strange, since for the most part Christians themselves were to be tried. Besides, the *Roman Laws* in other Things, were more severe than Christian Lenity could allow of; which sufficiently appears in the single Instance of the ¹² *Silanian Decree* of the Senate. But yet, after that *Constantine* embraced, and

² *Pædag.* Lib. II. Cap. XI. p. 240.

³ *Lib.* VII. Cap. III.

⁴ *Lib.* VIII. Cap. XXXII.

⁵ *Apolog.* Cap. XLII.

⁶ *Ibid.* Cap. XXXVII.

⁷ *Cap.* V. Father *PAGI*, in his Criticisms on *BARONIUS*, *Tom.* I. has shewn that this Story has a great Mixture of Fables. But it is sufficient for our Author's Purpose, that *Marcus Aurelius* had Christians in his Army; a Fact which can never be disputed, and which has given Occasion to all the Wonders invented concerning the *thundering Legion*, as it is called by *EUSEBIUS*, and others.

⁸ *Cap.* I.

⁹ Add to all these a Soldier, baptized by *Cornelius*, mentioned by *ADO*, in his Martyrology. *GROTIUS*.

¹⁰ *Epist.* XXXIX. Edit. *Oxon.* (34. *Pamel.*)

¹¹ *Capitalibus suppliciis.* Thus the Words stand in all Editions; but what follows makes it evident that the Author design'd to have said *Capitalibus Judiciis*, at Trials for Life. The Question is about acting as a Judge, not as a bare Spectator of the

capital Executions, as *TESMAR* ridiculously explains this Passage, who quotes *QUINTILIAN* and *SENECA*. It appears from *TERTULLIAN*, that the Obligation of being present at such Trials, was one of the Reasons why the primitive Christians made a Difficulty of bearing Arms; and that Father uses the very Terms which I have placed here, pursuant to my Author's Meaning. *De Idol.* Cap. XIX. *GROTIUS* has before quoted what follows, and immediately precedes that Sentence, to which he probably alludes.

¹² By this *Senatus Consultum*, or Decree of the Senate, it was ordered, that if a Master happened to be assassinated in his own House, all the Slaves under the same Roof should be put to Death; even tho' no Proof appeared of their being concerned in the Murder, or having heard any Thing when the Blow was given. We have an Example of the Case in *TACITUS*, *Annal.* Lib. XIV. Cap. XLII, &c. The Emperor *Adrian*; as our Author has observed in a Note, softened the Rigour of that Decree, by ordering that only they should be racked, who were near enough to the Place, where the Master

and begun to promote, the Christian Religion, capital Punishments did not thereupon cease. Nay, *Constantine* himself, among other Laws, made also this ¹³ of fowing up Parricides in a Leather Sack; tho' otherwise he was so very mild towards Criminals, that he is ¹⁴ blamed by many Historians, for too much Indulgence. He had also a great many Christians in his Army, (as History informs us) and caused the Name of CHRIST to be put ¹⁵ on his Standard: From that Time also the military Oath was changed to that Form extant in *Vegetius*, ¹⁶ *By GOD, and CHRIST, and the HOLY GHOST, and the Majesty of the Emperor, which, next to GOD, ought to be loved and revered by Mankind.* Neither at that Time; among so many Bishops, some of whom had suffered very severely for Religion, do we read of so much as one, that exhorted *Constantine* not to put any Criminal to Death, or to engage in any War, or that dissuaded the Christians from serving in Wars, out of Fear of GOD's Wrath; tho' most of those Bishops were very strict Observers of Discipline, and far from dissembling those Things, which related either to the Duty of the Emperors, or other Persons: Such was *St. Ambrose*, in the Time of *Theodosius*, who in his seventh Sermon speaks thus, ¹⁷ *To go to War is no Fault; but to do it purely for Plunder is a Sin.* And in his Offices, ¹⁸ *Valour, which either defends our Country by Arms from Barbarians, or protects the Weak at Home, or our Companions from Robbers, is compleat Justice.* This Argument seems to me of so great Weight, that I will seek for no other.

I am not ignorant, that Bishops, and other Christian People, have ¹⁹ often interceded in favour of Criminals, especially such as were condemned to Death, and that Custom was introduced, that they who ²⁰ took Sanctuary in a Church, should not be delivered up, but upon *promise* to save their Lives; and that about *Easter* ²¹, those who were committed to Prison should be released. But he that carefully considers all these and such like Things, will find that they are only the Effects of Christian Goodness, which eagerly embraces all Opportunities of Mercy; and not

ter was killed, to hear some Noise. SPARTIAN, *Vita Hadriani*, Cap. XVIII. Our Author says likewise, in the same Note, we may add to the too rigorous Laws of the Romans, that which forbids admitting the Evidence of a Slave, but when he perished in it on the Rack. See *Cod. Lib. VI. Tit. I. De servis fugitivis*, &c. Leg. IV. and Mr. NOODT's *Probabilia Juris*, Lib. I. Cap. XIII.

¹³ If any one is guilty of the Death of his Parent, or Son, or any other Relation, which falls under the Denomination of Parricide, — Let him be sewed up in a Sack, with a Dog, a Cock, a Viper, and an Ape — and thrown either into the neighbouring Sea, or a River, Lib. IX. Tit. XVII. *De his qui parentes aut liberos occiderunt.* Leg. ult. It is well known this was the antient Manner of punishing Parricides among the Romans; but the Use of it was abolished. Such Criminals were burnt, or obliged to engage with wild Beasts, for the Entertainment of the Publick. See the Commentators on the *Institutes*, Lib. IV. Tit. XVIII. *De publicis Judiciis*, § 6. and the *Receptæ Sententiæ* of PAUL the Lawyer. Lib. V. Tit. XXIV. with Mr. SCHULTHIG's Notes.

¹⁴ He used to say, *The distempered and rotten Limb must be cut off, that it may not communicate the Infection to those that are sound; but not a sound one, or one that began to heal.* ZON. *Vit. Constantini*, Lib. IV. Cap. XXXI. And this his Historian represents as the Result of his Tenderness for such as reformed their Lives. As the Christians complained of that Prince's Excess of Clemency, the Danes did the same in relation to their King *Harold*, as we learn from SAXO the Grammarian. *Northern Hist.* Lib. XI. p. 193, 194. Edit. Wechel. 1576. GROTIUS.

¹⁵ See the late Mr. CUPER's Notes on LAC-TANTIUS, *De Mortibus Persecutorum*, Cap. XLIV.

¹⁶ VIGET. *De Re Militari*, Lib. II. Cap. V. Edit. Plantin. Scriver.

¹⁷ We find a like Saying of St. AUGUSTIN, inserted in the *Canon Law*, *Caus. XXIII. Quæst. I. Can. V.* as taken from his Book, *De verbis Domini*, Tract or Sermon XIX. And our Author quotes the same Words elsewhere, under the Name of that Father, *B. II. Chap. XXV. § 9.*

¹⁸ *De Offic. Lib. I. Cap. XXVII.* This Passage occurs also in the *Canon Law* already quoted; where we have several of the like Thoughts of other Fathers of the Church.

¹⁹ St. AUGUSTIN says, *It is a Priest's Duty to intercede for Criminals.* Several Instances of such Acts of Goodness may be seen in that Father's Epistles. GROTIUS.

The very Passage, here quoted by our Author, occurs in that Father's fifty-fourth Epistle, addressed to *Macedonius*, a Judge, *You ask me, says he, Why we say it is a Duty annexed to our sacerdotal Character to intercede for Criminals? &c.* This is followed by his Reply to that Magistrate's Objections.

²⁰ See St. CHRYSOSTOM, *Homil. XVI. De Statuitis.* The Council of Orleans, Cap. III. and the Laws of the WISIGOTHS, Lib. VI. Tit. V. 16. Lib. IX. Tit. II. Cap. III. GROTIUS.

²¹ As soon as the first Day of the Paschal Feast is come, let no Man remain in Prison; let every ones Chains be loosed. *COD. Lib. I. Tit. IV. De Episcopali audentiâ*, &c. Leg. III. This, however, took Place only in regard to some certain Crimes, as appears from the rest of the Law. See *Observationes divini & humani juris*, printed at Paris in 1564. p. 43, &c. They were written by BARNABAS BRISSON, a President famous for his great Learning. Besides, the Custom under Consideration had been before received by the Jews, as any one may perceive from what he reads in the Gospels. Our Author, in his Notes on MATT. xxvii. 15. conjectures that this Privilege was granted them by Augustus.

the Consequences of a fixed and settled Opinion, which condemns in general all capital Punishments; and therefore, those Favours were not universal, but limited to certain Times and Places; and even the Intercessions themselves were moderated²² with certain Exceptions.

Here some object against us, the 12th Canon of the Council of Nice, which runs thus, ²³ *Whoever being called by Grace, have at first shewed their Zeal and Faith, and quitted their military Employment; but have afterwards returned like Dogs to their Vomit; so that some shall give Money, and make Interest, to be taken into the Service: They shall lye prostrate (in the Church) for ten Years, after having been for three Years bare Hearers (of the Word). But in regard to all these, it must be observed what Disposition they are in, and in what Manner they do Penance. For whoever, by Fear, by Tears, by Patience, and by good Works, testify the Sincerity of their Conversion, these fulfilling the appointed Time of Hearing, shall at Length assist at publick Prayers, and afterwards it shall be lawful for the Bishop to treat them somewhat more favourably. But whosoever shall look on their Punishment with Indifference, and shall think the Form of their entering into the Church to be sufficient for their Conversion, these shall fulfil the whole appointed Time.* The very Term of thirteen Years Penance, sufficiently declares, that the Matter in Question is not about a small or doubtful Sin, but a heinous and incontestable Crime. The Crime here meant, was undoubtedly²⁴ Idolatry; for the Mention which was made of the Times of *Licinius*, in the 11th Canon immediately preceding, ought to be supposed tacitly repeated here, as the Sense of the following Canon often depends on the former. See for an Instance the 11th Canon of the *Eliberan* Council. But *Licinius*, (as *Eusebius*²⁵ informs us) *dismissed those Soldiers from the Service, who would not*²⁶ *sacrifice to their Gods:* And the Emperor²⁷ *Julian* afterwards did the same; for which Reason we read *Victricius*, and others, quitted the military Profession for the Sake of CHRIST. And formerly 1104 Soldiers had done so in *Armenia*, under *Dioclesian*, of whom there is Mention made in the *Martyrologies*: And *Menna* and *Hesychius*, in *Egypt*. In the Time then of *Licinius*, many left the Service; of whom was *Arfaceus*, mentioned among the Confessors, and *Auxentius*, afterwards made Bishop of *Mopsuestia*. Wherefore those, who had resigned their military Employments from a Motive of Conscience, could not be admitted again under *Licinius*, but by renouncing the Christian Faith: Which Crime was by so much the greater, by how much their former Act had shewn them to have a superior Knowledge of the Divine Laws; therefore these Apostates were punished more grievously than those mentioned in the former Canon, who abjured Christianity, without any Danger of losing Life or Goods.

But to interpret this Canon generally of all War without Restriction, is absolutely against Reason. For²⁸ History plainly testifies, that they who had quitted their Posts under *Licinius*, and had not, during his Reign, returned to them again, because they would not violate their Christian Faith, were left to their Choice by *Constantine*, whether they would continue still discharged, or return to a military Life: Which doubtless many did.

²² These Exceptions may be seen in CASSIODORE, *Var. Lib. XI. Cap. XL.* See also the *Decretals*, Lib. III. Tit. XLIX. *De immunitate Ecclesiarum, Cæmeterii, &c. Cap. VI.* GROTIUS.

²³ SIMEON LE MAITRE expresses the Sense of this Canon thus, *Let such as (having at first resisted the Violence used on them) have afterwards yielded to Iniquity, and engaged in the Army again, be excluded from Communion for ten Years.* BALSAMON, ZONARAS, and RUFINUS, *Lib. X. Cap. VI.* give this Canon the same Sense. GROTIUS.

²⁴ TERTULLIAN, in his Treatise *Of Idolatry*, Cap. I. calls it, *The most enormous Crime which Man can commit: The Height of Guilt.* And St. CYPRIAN, *gravissimum & extremum Delictum.* Ep. XI. (XV. Edit. Oxon.) GROTIUS.

²⁵ In the Life of *Constantine*, Lib. I. Cap. LIV.

²⁶ We have likewise the Authority of SULPICIUS SEVERUS for this Fact. *Licinius, being engaged in disputing the Empire with Constantine, ordered his Soldiers to offer Sacrifice, and dismissed those from the Service who refused to comply.* Hist. Sacr. Lib. II. Cap. XXXIII. Num. 2. Edit. Vorst. *Valentinian*, who was afterwards Emperor, had for the same Reason been deprived of a military Employment, under *Julian*; as we learn from RUFINUS, PHILOSTORGIVS, THEODORE, SOZOMEN, &c. VICTOR of *Utica* says somewhat like this, when he tells us, that under King *Huneric*, several quitted the Service, because they could not continue in it without declaring for *Arianism*. GROTIUS.

²⁷ See SOZOMEN, Hist. Lib. V. Cap. XVII.

²⁸ EUSEBIUS, in the Life of *Constantine*, Lib. II. Cap. XXXIII.

There are also some who object the Epistle of ²⁹ Leo, which says, *That it is against the Rules of Ecclesiastical Discipline, after having done Penance, to return to the Profession of Arms.* But we must know, that in Penitents, no less than in Clergymen and Monks, there was required an eminent Degree of Sanctity, far above that of the Generality of Christians; that the extraordinary Purity of their Lives might serve as much to Edification, ³⁰ as their bad Examples had before given Offence. Likewise in the most antient Customs of the Church, which, that they might be the more revered for their venerable Name, are generally called the *Apostolical Canons*: Canon the 82d it is decreed, *That no Bishop, Priest, or Deacon, should follow the War, and retain at the same Time a Roman Employment, and the sacerdotal Function: For those Things that are Cæsar's, should be given to Cæsar, and those that are GOD's should be given to GOD.* By which it appears, that those Christians who did not aspire to Ecclesiastical Offices were not forbid to follow Arms.

Moreover, they who after Baptism had served any Office, Civil or Military, could not be ordained Clergymen, as you may see in the Epistles of *Syricius* and *Innocentius*, and by the Council of *Toledo*. For Clergymen were not chosen ³¹ out of Christians of any Sort, but of them who had given Proof of a most strict Life. Besides, Ecclesiasticks ought not to have been diverted from their Functions by ³² any other Care or Work, that required continual Application, such as the Service in War, and the Exercise of certain Civil Employments; for which Reason the first Canon provided, that no Bishop, Priest, or Deacon, should meddle in secular Affairs; and the 80th, that he should not be concerned in the administration of publick Affairs. And the sixth of the *African Councils*, that he should not act either as an ³³ Attorney or an Advocate. So *St. Cyprian* holds it ³⁴ unlawful for them to be appointed Tutors or Guardians.

But we have the express Judgment of the Church for our Opinion, in the first Council of *Arles*, which was held under *Constantine*; for the third Canon of that Council runs thus, *As to those who throw away their Arms in Time of Peace, we have thought fit to exclude them from the Communion*; that is, they who quit their military Employment, when there was no Persecution. For the Christians by the Word ³⁵ *Peace* meant so, as appears from *Cyprian* and others. Let us add the Example

²⁹ *Epist. XC. (al. XCII.) to Rusticus, a Bishop, Cap. X.* We find this Passage in the *Canon Law, Caus. XXXIII. Quæst. III. De Pœnitentiâ Dist. V. Can. III.* And in the *Capitularies of Charlemagne, Lib. VI. Cap. CCLXIV. Edit. Paris. 1640.*

³⁰ Pope *LEO*, in the same Epistle to *Rusticus*, says, that *He who obtains Pardon for doing Things unlawful, must abstain from several that are in their own Nature lawful.* We have almost the same Thought, in the Letter written by the Bishops to *Lewis King of Germany, Every Man ought to renounce the Use of what is in itself allowable, in Proportion to the Liberty he has allowed himself in unlawful Acts.* And in the *Capitularies of CHARLES the Bald, Let every one endeavour to enrich his Soul with good Works, of greater Value, as it has been more impoverished by Crimes.* *GROTIUS.*

³¹ *EUSEBIUS* observes, that the Life of a Christian is of two Sorts; the one perfect, ἐνελυγς, the other short of Perfection. He adds, that such as lead the latter, ought, among other Things, to represent their Duty to those, who serve in a just War. *Demonstr. Evang. Lib. I. Cap. VIII. GROTIUS.*

³² *Let not Ecclesiasticks or Monks engage in temporal Affairs.* Canon of the Council of *Mentz*, quoted in the *Decretals, Lib. III. Tit. L. Cap. I. GROTIUS.*

³³ See *St. JEROM's Epistle to Nepotian. GROTIUS.* The Canon here quoted, is not the VI. but the VII. as *ZIEGLER* observes on this Place.

³⁴ *Whoever has attempted to divert the Priests*

and Ministers of the Church, from the Service of the Altar, deserves not even to be mentioned in the Priest's Prayers at the Altar: For which Reason, Victor, who, in Opposition to the Regulation lately made in a Council, dared appoint a Priest to the Charge of a Guardian, is not to be allowed any Oblation among you, for the Repose of his Soul; (pro Dormitione ejus) nor is any Prayer to be offered in the Church in his Behalf. Lib. I. Epist. IX. (Edit. Oxon. Ep. I.) Addressed to the Priests, Deacons, and Laity at Furni. See also JUSTINIAN's Code, Lib. I. Tit. III. De Episcopis & Clericis, &c. Leg. LII. GROTIUS.

The Passage of *St. CYPRIAN*, to which our Author barely refers, occurs in the *Canon Law, Distinct. LXXXVIII. Can. XIV. and Caus. XXI. Quæst. III. Can. IV.* From which it appears, that, according to that Father, the deceased deserves some Kind of Punishment even after Death, for having dared to name a Priest Guardian; because he, on that Account, forbids Oblations, or publick Prayers to be offered in his Name, on the Anniversary of his Death, according to the Custom then introduced, which afterwards paved the Way to Superstition. See *Bishop FELL's Note* on this Passage; and *DODWELL's fifth Dissertation on St. Cyprian.* To which may be added, *Mr. LE CLERC's Life of St. Cyprian, in his Biblioth. Univers. Tom. XII. p. 234, &c.*

³⁵ Examples of this Acceptation of the Word may be seen in *TERTULLIAN, De Idololatria, Cap. XIX. in his Treatise, De fuga Persecut. Cap. III. CYPRIAN, Epist. X. (XVI. Edit. Oxon.) XXII.*

Example of the Soldiers under *Julian*, who had made so great Progress in Christianity, that they were ready to seal the Truth of the Gospel with their Blood; of whom *St. Ambrose* speaks thus, ³⁶ *The Emperor Julian, tho' an Apostate, yet had under him Christian Soldiers, to whom when he said, March (against the Enemy) in defence of the State, they obeyed him; but when he said, March against the Christians, then they acknowledged the Emperor of Heaven.* Such was the *Thebean Legion* long before, which in the Reign of *Dioclesian* the Emperor were instructed in the Christian Religion, by *Zabda*, the thirtieth Bishop of *Jerusalem*, and afterwards left a memorable Example of Christian Constancy and Patience to all Ages, which I shall speak of hereafter.

Let it suffice, in this Place, to mention that Speech of theirs, which expresses accurately, and in few Words, the whole Duty of a Christian Soldier, ³⁷ *We offer you our Service against any Enemy whatever, yet hold it a most heinous Crime to embroe our Hands in the Blood of Innocents: They can act vigorously against the Impious, and the Enemies of the State; but have no longer Force, when the Business is to massacre the Pious, and our fellow Citizens. We remember that we took up Arms for the Defence of our Countrymen, and not against them. We have always fought for Justice, for Piety, for the Preservation of the Innocent; these have been hitherto the Recompence of our Dangers. We have fought with Fidelity. How should we preserve it to you, (the Speech is made to the Emperor) if we neglect it towards GOD? And St. Basil speaks thus of the antient Christians. ³⁸ *Our Ancestors never accounted Slaughters committed in War, as Murders, excusing them who fought for Virtue and Piety.**

XXII. XXXI. (XXX. Edit. Oxon.) *De Lapsis*, p. 123. *SULPICIUS SEVERUS*, *Hist. Sacra*, Lib. II. Cap. XXXII. Num. 1 & 2. Edit. Vorst. Cap. XXXIII. Num. 3. and at the Beginning of his *Hist. Lib. I. Cap. I. Num. 3.* *GROTIUS*.

³⁶ *The Emperor Julian*, &c.) This Passage does not belong to *St. Ambrose*, tho' attributed to him in the *Canon Law*, *Caus. XI. Quæst. III. Can. XCIV.* where it has been observed, that *St. Augustine* has something like it, on *Psal. cxxiv.* which is also produced in *Can. XCVIII.* See *Mr. PITHOU's* Note. Our Author himself elsewhere quotes a Passage not unlike this, from the Father

last named, in a Note on *B. II. Chap. XXVI. § 3.*

³⁷ This Declaration is taken from the Account of the Martyrdom of the *Thebean Legion*, attributed to *St. Eucherius*, Bishop of *Lyons*. But *Mr. DUBOURDIEU*, Minister of the French Church in the *Savoy*, at *London*, published a Dissertation in 1705, shewing that Relation to be a spurious Piece, and that the *Thebean Legion* never had any real Existence.

³⁸ Our Author says nothing that can assist us in guessing from what Part of *St. Basil's* Works these Words are taken.

CHAP. III.

The Division of War into Publick and Private.

An Explication of the supreme Power.

THE most general and most necessary Division of War is this, that one War is private, another publick, and another mixed; that is a publick War, which is made on each Side by the Authority of the Civil Power. Private War is that which is made between private Persons, without publick Authority. Mixed War is that which is made on one Side by publick Authority, and on the other by mere private Persons. But let us first speak of private War, which is the most antient.

I: The Division of War into publick and private.

I. (1) *Auctore eo, qui jurisdictionem habet.* By the Authority of the Civil Power. The Reason of his expressing himself so, is, because on one hand, by the Term *War*, he understands all taking of Arms with a View of deciding a Quarrel, in opposition to the Way of terminating a Difference, by Recourse to a common Judge; and on the other, includes under the Name of *Publick War*, even

that which is carried on by an inferior Power, without the Orders of the Sovereign Power; as appears from what he says, § 4 and 5. Thus all the Criticisms of the Commentators fall to the Ground; who do not consider, that our Author was at full Liberty to define his Terms as he pleased; provided he always fixes the same Ideas to them, and reasons on them conclusively.

That some Sort of private War may be lawfully waged, as far as respects the Law of Nature, I think has been fully proved by what I have said above, where it was shewn, that it is not repugnant to the Law of Nature, for any one to repel Injuries by Force. But perhaps some will think, that it is not lawful, at least since the establishment of publick Judges; for tho' Courts of Justice are not from Nature, but human Appointment; yet, since it is much honefter, and more conducive to the Peace of Mankind, that Differences should be decided by a third Person that is disinterested, than that every Man should be allowed to do himself Justice in his own Cause, wherein the Illusions of Self-Love are much to be apprehended: Equity itself, and natural Reason, advise us to submit to so laudable an Institution. *Paulus the Lawyer* says, ² *That is not to be allowed to private Persons, which may be done publickly by a Magistrate; lest it be the Occasion of great Troubles. The Reason why Laws were invented,* says *King Theodorick*, is, ³ *that none should use Violence, and do himself Justice; for wherein does War differ from Peace, if private Persons determine their Disputes by Force?* And Laws call that Force, *whenever* ⁴ *a Man would take that which he thinks is due, without having Recourse to a Judge.*

II. That all private War, by the Law of Nature, was not unlawful, after the erecting of Tribunals of Justice, defended, with some Examples.

II. Undoubtedly, the Liberty allowed before is now much restrained, since the erecting of Tribunals: Yet there are some Cases wherein that Right still subsists; that is, when the Way to legal Justice is not open. For the Law which forbids a Man to pursue his Right any other Way, ought to be understood with this equitable Restriction, that one finds Judges to whom he may apply. Now the Way to legal Justice may fail, either for some Time or absolutely. It fails *for some Time only*, when the Judge cannot be waited for ¹ without certain Danger or Damage. It fails *absolutely*, either by Right or Fact: By Right, if a Man be ² in Places not inhabited, as on the Seas, in a Wilderness, in desert Islands; and any other Places where there is no Civil Government. By Fact, if Subjects will not submit to the Judge, or the Judge refuse ³ openly to take Cognizance of Matters in Dispute.

Ex. xxii. 2.

What we said before, that even since Tribunals of Justice were erected, every private War is not repugnant to the Law of Nature, may be gathered from the Law given to the *Jews*, where *GOD* thus speaks by *Moses*, *If a Thief be found breaking up, (that is, by Night) and be smitten, that he dies, there shall no Blood be shed for him; but if the Sun be risen upon him, there shall be Blood shed for him.* For this Law so accurately distinguishing the Cases, seems not only to import an Impunity; but also to explain the Law of Nature; and that it is not founded on any particular Divine Command, but on common Equity; whence we see that other Nations have followed the same Principle. That of the Twelve Tables is well known, which was undoubtedly taken from the ⁴ old *Attick Law*; ⁵ *If a Thief commit a Robbery in the Night, and if a Man kill him, he is killed lawfully.* So is he reputed innocent by the Laws of all known Nations, who by Arms defends himself against him that assaults his Life; which so manifest a Consent is a plain Testimony, that there is nothing in it contrary to the Law of Nature.

² DIGEST. Lib. L. Tit. XVII. De Diversis Reg. Juris, Leg. 176. See JAMES GODFREY'S Comment on that Law.

³ CASSIOD. Var. Epist. Lib. IV. Ep. X. See also the Edict of THEODORIC, Cap. X. and CXXIV. GROTIUS.

⁴ DIGEST. Lib. IV. Tit. II. Quod metus causa, &c. Leg. XIII. This is what the Latins call, in the Law Stile, *Inficere manum*, To lay Hands on; as is remarked by SERVIUS, the antient Commentator on VIRGIL. In *Aeneid*. X. v. 419. GROTIUS.

II. (1) As when a Man is attacked either in the Night, or even by Day, in private Places; or when such as see us in Danger, will not, or cannot, assist us, and bring the Aggressor to Justice. See B. II. Chap. I.

² See B. II. Chap. XX. § 8. Num. 6, 7.

³ This was the Case of MOSES, when he saw

one of his Brethren (that is, an Israelite) suffering Wrong, he defended him, and avenged him that was oppressed, and smote the Egyptian. *Exod.* ii. *Aets* vii. 24. For at that Time the Israelites had no Room to expect Justice from the Egyptian Judges.

⁴ SOLON'S Law runs thus, *If any Man steals in the Day-Time, above the Value of fifty Drachms, he shall be brought before the Council of the Eleven: But whoever steals any Thing by Night, it shall be lawful to kill him, or wound him in the Pursuit.* DEMOSTHENES Orat. against *Timocrates*, p. 476. *Edit. Basil.* 1572. See hereafter, B. II. Chap. I. § 12. where the Reason of the Law is more fully considered. GROTIUS.

⁵ This Law is preserved by MACROBIUS, who urges it as a Proof, that the Word *Nox* is by the Antients taken for *Noctu*. *Saturnal. Lib. I. Cap.* IV.

III. There is more Difficulty concerning the *Divine positive Law*, more perfect than the Law of Nature, I mean *the Gospel*. I doubt not but GOD, who has more Right over our Lives than we ourselves, might have required Patience of us to such a Degree, that being brought privately into Danger, we ought rather to suffer ourselves to be killed, than to kill. But our Question is, Whether he has thought fit to tie us up so far? Two Places (of Scripture) are wont to be brought for the affirmative Opinion, which we have already explained, when we examined whether War in general was lawful. *But I say unto you, resist not him that doth Thee an Injury. Dearly beloved, avenge not yourselves;* the Latin Version has it, *Defend not yourselves.* There is also a third Place, in those Words of CHRIST to St. Peter, *Put up thy Sword into the Sheath; for they that take the Sword shall perish by the Sword.* Some also add the Example of CHRIST himself, who died for his Enemies.

III. Nor by the Evangelical Law, with an Answer to the Objections.

Matt. v. 39.
Rom. xii. 19.

Matt. xxv. 52.
Rom. v. 8, 10.

Amongst the primitive Christians there are some, who indeed did not disallow of publick Wars, but believed Self-defence between private Persons to be unlawful. I have already cited some Passages of St. Ambrose, in favour of the Innocence of War: We find in St. Austin many more on that Subject, and more clear, which every Body knows. Yet the same St. Ambrose said, ¹ *Perhaps CHRIST therefore said to Peter, upon his shewing him two Swords, It is enough; as if it had been lawful to (the Time of) the Gospel, to make Use of the Sword; that the Doctrine of Equity might be in the Law, and the Perfection of Goodness in the Gospel.* And in another Place, ² *A Christian, tho' he be attacked by a Highwayman, is not to strike him again, lest in defending himself he offend against Piety.* And St. Austin, ³ *I do not dislike that Law, which allows those (Robbers, and other violent Aggressors) to be killed; but how I shall defend them who kill them, I know not.* And again, ⁴ *I do not approve of the Maxim of killing him, by whom one is apprehensive of being killed one's self; unless he happen to be a Soldier, or publick Officer, so that he does not do it for himself, but for others, by Vertue of a lawful Authority.* And it plainly appears, that St. Basil was of the same Mind, from his ⁵ second Epistle to Amphilo-
lochius.

But the contrary Opinion, as it is more common, so it seems to me more reasonable, that we are not obliged to such a Patience; for we are commanded in the Gospel to love our Neighbours as ourselves, not before ourselves; nay, when an equal Danger threatens us, we are not forbid to take Care of ourselves ⁶ before others; as we have already shewn from the Authority of St. Paul, explaining the Rule of Beneficence. Perhaps some one may object, and say, tho' I may prefer my own Good before that of my Neighbour, yet this holds not in Things unequal; wherefore I ought rather to part with my own Life, than suffer the Aggressor to fall into eternal Damnation. But it may be answered, that the Person assaulted may also stand in Need of Time to repent, or may reasonably think so; and that the Aggressor may likewise before his Death have some Time left him to repent. ⁷ Besides in moral Judgment, that Danger ought not to be regarded into

III. (1) Lib. X. in Lucam. Cap. XXII. p. 1782. Edit. Paris. 1569.

² De Offic. Lib III. Cap. IV.

³ De Lib. Arbitrio, Lib. I. Cap. V.

⁴ Epist. ad Publicolan, CLIV.

⁵ Cap. XLIII. LV. See also a Canon of the Council of Orleans, cited by GRATIAN, in the Canon Law, Caus. XIII. Quæst. II. Can. XXXII. GROTIUS.

⁶ CASSIODORE says, *We are not obliged by any Precept, or by any Reason, to procure the Salvation of our Neighbour's Soul by the Loss of our own, or prefer the Security of his Body to that of our own, except when we have Room to hope such an Action will put him in Possession of eternal Salvation.* De Amicitia. GROTIUS. The Treatise here cited, is judged by the Criticks to be the Work of PETER of Blois.

⁷ To this may be added, that we have no Assurance, that the Person whom we permit to kill us,

rather than expose him to the Hazard of eternal Damnation, by defending ourselves, is by that Means secured from the Danger. It may even happen, that he will only become more wicked, and more hurtful to Society. Besides, a Man has not Time to examine every Thing, when in the Terror occasioned by an approaching Death, with which he is threatened by an unjust Aggressor. And after all, we only make use of our natural Right to endeavour our own Preservation; farther, in my Opinion, we are under a Sort of Obligation so to do in this Case, as I have observed on PUFENDORF, B. II. Chap. V. § 2. Note 5. Second Edition. Let us add, with the late Mr. LA PLACETTE, "If Charity forbids us to kill Persons whom we know to be in a State of Sin and Perdition, it would follow, that the Magistrates have no Power to order the Execution of Criminals, whose Words and Actions make it appear, that they are not in a Disposition of making a good End. "Those

into which a Man throws himself, and from which he may deliver himself.

It is probable at least, that some of the Apostles wore Swords in Travelling, in the Sight, and with the Knowledge of our Saviour, during the whole Time they accompanied him, which ⁸ *Josephus* informs us, other *Galileans* also did in their Journey from their own Country to *Jerusalem*, (the Roads being much infested with Highwaymen) and who also tells us the same of the *Essenes*, the most quiet and peaceable of all Men. Hence it came to pass, that when CHRIST told his Disciples, such a Time was at hand, that they should sell even their Garments to buy Swords, the Apostles presently answered, that there were two Swords in their Company, and in that Company there were none but the Apostles. Besides, what CHRIST himself then said, tho' indeed it was not a Precept, but a proverbial Speech, declaring that most grievous Dangers were at hand; (as the Opposition of the first Time, which was safe and prosperous, plainly shews, *Ver.* 35.) seems however to allude to a common Practice, a Practice which the Apostles looked on as innocent.

Now, as ⁹ *Cicero* very rightly says, *Why should it be permitted to wear a Sword, if it were not permitted to use it?* But as to that Passage, *Resist not him that injures you*, it is not more universal than that which follows, *Give to every one that asketh*; which yet admits of an Exception, provided we do not too much incommode ourselves. Nay, there is nothing added to that Precept concerning giving, which intimates the Restriction; which is deduced only from the Rules of Equity; whereas the Prohibition of Resistance has its Explication adjoined, by the Instance of a Box on the Ear; which shews that we are only obliged to suffer without resisting, when the Injury offered us is as slight as a Box on the Ear, or something like it; for otherwise it would have been more natural to have said, *Resist not him that injures thee, but sacrifice thy Life rather than defend thyself by Force*.

In the Words to the *Romans*, *Avenge not yourselves*, the Word *ἐκδικᾶν* does not signify to defend but to revenge; as *Judith* i. 12. ii. 1. *Luke* xviii. 7, 8. *xxi.* 22. *2 Thess.* i. 8. *1 Pet.* ii. 14. *Rom.* xiii. 4. *1 Thess.* iv. 6. And this the very Connexion of the Words plainly shews, for the Words going before are *Render to no Man Evil for Evil*; but this is the Description of Revenge, not of Defence. St. Paul also supports his Exhortation from that Place of *Deuteronomy*, *Vengeance is mine, I will repay it*: Where 'tis in the *Hebrew* *לִי נִקְמָה*, which in its proper and natural Sense signifies Vengeance; and it is evident, Self-Defence cannot be meant in that Place.

Now what was said to St. Peter, does indeed contain a Prohibition to use the Sword, but not in the Cause of Defence; for he had no Need to defend himself: CHRIST had already said concerning his Disciples, *Suffer these to go away*; and this, *That the Saying might be fulfilled which he spake, of those thou hast given me I have lost none*. Nor was it necessary to defend CHRIST; for he would not be defended. Therefore he gives this Reason in St. *John* for forbidding it, *The Cup which my Father hath given me, shall I not drink it?* And he says in St. *Matthew*, *How then should the Scriptures be fulfilled, that thus it must be?* St. Peter being then of a fiery Temper, thought of Revenge, and not of Defence. Besides, he would have taken up Arms against them who came with publick Authority, which whether it be lawful in any Case to resist, is a particular Question, that shall be handled in its proper Place. But what CHRIST also adds, *All they that take the Sword, shall perish by the Sword*; is either a proverbial Saying, which signifies, that Blood causes Blood; and therefore, that the Use of Arms is never free from Danger: Or, according to the Opinion of *Origen*, *Theophylact*, *Titus*, and *Euthy-*

"Those Wretches need only utter Blasphemies
"and Impieties, to shelter themselves from the Punishment they have deserved; which is absurd
"and insupportable. It would also follow, that
"no War is allowable; for as it is morally impossible, that the least bloody War should not sweep
"away a great Number of Wretches, who will
"die in bad Dispositions, no War could be carried on without exposing ourselves to that Danger, and consequently, without violating the
"Laws of Charity." *Treatise on the Right which*

every Man has to defend himself, Ch. V. To conclude, If an unjust Aggressor loses his Life, he who killed him, in defence of his own, is the innocent Minister of the Divine Providence and Vengeance.

⁸ He says, that when any of that Sect travelled, they took neither Baggage nor Provisions with them; but were provided with Arms, on the Account of Highwaymen. *De Bello Jud. Lib. II. Cap. XII.*

⁹ *Orat. pro Milone, Cap. VI.*

nus, it shews, that we should not inroach upon GOD's Right, by anticipating the Vengeance which He, in his own due Time, will fully requite. In which Sense precisely, it is said, *He that killeth with the Sword, shall be killed by the Sword: Here is the Patience and Faith of the Saints.* With which agrees that of Tertullian, ¹⁰ GOD is a fit Depository of thy Patience; if thou layest thy Injuries in his Hand, he is thy Avenger; if thy Losses, he is thy Surety; if thy Grief, he is thy Physician; if thy Death, he is thy Reviver: What ought not Patience to do, that has GOD for its Debtor? Moreover, in these Words of CHRIST there seems to be included, a Prophecy of those Punishments which the Sword of the Romans would take of the Blood-thirsty Jews.

Rev. xiii. 10.

As to the Example of CHRIST, who is said to have died for his Enemies, it may be answered; that all CHRIST's Actions were indeed full of Virtue, that we may laudably imitate them, as far as 'tis possible; and that Imitation will certainly be rewarded; but yet they are not all such, as either result from an Obedience to an indispensable Law, or constitute a Law to us. For that CHRIST died for his Enemies, and the Ungodly, he did it not by any Law, but as it were by a special Covenant and Agreement with the Father; who, upon his doing it, did not only promise him the most exalted Glory, but also a People that should endure forever. Besides, this Fact of CHRIST was, as it were, singular, of which we can hardly find any Example; as St. Paul shews: And CHRIST himself commands us to expose our Life to Danger, not for every one, but for our Brethren, ¹¹ who profess the Christian Religion.

Ira. liii. 10.

Rom. v. 7.

1 John iii. 16.

In fine, the Passages quoted from Christian Doctors, either seem to give an Advice of extraordinary Perfection, rather than to establish an express Command; or contain only the Opinion of some private Persons. For in those most antient Canons called Apostolical, he only was to have been ¹² excommunicated, who with the first Blow killed his Adversary in a Quarrel, *through an* ¹³ Excess of Passion. And St. Austin himself, whom we quoted before on the other Side, seems yet to approve ¹⁴ of this Opinion.

IV. Publick Wars are either ¹ Solemn, according to the Law of Nations, or not solemn: What I here term Solemn is generally called Lawful, or made in Form, in the same Sense as a Will is termed Lawful, in ² Opposition to a Codicil; or a Marriage

IV. Publick War divided into that which is solemn, and that which is not solemn.

¹⁰ De Patientid, Cap. XV.

¹¹ Who profess the Christian Religion. This is the Signification of the Word Brother, here used by the Apostle. He at the same time supposes, without Doubt, that the Persons, in whose Favour we hazard our Lives, deserve so great a Sacrifice at our Hands, and that we have good Grounds to believe such an Action will procure them some considerable Advantage; which cannot be said in regard to a Highwayman, or any other unjust Aggressor.

¹² If an Ecclesiastick strikes a Man in a Quarrel, and kills him with one Blow, let him be deposed for his Rashness. If a Layman is guilty of the same Fault, let him be deprived of the Communion, Can. LXIV. Our Author, in his Margin, quotes two Canons from the Decretals; one, which orders that if a Layman wounds an Ecclesiastick, in his own Defence, or on finding him in Bed with his Wife, Mother, Sister, or Daughter, he shall not incur the Sentence of Excommunication. Lib. V. Tit. XXIX. De Sent. Excom. Cap. III. Another, which makes several Distinctions, in Cases where a Man kills an Aggressor, and supposes, as the former does, that he may be killed, Cum moderamine inculpatae tutelae. With the Moderation of an innocent Defence. Lib. V. Tit. XII. De Homicidio voluntario, vel casuali. Cap. XVI. In both of them it is laid down, as a Fact, that all Laws allow of repelling Force by Force.

¹³ St. AMBROSE, on the Advice of our Saviour, to sell our Coat and buy a Sword, has these Words: Lord, why do you forbid me to strike, since you command me to purchase a Sword? Why am I order'd

to carry a Weapon, which I am not allow'd to draw! Unless perhaps that I may be provided for my own Defence, not arm'd for Revenge. Lib. X. in Lucan. Cap. XXII. p. 1782. Edit. Paris. GROTIUS.

¹⁴ Our Author finds this in Quæst. LXXXIV. on the Book of Exodus. But St. AUGUSTIN in that Place only gives the Reason, why the Law of MOSES, allow'd of killing a Thief in the Night, but not in the Day. Because, says he, after Sun rising a Man might distinguish, whether the Thief came to kill or barely to steal; and in the latter Case, he was not to be kill'd. That Father makes no other Distinction; nor does he speak of what the Evangelical Law permits or requires in this Case.

IV. (1) See B. III. Cap. III.

² The Epithet Lawful is taken in this Sense in the very Definition of a Will or Testament, given by the Civil Law. A Testament is there called, A Declaration of our (last) Will, made in Form; which is expressed by *justa*, the very Word used by our Author. DIGEST. Lib. XXVIII. Tit. I. Qui Testamentum facere possunt, &c. Leg. I. See also the Fragments of ULPIAN, Tit. XX. § 1. I do not know that the Terms *justum Testamentum* occur in the Body of the Civil Law, precisely in Opposition to Codicils. For in the Law quoted from DIGEST. Lib. XXIX. Tit. II. De acquir. vel amitt. Hereditate. Leg. XXII. *justum Testamentum* is oppos'd to *non justum Testamentum*, that is, to a Will not made in Form; and this only is meant in the Title, *Injusto, rupto, inito facto Testamento*. Lib. XXVIII. Tit. III. It is well known, that certain Formalities are required even

riage *Lawful*, in Opposition of the ³ *Cohabitation of Slaves* ⁴: Not because it is not allowed a Man, if he pleases, to make a Codicil, and a Slave to cohabit with a Woman; but because a Will, and a Marriage in Form, have ⁵ some peculiar Effects, by the Civil Law; which it is convenient to observe; for many, misunderstanding the Word *Lawful*, think all Wars are condemned as unjust and unwarrantable, to which that Epithet does not agree. Two Things then are requisite to make a War solemn by the Law of Nations. First, that it be made on both Sides, by the Authority of those that have the Sovereign Power in the State: And then, that it be accompanied with some Formalities; of which we shall treat in its proper Place. These Conditions are equally necessary, so that if the one be wanting, the other is needless.

But a publick War not Solemn, may be made both without any Formality, and against mere private Persons, and by the Authority of any Magistrate whatever. And indeed if we consider the thing without respect to the Civil Law, every Ma-

in *Codicils*; tho' not so many as to make a Will good and valid; at least when no Will has been made before or after, which gave them Force.

³ *Contubernium*, and a Woman cohabiting with a Slave was called *Contubernalis*: Even when a Freeman cohabited with a Slave, it was not reckoned a lawful Marriage. *Inter Servos & Liberos Matrimonium contrahi non potest*, *Contubernium potest*. JUL. PAULUS, *Recept. Sent.* Lib. II. Cap. XIX. § 6. *Contubernales, quoque servorum, id est, uxores, & natos, instructo fundo contineri verum est*. DIGEST. Lib. XXXIII. Tit. VII. *De instructo, vel instrum. legato*. Leg. XII. § 33. *Cum Ancillis non potest esse Coannubium; nam ex ejusmodi Contubernio servi nascuntur*. COD. Lib. V. Tit. IV. *De incertis & inutilibus nuptiis*. Leg. III. VARRO calls the Wives of Slaves *Conjunctæ*. De Rusticâ. Lib. I. Cap. XVII. And such Cohabitation is expressed by the Word *Consortium*, in the *Institutes*, Lib. III. Tit. VII. *De servili cognitione*.

⁴ Even among such as were Citizens, and consequently free, there were *non-legitimate Marriages*, which produced *illegitimate Children*. PAULUS, *Sentent.* Lib. II. Tit. XIX. and DIGEST. Lib. XLVIII. Tit. V. *Ad Leg. Jul. de Adulterio*. Leg. XIII. § 1. SENECA, *De Vita Beatâ*, Cap. XXIV. and SUTTONIUS, in *Octav.* Cap. XL. likewise speaks of a Sort of *illegitimate Liberty*. GROTIUS.

The *non-legitimate Marriages*, which our Author here means, are those contracted by Children, who being under the Power of their Father, married without his Consent; for, according to him, such Marriages were not dissolved, when once contracted; they only wanted the Effects of Law, which they would have had, if authorized by the Father's Approbation. Thus he explains the following Words of the Lawyer PAULUS, *Eorum, qui in potestate Patris sunt, sine voluntate ejus Matrimonia jure non contrahuntur; sed contracta non solvuntur*. In which he follows the Opinion of CUJAS, *Observationes Juris*, Lib. III. Cap. V. But there is abundant Reason to believe the Roman Lawyer speaks only of Fathers being deprived of the Power of dissolving the Marriages of their Children under their Jurisdiction, even with their Consent. See Mr. SCULTING's Notes, Page 300 of his *Jurisprudencia Ante Justinianea*. As to the *Uxor injusta*, mentioned in Law XIII. § 1. DIGEST. *Ad Leg. Jul. De Adulter.* CUJAS seems to have retracted in another Part of his Work, where he conjectures, that the Law under Consideration speaks of a Woman who has not been married with the ordinary Formalities. *Observ.* Lib. VI. Cap. XVI. *Quæ non solemniter accepta est aqua & igni*. For among the antient Romans, when those Formalities, which

consisted in what they called *Confarreatio & Coemptio*, had been omitted, a young Woman, tho' brought home to the House of her intended Husband, was not reckoned married fully, and according to Law: She was not yet a Member of the Family, nor placed under the Man's Power, which they expressed by *In manum Viri convenire*: She had no Right of Succession to his Estate, either in the Whole, or in Conjunction with the Children proceeding from such a Cohabitation. In order to supply the Defect of the Formalities required, she was obliged to live a whole Year with her Husband, without lying three Nights out of his House, according to the Law of the *Twelve Tables*, preserved by A. GELLIUS, *Noct. Attic.* Lib. III. Cap. II. and MACROBIUS, *Saturnal.* Lib. I. Cap. XIII. 'Till that Time she was called *Uxor injusta*, as the President BRISSON has explained this Matter, in his Treatise, *Ad Leg. Jul. De Adulteriiis*, published before the sixth Book of CUJAS's *Observations*; that is, she was considered not as a Concubine but a real Wife, tho' something was still wanting in that Union, for investing her with all the Rights and Privileges of a legitimate Marriage. Whereas Matrimony contracted without the Father's Consent, or that of the Person under whose Power the Father himself lived, was absolutely null and illegitimate; in the same Manner as incestuous Marriages, and such as were contracted between a Guardian and his Ward, between a Governor of a Province and a Woman of the same Province, &c. And our Author himself, *B. II. Chap. V. § 14. Note II.* suspects that the last Words of the Passage, quoted from PAUL's *Receptæ Sententiæ*, were added by ANJAN, Referendary to the King of the *Wisigoths*. It is certain, at least, that the Roman Lawyer says the direct contrary in another Place, *A Marriage cannot be good, without the Consent of all, that is, of those who contract, and of those under whose Power they are*. DIGEST. Lib. XXII. Tit. II. *De Ritu Nuptiarum*. Leg. II. The *Libertas non justa*, alledged by our Author in this Place, was a Sort of Freedom, neither intire nor irrevocable. See the learned TORRENTIUS on that Point, in his Commentary on the Passage of SUTTONIUS, above quoted; and J. LIPSIVS, on TACITUS, *Annal.* Lib. XIII. Cap. XXVII. as also, Mr. NOODT on DIGEST. Lib. I. Tit. V. p. 33.

⁵ Thus a Man could not, by a Codicil, directly appoint an Heir, or disinherit those who had a Right to the Succession. *Institut.* Lib. II. Tit. XXV. *De Codicillis*. § 2. A Slave had not the Right of paternal Power over his Children; nor even a Freeman over those born to him of his Wife, who was a Slave, &c.

Magistrate⁶ seems to have as much Right, in case of Resistance, to take up Arms in order to execute his Jurisdiction, as to defend the People committed to his Protection. But since by War the whole State is endangered, therefore it is provided, by the Laws of almost all Nations, that it be undertaken only by the Order or with the Approbation of the Sovereign. There is such a Law in⁷ *Plato's* last Book *de Legibus*. And by the *Roman Law* he was reckoned⁸ guilty of High Treason, who without Commission from the Prince presumed to make War, lift Soldiers, or raise an Army. And the *Cornelian Law*,⁹ enacted by *L. Cornelius Sylla*, says, without Commission from the People. In the Code of *Justinian*, there is a Constitution extant, made by *Valentinian* and *Valens*, thus,¹⁰ *Let no Man use any Sort of Arms without our Knowledge and Permission*. According to *St. Austin*,¹¹ natural Order and the Peace of Mankind require, that the Matter should be so regulated in every State. This Law however ought to be understood with some Restriction, according to the Rules of Equity, as every Maxim is, however general the Terms may be in which it is expressed.

First then, It cannot be doubted, but that it is lawful¹² for him who has any Jurisdiction, to reduce to their Duty, by his Officers, a Few who are disobedient; provided it requires not great Force to do it, nor endangers the State. Again, If the Danger be so pressing, that Time will not allow to consult the Sovereign, here also Necessity grants an Exception.¹³ *L. Pinarius*, Governor of *Enna*, a *Sicilian* Garrison, presuming on this Right, upon certain Information that the Townsmen designed to Revolt to the *Carthaginians*, put them all to the Sword, and so preserved the Place. *Franciscus de Victoria* has pretended to transfer the

Franc. Victoria,
De Jure Belli,
n. 9. *Molin.*
Disp. c. 6.
Idem Victoria
Bartol. in Leg.
Ex hoc jure
Digest. de
Just. & Jure.
Bartol. de Re-
pres. 3. prin-
cipali ad se-
cund. n. 6.
Mart. Laud. de
Bello, Qu. 2.
Livy, l. 24.

6 PUFENDORF criticises this Opinion, *B. VIII. Chap. VI. § 10.* But it is easy to reconcile our two Authors. GROTIUS fixes a more general Idea to the Term War, as appears by his Definition of it, *Chap. I. § 2.* See my first Note on that Chapter. According to him also, when an inferior Magistrate takes Arms for the Maintenance of his Authority, and to reduce those to their Duty, who refuse to submit; he is supposed to act with the Approbation of the Sovereign, who by entrusting him with a Share in the Government of the State, invested him at the same Time with the Power necessary for the Exercise of his Charge. The Question therefore is only, whether every Magistrate, as such, stands in need of an express Order from the Sovereign in this Case, so that the Frame of civil Societies in general require it, independently of the Civil Law of each particular State. Now I ask, if such a Magistrate has a Right to employ Arms for the Reduction of one Person, of two, three, ten or twenty, who refuse him Obedience, or attempt to hinder the Exercise of his Jurisdiction, why may he not make use of the same Means against fifty, a hundred, a thousand, two thousand, &c. ? The larger the Number is, the more he will stand in need of Force for conquering the Resistance. Now this is what our Author includes under the Term *War*. If it be objected, that it would be dangerous to allow an inferior Magistrate so much Power, this only proves that Legislators do well in setting Bounds to what would otherwise be a Consequence of the very Design of placing the Magistrate in his Post, in order to proceed in a Manner attended with fewer Inconveniences, so that the Commentators on our Author have no good Reason for falling on him in this Place, as if he weaken'd and destroy'd the first Principles of publick Law.

7 If any Man makes Peace or War, by his own private Authority, without the Order of the State, let Death be his Punishment? But if any Part of the State makes Peace or War of their own Heads, let the Officers of the Army convene the Authors of such an Attempt before a Council of War; and let the Criminal, on Conviction, suffer Death. *De Legib. Lib. XII. p. 955. Vol. II. Edit. H. Steph.*

8 DIGEST. *Lib. XLVIII. Tit. IV. ad Leg. Jul. Majest. Leg. III.*

9 This Law is by Conjecture only ascribed to *L. Corn. Sylla*. All we know of the Matter is grounded on a Passage of CICERO, where the Orator speaks of a *Cornelian Law*, relating to Treason. *I take no notice of his going out of the Province, heading an Army, making War by his own private Authority, going to a Kingdom without the Order of the People and Senate; which Actions as they are prohibited by several ancient Laws, so are they most expressly forbidden by the Cornelian Law Majestatis, and the Julian de pecuniis repetundis. Orat. in Pison. Cap. XXI.*

10 *Lib. XI. Tit. XLVI. Ut armorum usus, inficio principe, interdictus sit.* This Law has no manner of Relation to the Power of making War, in whatever Sense the Word is taken. The Emperors VALENTINIAN and VALENS forbid such as are not Soldiers by Profession, to carry Arms on a Journey. See GODFREY's learned Comment on Law I. of the same Title, in the *Theodosian Code*, *Lib. XV. Tit. XIV. Tom. V. p. 419.* where he gives a very good Explication of that Law; and shews that *movere arma*, the Phrase here employ'd, signifies only to carry Arms, whether a Person makes use of them or not.

11 *Lib. XXII. contra Faustum, Cap. LXXIV.* the Passage is quoted in the *Canon Law, Caus. XXIII. Quest. I. An militare sit peccatum, Can. IV.* as our Author observes in a Note on this Place; where he adds that the Jewish Doctors call every War not made by an express Order from GOD, *מלחמה פרטית*, a War of the Heads or Powers. See SELDEN, *De jure Nat. & Gent. juxta discipl. Hebr. Lib. VI. Cap. XII.*

12 For this Reason the Tip Staffs, or Judges Officers, are in the Roman Law call'd *manus militaris*, DIGEST. *Lib. VI. Tit. I. De rei Vindicatione, Leg. LXVIII.* See GODFREY on the *Theod. Code, De officio judicis milit. Lib. I. Tit. IX. Tom. I. p. 54.* &c. and Mr. DE BYNCKERSHOEK observ. *Lib. III. Cap. XIV.*

13 See PUFENDORF, *B. VIII. Chap. VI. § 10, 11.* with the Notes.

Right of taking up Arms to the Inhabitants of a Town, even without such a Case of Necessity, in order to have Satisfaction for those Injuries, which the Prince neglects to revenge; but his Opinion is justly rejected by others.

V. Whether a War made by the Authority of a Magistrate that has not supreme Power be publick, and when?

Ayala de Jure Belli, l. 1. c. 2. n. 7. Sylv. verbo Bellum, n. 2. ibi. sufficit etiam.

Innocent. C. olim de Restit. spol. n. 8. & C. sicut de Jure jurando, n. 5. Panormit. ib.

Bartol. ad Leg. Hostes, D. de Captivitate.

Livy, ubi sup. Victor. n. 29.

Cajet. Sec. qu. 40. Art. 1. Sylv. verbo Bellum, p. 1. n. 2. Lorca, Disp. 50. n. 12.

V. But Lawyers do not agree, whether in those Cases wherein it is allowed that inferior Magistrates have a Right to take up Arms, such a War ought to be called Publick; some affirm, and others deny it. Indeed, if by *Publick* we mean only that which is done by Vertue of a Magistrate's Power, no doubt but such Wars are publick; and therefore, they that in such a Case resist the Magistrate, are liable to the Punishments due to those that rebel against their Superiors. But if *Publick* be taken in a higher Sense, for that which is Solemn, as without Dispute it is often taken, they are not publick Wars; because, to render the Idea complete in that Sense, there must be an express Resolution of the Sovereign, and several other Circumstances. It would be in vain to object, that in such Kind of Quarrels, the Goods of the Rebels are taken, and given to the Soldiers. For that is not so peculiar to a solemn War, as that it may not also be done in any other.

But it may happen, that in a very large State, the inferior Powers² may have Authority granted them to begin a War; which, if so, then the War may be reputed as made by the Authority of the Sovereign Power: For he that gives to another the Right of doing a Thing, is esteemed the Author of it.

But it is more difficult to decide, whether, if such an Authority be not granted, the bare Conjecture of the Sovereign's Will be sufficient? For my Part I cannot think it is: For it is not enough to foresee what the Will of the Sovereign would be, if he were consulted in this Case; but it must rather be considered, what a Prince would have done without being advised with, where the Matter will allow Time, and when the Affair is doubtful, if a Law were thereupon to be made: For tho' the Reason which determines a Sovereign to require that his Orders should be waited for, may in such or such a Case³ cease, when particularly considered; yet the same Reason, when taken generally, always subsists; which is, to prevent the Dangers to which the State would inevitably be exposed, if every Magistrate should pretend to judge of the Usefulness or Necessity of War.

Cneius Manlius was not therefore injuriously accused by his Lieutenants, because he had made War upon the Galatians, without the Order of the People of Rome; for tho' the Galatians had supplied Antiochus with some Troops; yet, as Peace had been made with that Prince, it did not belong to Manlius, but to the People of Rome, to determine whether that Injury was to be revenged on the Galatians.

⁴ Cato would have had C. Cæsar delivered up to the Germans, for making War on them:

§. V. (1) To the Lawyers quoted in the Margin, add FRAN. ARET. Conf. XVI. num. 7. GAILIUS, De Pace publicâ, Cap. II. numb. 20. Cardinal TUSCHUS, Præf. Quæst. LV. lit. B. verbo Bellum, numb. 20. GOEDDEUS, Consil. Marpurg. XXVIII. num. 202. &c. GROTIUS.

² See the Law of FRIDERIC I. in CONRAD, Abbot of Ussperg. GROTIUS.

This Law relates to the Members of the German Empire. See a Dissertation on it, written by the late Mr. HERTIUS, intituled, De superioritate Territoriali, § 31. where he also observes, after FA. MABILLON, De re Diplomaticâ, Lib. IV. Cap. XX. § 5. that formerly in France, every Gentleman might make War on his Neighbours by his own private Authority. Herefers us for Satisfaction on that Subject, to Mr. DU CANGE's Remarks on the History of St. LEWIS, by JOINVILLE, and to the Extract of a Book of FA. MAIMBOURG, in the Journal des Sçavans, for the Year 1676.

³ That is, though no Damage has actually ensued from a Governor's undertaking a War, without waiting for the Sovereign's Order. See B. II. Chap. XVI. §. 25. num. 1.

⁴ SÆTONIUS says, in one Place, that Cato had frequently declared on Oath, that he would impeach

him (Cæsar) as soon as he was divested of the Command of the Army. Cap. XXX. And in another Place, he speaks in general of some Persons who were for giving him into the Hands of the Enemy. Cap. XXIV. But PLUTARCH relates the Fact, with its several Circumstances: He tells us, that after the Victory gained by Cæsar in the Belgick Gaul, over the Uspetes, and the Tencherians, who had passed the Rhine, in Order to settle themselves, the Senate decreed publick Rejoicings and Sacrifices, to express their Gratitude to the Gods, and do honour to the General. Whereupon Cato delivered it as his Opinion, that Cæsar should be delivered up to the Barbarians, (that is, the Germans) to expiate his Perfidy, and divert the Curse from the State, which that Action might draw on it. Vit. Cæs. p. 718. Tom. II. Edit. Wechel. Where PLUTARCH produces the Authority of TANUSIUS GEMINUS. Τανύσιος δὲ λέγει; for that is the true Reading, and justified by a MS. not Γασύσιος. See also what he says in his Parallel of the Lives of Crassus and Nicias, p. 567. So that Cato proposed giving Cæsar into the Hands of the Enemy, not because he had made War on the Germans without the express Orders of the Commonwealth, but because that General had attacked the Germans, against the Promise and

Livy, l. 38, cap. 45, &c.

them: I believe not so much in respect to Justice, as to free the City from the Fear of a Man that wanted to render himself absolute. For the *Germans* had assisted the *Gauls*, declared Enemies to the People of *Rome*, and therefore could have no Reason to complain of any Wrong done them, if the *Romans* had just Cause to make War against the *Gauls*. But *Cæsar* ought to have been contented with beating the *Germans* out of *Gaul*, the Province appointed to him, and not to have pushed the War on the *Germans* in their own Country, especially when there was no Danger to be feared from thence, without first consulting the People of *Rome*. The *Germans* therefore had no Right to demand *Cæsar* to be delivered up to them, but the People of *Rome* had to punish him; as the *Carthaginians* plainly answered the *Romans*, ⁵ *The Question is not whether Hannibal has besieged Saguntum by publick Authority, or by his own private Authority? But whether in that he has done you an Injury, or not? For it is our Business to see whether our Subject has acted by Vertue of our Orders, or of his own Head. The only Point to be decided between you and us, is, whether the Thing could be done without Prejudice to our Treaties?*

⁶ *Cicero* defends what *Octavius* and *Decimus Brutus* did, who made War upon *Antony* of their own Heads. But tho' it were plain that *Antony* had deserved it,

and Assurance given them, and seized several of their Deputies; as appears from what he himself says in his Commentaries. *Bel. Gall. Lib. IV. Cap. XI. &c.* He does indeed endeavour to put a Gloss on his Conduct; but there is good Reason for believing that he here, as on other Occasions, disguises Things, in order to turn them to his own Advantage. See his Commentators on this Place, in Mr. DAVIES's Edition; and FREINSHEIM's Supplement to LIVY, *Lib. CV. Cap. LI. &c. Edit. Cleric.* The Manner in which *Cato* gives his Opinion is sufficient for forming a Conjecture, that they were persuaded at *Rome* that *Cæsar* had not dealt fairly and honestly in the Matter under Consideration. But, whatever becomes of this Question, it is evident from the Authority alledged, that our Author has not given the true Reason for *Cato's* voting for delivering *Cæsar* into the Hands of the *Germans*. He likewise confounds the Defeat of the *Usipetes* and the *Tenchterians*, which happened before *Cæsar* laid the first Bridge over the *Rhine*, with the Victory he gained over those of *Treves* about two Years after; for *Cæsar* did not till that Time carry the War into the Country of the *Germans*, in order to take his Revenge on them, as he himself says, for sending Succours to those of *Treves*. *Bell. Gall. Lib. VI. Cap. IX.* And this Expedition took up but little Time, and was far from being considerable. At *Cæsar's* Approach the Enemy retired into their Forests; and the *Roman* General being apprehensive he should fall short of Provisions for his Army, repassed the *Rhine* a few Days after. *Ibid. Cap. XXIX.* Tho' DION CASSIUS attributes this Motion to his Fear of the Enemy. *Lib. XL. p. 151. Edit. H. Steph.* But several of our Author's Expositors have confounded Matters still more, by understanding what he here says of *Cæsar's* War with *Ariovistus*, when that Prince had possessed himself of Part of the Country of the *Sequani*, related. *Bel. Gal. Lib. I.* The learned OBRECHT is one who gives into this Mistake, as appears not only from his Notes on this Work, published by one of his Scholars without his Knowledge; but also from a Corollary placed at the End of his Dissertation *De Censu Augusti*, which is the ninth of the Collection printed in 1704. For he there makes PLUTARCH say, *Cæsar's War with Ariovistus being ended, Cato gave his Opinion, &c.* And he maintains, that the *Roman People* had at that Time no Right to punish *Cæsar*, but that the *Germans* had a Right to de-

mand his Delivery into their Hands. Mr. BUDDEUS makes the same Supposition, in his *Jurisprudentiæ Historiæ specimen. § 110.* Even in the Application which they both make of *Cato's* Vote, the last Proposition advanced by OBRECHT is as false as the first is true; as I shall shew in another Place, where I shall have Occasion to speak after our Author of the War made on *Ariovistus*. *B. III. Chap. III. § 10.*

⁵ LIVY, *Lib. XXI. Cap. XVIII. Num. 6.* The learned GRONOVIVS thinks this Way of reasoning, employed by the *Carthaginians*, was a mere Piece of Chicanry; because *Hannibal*, by attacking the City of *Saguntum* by his own private Authority, had violated a Clause of the Treaty between the *Romans* and *Carthaginians*. It is true here was a real Infraction of the Treaty, as I shall shew elsewhere, in Opposition to our Author, *B. II. Chap. XVI. § 13.* But then that was the very Thing in Question; and till they were convinced of that, they might say with Reason, that the *Romans* had no Business to enquire whether *Hannibal* had acted by the Orders of their Republick, or not?

⁶ In the third of his *Philippicks*, *Cap. XI. &c.* GRONOVIVS undertakes to defend CICERO's Opinion against the Criticism of our Author. *Octavius* and *Brutus*, says he, might have been justly blamed, if the Senate had been free at that Juncture, and *Mark Antony's* Enterprizes had allowed sufficient Time for consulting the Senate and People; But, as VELLEIUS PATERCULUS very well observes, the Commonwealth was oppressed, and as it were benumbed under the Power of *Antony*. *Torpebat oppressa dominatione Antonii Civitas. Lib. II. Cap. LXI.* And had not *Antony* himself attacked *Brutus* merely by his own Authority? Had he not seized on *Gaul*? And did he not take the same Steps towards Tyranny as *Julius Cæsar*? Good Men would be very unhappy if they were obliged to act in Form, where ill designing Persons trample on all Laws human and divine. Had *Brutus* waited for Orders from *Rome*, he would have been ruined, and all *Gaul* with him, before he could give an Account of the State of Affairs. In such a Case it might be justly said, that a just Presumption of the Will of the Senate, ought to pass for an express Order, according to CICERO's Advice to the same *Brutus*. *Epist. ad Famil. Lib. XI. Ep. VII.* See *Cato's* Speech to the great *Pompey's* Son in HIRTIUS, *Bell. African. Cap. XXII.* and the following Note.

they should have staid for the Decision of the Senate and Roman People, Whether it were for the Benefit of the State to have dissembled the Matter, or to have revenged it; to have come to Terms of Peace, or to have recourse to Arms? For no Body is obliged to pursue his own Right, which is often attended with the Hazard of Damage.

But then further, tho' *Antony* had been declared an Enemy, the Senate and People of *Rome* should have been allowed to consider, whom to employ as Generals to command in that War: Thus the *Rhodians*⁷ answered *Cassius*, when he desired their Assistance by Vertue of a Treaty, that they would give it if the Senate ordered it. This Example, (of *Cicero's Apology*) and many more that one may meet with, ought to teach us, not to approve of every Thing that is said by the most famous Authors: For they often reason according to the Circumstances of the Times, and often according to their own Passions; *sitting, τῷ πάτερῳ εἰθύνειν, the Line to the Stone; or the Rule of Equity to Things, and not Things to the Rule of Equity.* Wherefore we must endeavour in the Examination of such Matters, to use an unbiassed Judgment, and not rashly draw those Things into Example, which may be rather excused than commended, in which respect we often fatally err.

Since then, as we have said, a publick War ought not to be made, but by the Authority of the Sovereign; for the understanding both this Affair, and the Question concerning a solemn War, and several other Things that depend upon it, it will be necessary to be thoroughly informed, what this SOVEREIGNTY is, and in whom it resides; and so much the more, because learned Men in our Age, each of them handling this Argument rather according to the present Interest of the Affairs of his Country, than according to Truth, have made that which was of itself not very clear, much more perplexed.

VI. In what Things the Civil Power consists.

VI. The Moral Power then of governing a State, which uses to be called the Civil Power, *Thucydides* describes by three Things, where he calls a State that is really so, 'A Body that has its own Laws, Magistrates, and Tribunals. *Aristotle* divides the Administration of the Government into three Parts.³ 1. Consultation about publick Affairs. 2. The Establishment of Magistrates. 3. Judgments. To the first he refers the Power of making War or Peace, of concluding or breaking Treaties and Alliances, of enacting or repealing Laws; to which he adds, the inflicting of Death, Banishment, Confiscation of Goods, and the Punishment of Peculation and Extortion: That is, in my Opinion, the Judgments that relate to publick Crimes; whereas, in the third Class, by *Judgments* he means those that concern Crimes committed directly against private Persons. *Dionysius Halicarnassensis* chiefly takes Notice of these⁴ three Things, 1st, The Right to create Magistrates. 2^{dly}, The Right to⁵ make Laws and repeal them. 3^{dly}, The Right of making Peace or War. In another Place he adds, the Right of Judging as a⁶

⁷ This Example is not exactly to the Purpose, for the *Rhodians* were not subject to the *Romans*, but an inferior Sort of Allies, as our Author himself terms them, § 21. Num. 9. Tho' in Reality, they were dependent on the *Romans*, in spite of the Liberty they in one Sense enjoyed. See my 25th Note on that Paragraph. Besides, *Cassius*, in his Reply to the *Rhodian* Deputies, told them, they bantered and trifled with him, when they talked of the Consent of the Senate, that Body being then dispersed by the Oppression of the Tyrants. *APPIAN. De Bell. Civilib. Lib. IV. p. 627. Edit. H. Steph.* This helps to confirm the Reflections made in the preceding Note, and I am surprized the learned *GRONOVIVS* has taken no Notice of this Passage.

VI. (1) *Lib. V. § 18. Edit. Oxon.*

² One may also translate the original Word ἀντιλήν, which has its own Taxes, or Imposts; that is, pays Tribute to no foreign Power. And this is the Sense which the *Greek* Scholiast gives that ambiguous Word. *GROTIUS.*

³ *Politic. Lib. IV. Cap. XIV. p. 379. Edit. Paris.*

⁴ The *Greek* Writer is there speaking of the *Roman* People, *Who*, he says, were from the very Beginning possessed of three great and most necessary Branches of Power, viz. that of creating civil Magistrates, and Officers for the Army; that of enacting and abrogating Laws; and that of regulating whatever belonged to Peace and War. *Antiq. Rom. Lib. IV. Cap. XX. p. 215. Edit. Oxon.* See likewise *Lib. II. Cap. XIV.*

⁵ The *Grammarian* *SERVIVS* describes the Power of the *Romans* in the same Manner, *Omni Ditione.* *Omni* in this Place, says he, is better than *omnis*, to express their enjoying all Power, in regard to Peace, War, and Laws. *GROTIUS.*

⁶ In a Speech made by *Manius Valerius*, where he requires, that the People should be allowed a Share in the Administration of Justice, especially in Causes which nearly concern the Good of the Commonwealth; as when a Person is accused of raising Sedition, endeavouring to enslave his Country by the Exercise of despotick Power, or betraying it to the Enemy. *Antiq. Rom. Lib. VII. Cap. LVI. p. 445. Edit. Oxon.*

Fourth; and again, elsewhere, ⁷ the Right of Regulating the Affairs of Religion, and of calling Assemblies.

But if any one would divide it right, he may easily find all Things relating to it; so as that nothing may be wanting or superfluous. For he that governs a State, does it either by himself or by another. What he does himself respects either general Affairs or particular; what concerns general Affairs relates to the making or repealing of Laws; which extends as well to sacred Things (as far as he has a Right to meddle in them) as to profane. *Aristotle* calls this *Ἀρχιτεκτονική*, the ⁸ chief Art of Government. The Particular Affairs are either directly publick or private, but considered as they relate to the publick Good. Those which are directly publick, concern either certain Actions, as the making of Peace, War, Treaties, Alliances; or certain Things, as Taxes, and such like, in which is comprehended that ⁹ eminent Dominion which a State has over its Subjects, and their Goods, for the publick Use. *Aristotle* calls this Art by the general ¹⁰ Name *πολιτική*, *Political*, and by another (*βουλευτική*) that signifies the Art of *Deliberating*. Private Affairs are here the Differences of private Persons, so far as the Repose of the Society requires the Decision of them by publick Authority: And this Art *Aristotle* calls ¹¹ *δικαστική*, *Judicial*. Those Things which are dispatched by another, are either done by Magistrates, or other Ministers, among whom we may put Embassadors. In these then consists the Civil Power.

VII. That is called Supreme, whose Acts are not subject to another's Power, so that they cannot be made void by any other human Will. When ¹ I say, by any other, I exclude the Sovereign himself, who may change his own Will, as also his Successor, who enjoys the same Right, and consequently, has the same Power, and no other. Let us then see what this Sovereign Power may have for its Subject. The Subject then is either common or proper: As the Body is the common Subject of Sight, the Eye the proper; so the common Subject of Supreme Power is the State; which I have before called a perfect Society of Men.

VII. What Power is supreme.

Cacheranus Decis. Pedem. 139. n. 6.

We then exclude the Nations, who are brought under the Power of another People, as were the *Roman* Provinces; for those Nations are no longer a State, as we now use the Word, but the less considerable Members of a great State, as Slaves are the Members of a Family. Again it happens sometimes, that divers People have one and the same Head, and yet each of those People make a compleat Society; for it is not in the moral Body, as 'tis in the natural, where one Head cannot belong to several Bodies; for there the same Person may be head, under a different Consideration, to several distinct Bodies; of which this is a certain Proof, ² that upon the Extinction of the reigning Family, the Sovereign Power reverts to each People. So it may also happen, that several States may be linked together in a most strict Alliance, and make a ³ Compound, as *Strabo* more ⁴ than once calls it; and yet each of them continue to be a perfect State, which is observed both by others, and by ⁵ *Aristotle* in several Places.

Vit. de jure belli. n. 7.

The State then is, in the Sense I have just mentioned, the common Subject of Sovereignty. The proper Subject is one or more Persons, according to the Laws

⁷ Our Author has his Eye on the Place where the *Grecian* Writer speaks of the Power given by *Romulus* to the Kings, which was reduced to the following Heads, 1. The Direction of what related to the Sacrifices, and other Parts of Religious Worship. 2. The Maintenance of both the Natural and Civil Laws, with the Cognizance of the most considerable Violations of both. 3. The Convening of the Senate, Assembling of the People, giving their Votes first, and putting in Execution whatever was carried by a Plurality of Voices. 4. The Command of the Armies, Lib. II. Cap. XIV.

⁸ *Ethic. Nicom.* Lib. VI. Cap. VIII.

⁹ See Chap. I. § 6.

¹⁰ *Ethic. Nicom.* Lib. VI. Cap. VIII.

¹¹ *Ibid.*

VII. (1) What PUFENDORF says, B. VII. Chap. V. may serve as a Comment on all this. As to

our Author's Definition of the Sovereign Power, see a Treatise *De Jure Imperii*, written by RABOD HERMAN SCHELIUS, p. 132. &c.

² See B. II. Chap. IX. §. 8.

³ PUFENDORF treats of this at large, B. VII. Chap. V. § 16, &c. It is worth while to consult him on the Subject.

⁴ He makes use of the Term *σύνημα*, when speaking of the *Amphictyons*, Lib. IX. p. 643. Ed. *Amst.* (420. *Parif.*) and of the *Lycians*, Lib. XIV. p. 980. Edit. *Amst.* (664. *Parif.*)

⁵ He calls those Bodies *Συμμαχίαι*, Alliances, *Polit.* Lib. II. Cap. II. p. 313. Edit. *Parif.* Tom. II. and Lib. III. Cap. IX. p. 348. because such Sort of Confederacies are commonly formed chiefly with a View of mutual Defence against the common Enemy.

and

and Customs of each Nation, ἡ πρώτη ἀρχή, the first Power of the State, in *Galen, Lib. 6. de placitis, Hyppoc. & Plat.*

VIII. *The Opinion refuted which holds that the supreme Power is always in the People, and the Arguments answered.*
Ex. xxi. 6.
Instit. l. i. tit. 3
de jure person.
§ 4.

Gail. de Arestis
c. 6. n. 22, &c.

VIII. And here we must first reject their Opinion, ¹ who will have the Supreme Power to be always, and without Exception, in the People; so that they may restrain or punish their Kings, as often as they abuse their Power. What Mischiefs this Opinion has occasioned, and may yet occasion, if once the Minds of People are fully possessed with it, every wise Man sees. I shall refute it with these Arguments. It is lawful for any Man to engage himself as a Slave to whom he pleases; as appears both by the *Hebrew* ² and *Roman* Laws. Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share of that Right to themselves? Neither should you say this is not to be presumed: For the Question here is not, what may be presumed in a Doubt, but what may be lawfully done? In vain do some alledge the Inconveniences which arise from hence, or may arise; for you can frame no Form of Government in your Mind, which will be without Inconveniences and Dangers. ³ *Either you must take the one with the other, or* ⁴ *refuse both,* says the Comedian.

But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will ⁵ of those who conferred it upon him.

There

VIII. (1) See my Remarks on PUFENDORF, *B. VII. Chap. VI. § 5. Note 2.* The late Mr. HERRIUS has left us a whole Dissertation on this Question, which is the eighth in his first Volume of *Commentationes & Opuscula, &c.* Where we have a particular and exact Account of the Books published on both Sides of this Question. It must be owned, there has been much Misunderstanding in regard to the whole Subject of the respective Rights of the Sovereign and People. The first who wrote on it with any Extent, having only confused Ideas of the Law of Nature, were not sufficiently acquainted with the Topick of such Questions. Add to this the particular Interests and Passions, which in this, as in other Cases, have carried the Disputants on both Sides into vitious Extremes. But if we examine Things without Prejudice, I believe we shall find it not very difficult to establish certain Principles, which neither favour Tyranny, nor the Spirit of Independence and Rebellion. It is certain, that as soon as a People in any Manner submits to a King, really such, they are no longer possessed of the Sovereign Power; for it implies a Contradiction, to say we confer a Power on any one, and keep it still in our own Hands. But it does not thence follow, that we have conferred it so as not to reserve a Right to reassume it in any Case. This *Reserve* is sometimes expressed; and there is always a tacit one, the Effect of which appears, when the Persons on whom the Power has been conferred abuses it in a Manner directly, and remarkably, contrary to the End for which it was conferred. See our Author, in the following Chapter, § 11. For I do not know any Man has ventured to maintain, that a Prince entirely forfeits his Right for the least Abuse of the Sovereign Authority. Princes being Men, as well as the meanest private Person, and consequently, subject to Faults, that Consideration is supposed to be taken in, when they are invested with their Power. And it is certain, that the People pardon them a great Number of crying Injustices, before they think of recovering their natural Liberty.

2 In the Margin of the Original, we have here a Quotation from A. GELLIUS, which is not only faulty in all the Editions before mine, but also misapplied; as has been observed by GRONOVIVS, in a Note on that antient Writer, tho' he is entirely silent in this Place. The Passage in Question is as follows,

Diogenes the Cynick was a Slave; but he was sold into Slavery, and so lost his Liberty. Noct. Attic. Lib. II. Cap. XVIII.

Our Author by this designs to let us know, that among the antient Grecians every Man had a Right to sell his own Liberty directly; as appears from his *Florum Sparsiones ad Jus Justinianum*. Tit. *De Jure Personarum*. p. 14. Edit. Amstel. where he makes use of this Passage for proving the pretended Difference between the Grecian and Roman Laws in this Particular. But the Latin Compiler of *Miscellaneous Observations* only means, that Diogenes from a Freeman became a Slave; for he was taken by Pirates, who sold him; as appears from the Passages of DIOGENES LAERTIUS, alledged by GRONOVIVS on that Place. A Passage from DION of Prusa, quoted by our Author, *B. II. Chap. V. § 27. Num. 1.* would have been more to his Purpose.

3 TERENCE, *Heautontim.* Act II. Scene II. Ver. 84.

4 CICERO speaking of the Power of the Tribunes of the Roman People says, *You see plainly, Quintus, that the Tribuneship is exposed to many Abuses. But it is unjust, in the Prosecution of any Accusation, to enumerate Inconveniencies, and place Abuses to View, without taking any Notice of the Advantages resulting from the Thing under Consideration — But we should not enjoy the Advantage sought for, without that Mixture of Inconveniencies.* De Legibus, Lib. III. Cap. X. GROTIUS.

5 The City of Augsbourg petitioned Charles V. that the Resolutions of their Senate might be allowed no Force, without the Assent of the Masters of the Tribes of the People. The Norimbergers desired the direct contrary. GROTIUS.

There may be many Causes why a People should renounce all Sovereignty in themselves, and yield it to another: As when they are upon the Brink of Ruin, and they can find no other Means to save themselves; or being in great Want, they cannot otherwise be supported. For if the *Campani* formerly, obliged by Necessity, submitted themselves to the *Romans* in this Form, ⁶ *We yield up, O ye Senators, the People of Campania, and the City of Capua, our Fields, Temples, and all that we have, both Divine and Human, into your Power* ⁷. And some People, when they offered to submit themselves to the Power of the *Romans*, were refused, as ⁸ *Appian* relates: What hinders, but that any People may, after the ⁹ same Manner, yield up themselves to one powerful Prince. We read in *Virgil*,

Nec cum se, &c.

It may also happen, that a Master of a Family having large Possessions, will suffer no Body to dwell in them upon any other Condition; or one may have a great many Slaves, and make them free, upon Condition of acknowledging him for their Sovereign, and paying some Taxes: Of which we have many Instances. *Tacitus* speaks thus of the *German Slaves*, ¹⁰ *Every one has his Dwelling, and governs his own House. The Master demands of him, as of a Farmer, a certain Proportion of Corn, Cattle, or Stuffs; after which the Slave is under no Obligation.*

Besides, as *Aristotle* said, ¹¹ some Men are naturally Slaves, that is, turned for Slavery. And some Nations also are of such a Temper, that they know better how to obey than to command; which the *Cappadocians* seem to have been sensible of, when being offered their Freedom by the *Romans*, they preferred living under a King, declaring that they could not live without one. Thus *Philostrophus* in the Life of *Apollonius*, ¹² It is a Folly to pretend to set the *Thracians*, *Mysians*, and *Getæ* at Liberty, since they don't like it.

Moreover, the Examples of other Nations, who for many Ages ¹³ lived happily under an arbitrary Government, may have influenced some. ¹⁴ The Cities under

Strabon. xii. p. 815. Ed. Amst. (540 Paris.) Justin xxxviii. cap. 2.

Our Author is mistaken here, in attributing to *Charles the Fifth*, what the Historians say of *Sigismund*; as has been observed by *WAGENSEIL*, *De Norimbergæ rebus notabilibus*. Cap. XXIII. p. 179; for which he quotes *MELANTHON*, *Chron. Carion*. Lib. II. p. 206. I am beholden to Mr. *HERTIUS* for this Remark. See his Dissertation *De specialib. Rom. Germ. Imperii Rebus publicis, &c.* § 23. in Tom. II. of his *Commentationes & Opuscula, &c.*

⁶ *LIVY*, Lib. VII. Cap. XXXI. Num. 4.

⁷ The *Falisci* and the *Samnites* did the same. See *LIVY*, Lib. V. Cap. XXVII. and Lib. IX. Cap. XLII. Thus likewise the *Epidamnii*, being abandoned by those of *Corcyra*, engaged themselves to the *Corinthians*, to engage that People in their Defence against the *Taulantii*, the *Illyrians*, and the *Exiles*, who had joined them. *THUCYDIDES*, Lib. I. § 24, 25. Edit. Oxon. *GROTIUS*.

⁸ See *APPIAN*'s Preface, p. 6. Edit. Tol. The same Author instances in the *Libyans*, p. 7. Edit. Toll. (3 H. Steph.)

⁹ This Passage of *VIRGIL* is nothing to the present Purpose, as has been observed by the Commentators of the Work before us. It is taken from the fourth Book of the *Æneid*, v. 618, 619. where *Dido*, among the Imprecations with which she loads *Æneas*, wishes that, after having made a disadvantageous Peace, he may enjoy neither Kingdom nor Life,

— *Nec cum se sub leges pacis iniquæ
Tradiderit, regno aut optatâ luce fruatur;
Sed cadat ante diem, —*

Our Author, by changing the Punctuation, and the Sense, makes the unfortunate Lover say,

— *Nec, cum se sub leges pacis iniquæ
Tradiderit regno.*

A remarkable Example how far the Memory imposes on such as depend on it too much.

¹⁰ *De moribus Germanorum*, Cap. XXV. See a Dissertation by Mr. *THOMASIVS*, *De hominibus propriis Germanorum*, § 66, &c. Where he explains that Historian's Account of the several Sorts of Slaves among the ancient Germans. The *Liti* or *Lidi*, in the middle Age, are also brought as an Example on this Occasion. See the late Mr. *HERTIUS*, *De hominib. propriis*. Sect. I. § 4. in his *Comment. & Opuscula, &c.* Tom. II.

¹¹ See *PUFENDORF*, B. III. Chap. II. § 81. Where he examines this Opinion of the old Philosopher.

¹² *Vita Apollonii*, Lib. VII. Cap. III. Edit. Olear.

¹³ *SENECA*, speaking of *Marcus Brutus*, says, *Tho' he was a great Man in other Respects, I think he was extremely mistaken, and deviated from the Maxims of the Stoicks, in dreading the Name of King, since there is no better Government than that of a good King: In flattering himself with the Hopes of Liberty, at a Time when both those who aspired at Power, and those who should submit to it, had so large a Reward in view: Or in imagining the State could be re-established in its first Form, when the ancient Morals were corrupted; and that it was possible to settle the Equality of a Commonwealth, and put the Laws duly in Execution, in a State where he had seen thousands in Arms, not to assert their Liberty, but to decide who should be their Master.* *De Benef. Lib. II. Cap. XX.* See *PET. BIZAR*. *Hist. Genuesium*, Lib. XIV. p. 329. *GROTIUS*.

¹⁴ *Lib. XLII. Cap. V. Num. 2, 3.*

Eumenes, says *Livy*, would not have changed ¹⁵ their Condition with any free State whatever. And sometimes the Situation of publick Affairs is such, that the State seems to be undone without Remedy, ¹⁶ unless the People submit to the absolute Government of a single Person; which many ¹⁷ wise Men thought to be the Case of the *Roman* Republick, in the Time of *Augustus Cæsar*. For these and such like Reasons, it not only may happen, but often does, that Men submit themselves to the Government and Power of another, as *Cicero* ¹⁸ observes in his second Book of Offices.

But now as Property, or Right to the Goods of an Enemy, may be acquired by a lawful War, the Word *Lawful* being taken in the Sense I before mentioned, so may also Civil Dominion, or an absolute Right to command and govern the Enemy. What I have said, does not tend solely to maintain the Sovereign Authority of a Monarch, in Places where it is established; for there is the same Right, and the same Reason, for that of the Nobles, who govern a State exclusive of the People. Not even a Commonwealth was ever ¹⁹ found so popular; but that those who were very poor, or Strangers, the Women and young Folks, were excluded from publick Councils. There are also some People that have other ²⁰ People

¹⁵ Thus *ISOCRATES* tells us, that several Citizens of the free States of *Greece* left their own Country, and settled at *Salamis* in *Cyprus*, because *Evagoras* reigned there. *Orat. laudat Evag.* p. 199. *Edit. H. Steph. GROTIUS.*

¹⁶ *PHILOSTRATUS* makes *DION* say, *I fear the Romans, who have been long accustomed to Monarchy, will bear no Change in their Form of Government.* *Vita Apol. Tyan. Lib. V. Cap. XXXIV. Edit. Lips. Olear. GROTIUS.*

¹⁷ Thus *TACITUS* says it was the Opinion of wise and discerning Persons, after the Death of *Augustus*, that there was then no Way of composing the Dissensions of the State, but that of submitting to the Government of One. *Annal. Lib. I. Cap. IX. Num. 4.* See also *Hist. Lib. I. Cap. I. Num. 2.* *FLO-RUS, Lib. IV. Cap. III. Num. 6.* *LUCAN's Pharsalia, Lib. I. v. 670. IX. 262.* And *DION CASIUS, Hist. Lib. LIII. p. 575. Edit. H. Steph.*

¹⁸ There are several Reasons which induce Men to submit to the Command and Power of another: They are engaged either by Benevolence, by the Greatness of Favours received, the Dignity of the Person's Character, the Prospect of some Advantage, or an Apprehension of being forced to obey: They are captivated by the Hope of a valuable Consideration, and large Promises: Or lastly, They are hired to make their Submission, as we see is frequently the Case in our Commonwealth. *De Offic. Lib. II. Cap. VI.*

¹⁹ This Reflection (which our Author has inserted in his short Remarks on *CAMPANELLA's Potius*, p. 97. of the Collection printed at *Amsterdam*, in 1652.) is designed to shew that it is not contrary to the End of Civil Society in general, that People should be subject to an independent Power; because in the most popular Commonwealths, there is always a considerable Number of Persons of both Sexes, who have no Share in the Administration, and depend on the Assembly of the People, in whose Hands the Sovereign Power is lodged, as much as the Subjects of a Monarchical Government depend on their Prince, or those of an Aristocracy on the Council of the Chiefs of the State. I make this Observation because the learned *GRONOVIVS* makes our Author reason thus: There are some Persons who are ordinarily excluded from publick Debates; therefore the whole People, or the greater and better Part of them, is not permitted to resist a Tyrant, even in extreme Necessity. Whereupon the Commentator concludes with an Air of Contempt, *Sic apparet Argumenti Vanitas.* In Reality, the Argument would be down-

right impertinent, if it had been included in the Words of our Author, who was not capable of such an Extravagance. We are therefore to place it to the Account of his Expositor, who is in other Respects a very great Critick, but here on this and other Subjects, has often made strange Mistakes, in explaining an Author whose Principles he did not thoroughly understand; as I have long since observed in my Notes on *PUFENDORF*, and as appears from what I have said in my *Latin* Edition of this Work of *GROTIUS*.

²⁰ Thus *Salamis*, depended on the *Athenians*, from the Time of *Phileus*, and *Euryclæus* the Son of *Ajax*, as *PLUTARCH* informs us in the Life of *Solon*, p. 83. *Tom. I. Edit. Wech.* The Emperor *Augustus* took that Island from the *Athenians*; as *Adrian* afterwards did *Cephalenia*. *XIPHILINUS.* The Country of *Atarnes* in *Mysia*, formerly belonged to those of *Chios*, as we learn from *HERODOTUS, Lib. I. Cap. CLX.* and the *Samians* were Masters of several Towns on the Continent, according to *STRABO, Lib. XIV. p. 639. Edit. Paris. Anaëtorium* in the Gulph of *Ambracia*, was partly in the Hands of the *Corinthians*, and partly in those of the *Corcyrans.* *THUCYD. Lib. I. Cap. LV. Edit. Oxon.* In a Treaty of Peace concluded between the *Romans* and *Etolians*, it was stipulated that the City of *Oenæades*, with its Territories and Inhabitants, should belong to the *Acarnaniæns.* *LIVY, Lib. XXXVIII. Cap. XI. Num. 9.* *PLINY* speaks of seven (*GROTIUS* says six) Cities given to those of *Halicarnassus*, by *Alexander the Great.* *Hist. Nat. Lib. V. Cap. XXIX.* The same Writer says, the Island of *Lindus*, and the City of *Cannus* belonged to the *Rhodians,* *Lib. XXXIII. Cap. IV. and Lib. XXXV. Cap. X.* which is also attested by *CICERO, Ep. ad Quintum Fratrem, Lib. I. Ep. I.* The *Romans* gave several Towns to the same *Rhodians*, in return for their Assistance in the War with *Antiochus.* *EUTROP. Lib. IV. Cap. II. Num. II. Edit. Cellar.* Those were Towns in *Caria* and *Lyfia*, which the Senate afterwards took from them. See *POLYB. Exc. Legat. Cap. XXV. and XCIII. GROTIUS.*

Besides that this Note is superfluous, which gives such a Number of Instances of what is well known, there are several Mistakes in it. First, *Augustus* did not take *Salamis* from the *Athenians.* *STRABO*, who flourished under *Augustus* and *Tiberius*, expressly tells us, that the Island in Question depended then on the *Athenians.* *Geogr. Lib. IX. p. 603. Edit. Amst. (394. Paris.)* Our Author has con-

founded

ple under them, who are no less subject to them than if they were under Kings. Whence arose that Question, ²¹ *Are the Collatine People in their own Power?* And when the *Campani* had delivered themselves up to the *Romans*, they ²² are said to have passed under a foreign Dominion. As *Acarnania* and *Amphilochia* are said to have been under the Power of the *Ætoliens*; *Peræa* and *Caunus* under that of the *Rhodiens*. *Pydna* was given by *Philip* to the *Olynthians*. And those Towns which had been under the *Spartans*, when they were delivered from their Government, were called *Eleutherolacones*, (*freed Laconians*). The City *Cotyora* is said to have belonged to the People of *Sinope*, in *Xenophon*. *Nice* in *Italy* was adjudged to the People of *Marseilles*, in *Strabo*. And the Island of *Pithecusa* to the *Neapolitans*. So we read in *Frontinus*, that the Town *Calatia* was adjudged to the Colony of *Capua*, *Caudium* to the Colony of *Beneventum*, with their Territories. *Otho* gave the Cities of the *Moors* to ²³ the Province of *Bætica*, as it is in *Tacitus*. All which were absolutely void, if we allow, that the Right of Government is always at the Discretion and Will of the Persons governed.

But both sacred and profane History do testify, that there are some Kings who do not depend on the People, considered even as a Body, *If thou shalt say*, (said GOD to the *Israelites*) *I will set a King over me*. And to *Samuel*; *Shew them the Manner of the* ²⁴ *King that is to reign over them*. Hence the King is said to be anointed over the People; and over the Inheritance of the LORD; and over *Israel*. *Solomon* is called King over all *Israel*. So *David* thanks GOD, that he had subdued the People under him. And CHRIST says, *The Kings of the Gentiles exercise Lordship over them*. That Passage of *Horace* is well known,

Liv. l. 26. c. 24.
xxxviii. c. 3.
xxxii. c. 33.
xlv. c. 25.
Strab. xiv.
Diod. xvi.
Paus. l. iii.
Exp. Cyri. l. v.
Strab. l. iv.
— v.

Deut. xvii. 14.
1 *Sam.* viii. 4, 9
— ix. 16.
— x. 1.
— xv. 1.
2 *Sam.* xv. 2.
1 *Kings* iv. 1.
Pf. cxliv. 2.
Luke xxii. 25.

²⁵ *Regum timendorum, &c.*

Formidable Kings have Dominion over their own People; but Kings themselves are subject to the Dominion of Jupiter.

Seneca thus describes the three Forms of Government, ²⁶ *Sometimes we have Reason to fear the People; sometimes the Persons of Credit in a Council, when the greatest Part of publick Affairs are in the Hands of that Council; and sometimes one single Person, who is invested with the Power of the People, and over the People*. Such are those who ²⁷ *Plutarch* says, *Not only command according to the Laws, but even command the Laws themselves*. And in *Herodotus*, *Otanes* thus describes Monarchy, *A Power to command as one pleases, without being accountable to any Person*. And *Dion Prusæensis* describes Royalty: *So to govern, as not to give Account to another*. *Pausanias* to the *Messenians*, opposes regal Government to that which must give Account of its Actions.

Aristotle says, there are some Kings who have the same Power as the whole Nation has in another Place over their Persons and Goods. So after the chief Men of *Rome* began to assume to themselves the Regal Power, the ²⁸ People are said to have

founded *Salamis* with *Egina*; for *XIPHILIN* says, *Augustus distressed the Athenians, and took Egina from them*, p. 75. Edit. H. Steph. Secondly, Neither did *Adrian* take the Island of *Cephalenia* from the *Athenians*. On the contrary, they received it from that Emperor, as we learn from the Author here quoted, p. 264. Thirdly, there is no such Island as *Lindus*, which is the Name of a City in *Rhodes*, as *PLINY* assures us, *Lib. V. Cap. XXXI*.

²¹ *LIVY, Lib. I. Cap. XXXVIII. Num. 2.*

²² *Idem. Lib. VII. Cap. XXXI. Num. 6.*

²³ This Example is nothing to the Purpose; for it speaks of a Province of the Roman Empire, which of Course could not have a Sovereign Power over those Cities, without the Emperor's Will and Pleasure.

²⁴ See what is said on the following Chapter, § 3.

²⁵ *HOR. Lib. III. Ode I.*

²⁶ *Epist. XIV.*

²⁷ This Passage of *PLUTARCH* is not very well applied. The Historian speaks there of *Philopeme-*

nes, General, not Sovereign of the *Achæans*, and observes, that *He was so great a Master of the Art of War, that he understood not only how to command according to the Laws, but even how to command the Laws themselves, when the Good of the State required it; that he did not stay till the Command was given him, but took it when Opportunity offered; being persuaded, that the Person who had better Skill and Judgment than those at the Helm, was their General, rather than he whom they chose*. Compar. Vit. Philopœm. & *Flamin*, p. 382. Tom. I. Edit. Wech.

²⁸ *The Prince's Pleasure has the Force of a Law; for by the Lex Regia, made by his Authority, the People conferr'd on him all the Authority and Power*. DIGEST. Lib. I. Tit. IV. De Constit. Principum, Leg. I. See the learned *GRONOVIVS*'s Oration *De Lege Regia*, which I have translated into French, and illustrated with Notes. That Piece was published in 1714, in the second Edition of Mr. *NOODT*'s Discourse on *The Power of Sovereign Princes, and Liberty of Conscience*.

bestowed

bestowed all their Dominion upon them, and Power even over themselves; as ²⁹ *Theophrastus* expounds it. Hence is that Saying of *Marcus Antoninus* the Philosopher, ³⁰ *No one but GOD only can be the Judge of a Prince*; and ³¹ *Dion*, B. 53. of such a Prince, *He is free, Master of himself, and of the Laws, so that he does what he pleases, and what he doth not please he need not do*. Such a Kingdom was that of the ³² *Inachidæ* antiently in Greece at *Argos*; for in the *Argive Tragedy of Suppliants*, the People thus address the King in *Æschylus*. ³³ *Sir, you are the City and the Publick; you are an independent Judge. Seated on your Throne, as upon an Altar, you alone govern all by your absolute Commands*.

Quite otherwise than King *Theseus* himself speaks of the State of *Athens* in ³⁴ *Euripides*, *This City is not governed by a single Person, but it is a free City, where the People reign, by establishing new Magistrates every Year, as they think fit*. For *Theseus*, as ³⁵ *Plutarch* explains it, was only their General in Time of War, and the Guardian of their Laws; in other Things upon ³⁶ a Level with the Citizens. Hence it comes to pass, that Kings who are accountable to their People, are said to be called Kings improperly. So after *Lycurgus*, and especially after the *Ephori* were constituted, the *Lacedemonian Kings* are said by ³⁷ *Poly-*

²⁹ *The Lex Regia gave the King all Manner of Power over the People. Ad Institut. Lib. I. Tit. II. § 6. p. 22. Edit. Fabroti.*

³⁰ *XIPHILINUS*, in *Marc. Anton.* p. 271. *Edit. H. Steph.* See *MILTON's* Exposition of this Passage, *Defens. pro Pop. Anglic.* Cap. II. p. 49. *Mr. DE TILLEMONT*, in his *History of the Emperors*, Vol. IV. p. 644. *Edit. Bruxelles*, joins and explains that Prince's Words, as if he meant to say, *He feared not the Mutinies of the Soldiers, because GOD alone is the Master of Empires*. *GRONOVIVS* gives them the same Sense.

³¹ This is said in Justification of *Augustus's* Conduct, whom he thought discharged from all Obligation of Obedience to the Laws, *Lib. LIII. p. 591. Edit. H. Steph.*

³² These are the *Anakim* אנכים, mentioned *Deut. ii. 10*. Hence the Name of the Goddesses *Ὀφειά* Ὀφειά, to whom *Cadmus* built a Temple at *Thebes*, and whom the Grecians called *Pallas*. *ÆSCHYLUS* says, the *Inachidæ* were *Pelasgi*, that is, Exiles, for the Syriac Word פלג. The first Inhabitants of *Lacedæmonia* were *Pelasgi*; for which Reason the *Lacedæmonians* called themselves Descendants of *Abraham*, *1 Maccab. xv. 21*. Now as the Kings of *Argos* were arbitrary, in Imitation of those of the *East*, from whence they came, so were the Kings of *Thebes*, who descended from the *Phœnicians*. This appears from the Words of *Creon*, in *SOPHOCLES*, and those of the *Theban Herald*, in the *Suppliants* of *EURIPIDES*. *GROTIUS*.

In regard to the *Anakim*, and the Origin of *Inachus*, see *BOCHART, Chanaan. Lib. I. Cap. I.* and *Mr. LE CLERC's Compendium of Universal History*, p. 13, 14. Second Edition. For what concerns the Goddesses *Ὀφειά*, consult *SELDEN, De Diis Syris*, Syntagm. II. Cap. IV. The Passage of *SOPHOCLES*, referred to by our Author, as tending to prove the Kings of *Thebes* in *Bœotia* absolute, is taken from that great Poet's *ANTIGONE*. The new King is introduced speaking like a most absolute Prince, in relation to his Prohibition of burying *Polynice*. *ANTIGONE* owns *It is one of the many Advantages of a Tyrant*, that is, of a King, according to the Language of those Times, *to do and say what he pleases*; and affirms, that is the Reason why the *Thebans* dared not open their Mouths, tho' they were persuaded in their Hearts, that *Creon's* Edict was unjust and inhuman, v. 516, &c. See also v. 748, &c. That Prince, in another Place, falling on the common Place of the

Necessity of Subordination and Obedience in a State, says, *The Will of him whom the People has placed at their Head, is to be obeyed, when he commands Things of small Consequence, what is just or unjust*. v. 681, 682. He then asks, whether he was guilty of a Fault, in supporting the Honour of his Authority? The *Theban Herald* in *EURIPIDES* speaks thus, *The State from which I am deputed, is governed by one Man, not by the People*. v. 410, 411. And *THESEUS*, who thence takes Occasion to harangue on the Advantages of a popular Government, as was that of *Athens*, in Opposition to Monarchy, observes, among other Things, that in a Kingdom there are *no common Laws*, made by the People, *but one Person's Will is the only Law*. v. 429, &c. *PAUSANIAS* plainly tells us, that the Kings of *Thebes* were absolute, when he speaks of the Revolution that happened after the Demise of *Xanthus*, the last *Theban King*, *From that Time, says he, the Thebans judged it better to be governed by a Number, than to let every Thing depend on one Man*. *Bœotic. Cap. V. p. 287. Edit. Wechel.* But we cannot say quite the same of the Kings of *Argos*.

³³ But, as *MILTON* observes, in his *Defens. pro Pop. Anglic.* Cap. V. p. 174. The Poet puts those Words into the Mouth of some foreign Women, who desiring the King of *Argos's* Protection and Assistance against the *Egyptian Fleet* in Pursuit of them, flatter him with an absolute Power, which did not belong to him; as is evident from that Prince's own Words, *I have already told you, I will not do it, without the Consent of the People, even tho' it was in my Power*. Conformably to this Declaration, he convenes the People, and having obtained their Approbation, promises the Petitioners to comply with their Request. See also the Passage of *PAUSANIAS*, quoted by our Author, *Note 40*.

³⁴ *Supplic. v. 404, &c.*

³⁵ *Vit. Thef. p. 11. Tom. I. Edit. Wech.*

³⁶ *Demophoon* the Son of *Theseus*, speaks thus in one of *EURIPIDES's* Tragedies, *I am not invested with absolute Power, like the Kings of the Barbarians; but if I govern with Justice, I shall be treated as I deserve*. *Heraclid. v. 424, 425. GROTIUS*.

³⁷ That Historian speaks only of the Manner how the Kings of *Lacedæmonia* were limited. *Lib. VI. Cap. VIII.* which is the Place our Author had in View.

bius,

bis, ³⁸ *Plutarch*, and ³⁹ *Cornelius Nepos*, to be Kings only in Name, and not in Reality; which Example others also followed in Greece. Thus ⁴⁰ *Pausanias* says (of the *Argives*) to the *Corinthians*, *The Argives, of old great Lovers of Equality and Liberty, have limited the Regal Power as much as possible; so that they have left to the Sons and Posterity of Cifus, nothing but the bare Name of King.* So also *Plutarch* ⁴¹ observes, That the Senate had Power to judge Kings among the *Cumæans*. ⁴² *Aristotle* denies that such Kingdoms constitute any proper Form of Government, because they do but make Part of an Aristocratical or Democratical State.

Nay, even among Nations, which are not always under Kings, we meet with some Instances of a Sort of temporary Monarchy, which is not subject to the People. Such was the Power of the ⁴³ *Amymones* among the *Cnidians*, and of the Dictators ⁴⁴ in the first Ages at Rome, from whom there was no Appeal to the People; whence a Dictator's Edict was held as sacred, says ⁴⁵ *Livy*. Neither was there any ⁴⁶ Security but in a careful Obedience. And ⁴⁷ *Cicero*, that the Dictatorship had possessed itself of the whole Force of the Royal Authority.

The Arguments which are brought for the other Opinion are easily answered. For first, Whereas it is alledged, that the Person constituting, must be superior to the Person constituted; it is only true in regard to those Powers whose Effect depends always upon the Will of their Author; but not in regard to a Power which, tho' at first one was at Liberty to confer it or not, cannot afterwards be revoked by him that has once conferred it. As when a Woman chuses herself a Husband, whom she must from that Time always obey. *Valentinian* told his Soldiers, who had made him Emperor, when they desired something which he did not like, ⁴⁸ *It was indeed in your Power to chuse me your Emperor, O ye Soldiers!*

But

³⁸ It is where he speaks of *Cleomenes*, who, as he observes, *had only the Name of King, but the whole Power was lodged in the Hands of the Ephori.* Vit. Agid. & Cleomen. p. 805. Edit. Wech.

³⁹ His Words are these, *For it has long been a standing Custom among the Lacedemonians, to have two Kings, who are such more in Name than Authority, chosen out of the two Families of Proclus and Euristhenes, &c.* Vit. Agefil. Cap. I. Num. 2. Edit. Cellar. And Cap. XXI. De Regibus, Num. 2. But Agefilus, like the other Spartans, was King of the Lacedemonians, in Name, not in Power.

⁴⁰ *Corinthiac.* Cap. XIX. p. 61. Edit. Wech. Græc.

⁴¹ *The Officer who had the Care of the Prison, used to bring the Kings before the Senate by Night, and not give them their Liberty till they were cleared by that Body.* PLUTARCH, *Quæst. Græc.* p. 291, 292, Tom. II. Edit. Wech.

⁴² The Philosopher does not say such Kings made Part of an Aristocratick or Democratick State; but that there may be, even in Democracy and Aristocracy, Generals invested with as large a Share of Authority in Military Affairs, as the Persons who bear the Title of King. Polit. Lib. III. Cap. XVI. p. 359. Edit. Paris.

⁴³ *Amymones.* Our Author, and some others, miscall this People, as GRONOVIVS observes; for *Amymones* is the true Reading, which he shews from PLUTARCH, *Quæst. Græc.* 292. But I am surprized that no one has taken Notice of the Misapplication of this Example. For the sixty chosen Men, there mentioned, who governed in the most important Affairs with absolute Authority, held their Office during Life, (*διὰ βίης*). So that this cannot be alledged as an Instance of temporary Sovereignty. But our Author, trusting his Memory on this Occasion, thought PLUTARCH wrote *δι' ἔτους*, were chosen annually. Or perhaps, having read BODIN, who makes the same Mistake in his *Treatise Of the Commonwealth*, Lib. I. Cap. VIII. p. 126. Edit. Lat. Francof. 1622. he took it

from that Writer, without consulting the Original. I am inclined to believe this was the Case, because they agree in giving the Magistrates of *Cnidus* the Appellation of *Amymones*. But whatever led him into this Error, our Author might have produced a more suitable Example nearer Home, which is that of the Government of *Friesland*, where the Senators, who compose the supreme Council of State, and are elected every Year, have had, during that Time, so absolute an Authority ever since the Year 1629, that they do what they please, without consulting any one, or being obliged to answer for their Conduct when out of Office; nor can any Act of theirs be abrogated. This I learnt from a Lawyer of that Country, who has been successively Professor and Member of that Sovereign Council; from whence he was called into the Academy of *Franecker*. See ULRIC HÜBER, *De Jure Civitatis*, Lib. I. Sect. VIII. Cap. II. Num. 3, &c.

⁴⁴ See § II. where the Author treats professedly of the Dictators. I have transposed a Note of the Author to that Place; because it contains an Example taken from the Roman History, relating to what he says of the Power of those extraordinary Magistrates.

⁴⁵ Lib. VIII. Cap. XXXIV. Num. 2.

⁴⁶ *Idem.* Lib. II. Cap. XVIII. Num. 8.

⁴⁷ The Roman Orator does not speak of the proper and ordinary Power of the Dictators, but of the Manner in which *Julius Cæsar* had employed it, when he found Means to make that Office perpetual; as is evident from the whole Series of the Discourse. The Words are these, *He (M. Anthony) entirely abolished the Dictatorship from the Commonwealth, which had possessed itself of the whole Force of the Royal Authority.* — *The perpetual Dictatorship being fresh in every one's Memory.* Philippic. I. Cap. I.

⁴⁸ SOZOMEN, *Hist. Eccl.* Lib. VI. Cap. VI. THEODORET makes the Emperor speak thus to his Army, *During the Vacancy of the Throne, it was your Business to deliver me the Reins of the Government;*

But after you have chosen me, what you request depends on me, and not on you. It is your Duty, as Subjects, to obey, and mine to consider what is proper to be done. Neither is that true which is supposed, that all Kings are constituted by the People. The contrary sufficiently appears from the Examples I have already alledged; of a Master of a Family that receives Strangers into his Lands, upon Condition of Subjection; and of Nations reduced under one's Dominion by the Right of War.

2 Arg.

2. Another Argument they fetch from a Saying of the Philosophers, that all Government was ordained for the Sake of the Governed, not of the Governor; whence it follows, as they pretend, that the Governed are superior to the Governors, since the End is more noble than the Means. But neither is that universally true, that all Government was designed for the Sake of the Governed; for some Powers are of themselves established for the Sake of the Governor, ⁴⁹ as that of a Master over his Slave: For there the Benefit of the Slave is extrinsecal and accidental: As the Gain of the Physician has no Connection with the Art of Physick. There are other Powers that tend to the mutual Advantage of him who commands, and of him that obeys, as the Authority of a Husband over his Wife. So that there may be some Civil Governments established for the Benefit of the Sovereign, as the Kingdoms which a Prince acquires by the Right of Conquest; but are not therefore to be reputed Tyrannical; for Tyranny, as the Word is ⁵⁰ now taken, implies Injustice. Some Governments may also respect the Benefit as well of the Governor as of the Governed; as when a People, unable to defend themselves, submit to the Dominion of a powerful Prince, I do not deny but that the Good of the Subject is the direct End proposed in the Establishment of most Civil Governments; and that it is true, which ⁵¹ Cicero said from ⁵² Herodotus, and Herodotus from ⁵³ Hesiod, That Kings were constituted to administer Justice to the People. But it does not therefore follow, as they infer, that the People are superior to the King: For Guardianship was undoubtedly designed for the Benefit of the Pupil; and yet it gives to the Guardian ⁵⁴ a Power over the Pupil. Neither does it avail, that a Guardian may be removed if he does not manage his Charge well; and therefore there ought to be the same Power over a King. For as to a Guardian, it is to be considered, that he has a Power superior to him: But in Civil Governments, because there must be some dernier Resort, it must be fixed either in one Person, or in an Assembly; whose Faults, because they have no superior Judge, GOD declares, that he takes Cognizance of; who either punishes them, if there be a Necessity for it; or tolerates them, for the Chastisement or Trial of a People.

Jer. xxv. 12.

It is admirably said of ⁵⁵ Tacitus, *You must bear with the Luxury or Covetousness of Princes, as you do Barrenness, Storms, and the other Inconveniences of Nature: There will be Faults, as long as there are Men; but the Evil is not perpetual, and*

ment; but from the Moment I received them, it was my Business, not yours, to consider what is expedient for the Commonwealth, Lib. IV. Cap. VI. GROTIUS.

⁴⁹ But in this, as in all other Sorts of Conventions, each of the Parties has his own Interest in View, inasmuch that he who is to obey, neither is or can be supposed to engage farther than the Condition shall be supportable. See Mr. NOODT's Discourse on *The Rights of the Sovereign Power*, p. 241, &c. French Translation, second Edition.

⁵⁰ This Word had not an odious Meaning originally among the Grecians, from whom it passed into the Latin, and some living Languages. We have an Instance of this in what I have said in the 32d. Note on this Paragraph. I shall here add a Passage of CORNELIUS NEPOS, in his Life of Miltiades, which is fully to the Purpose, *For he had obtained a perpetual Power in Chersonesus, during his Stay in that Country, and was called Tyrant, but with the Epithet of just: For he did not acquire that Power by Force, but received it at the Hands of the*

Persons governed, and retained it by his good Administration. All who are in Possession of perpetual Power, in a State that was once free, are called Tyrants. See likewise Mr. COSTE's Preface to his excellent Translation of XENOPHON's *Hiero*, p. 11, &c.

⁵¹ *De Offic.* Lib. II. Cap. XII.

⁵² The Author has his Eye on that Place where the Historian relates how Dejoces was raised to the Royal Dignity, Lib. I. Cap. XCVI, XCVII.

⁵³ The Poet says the *Muses* give Kings the Art of Persuasion, that they may engage the People to submit to their Decisions, for which End they were placed in that exalted Station; for the first Kings were properly no more than Judges, who had no Power to inflict Punishments by their own Authority, and without the Consent of the People. *Theog.* v. 83, &c.

⁵⁴ Guardianship, as SERVIUS defines the Term, is a Power over a free Person, &c. *Instit.* Lib. I. Tit. XIII. *De Tutelis*, § 1.

⁵⁵ *Hist.* Lib. IV. Cap. LXXIV. Num. 4.

is compensated by the Good which happens from Time to Time. And ⁵⁶ M. Aurelius said, the Magistrates are to judge of private Persons, Princes of Magistrates, and GOD of Princes. There is a remarkable Place in Gregory of Tours, where that Bishop thus ⁵⁷ addresses the King of France, *If any one of us (O King!) should transgress the Bounds of Justice, he may be punished by you: But if you yourself should offend, Who shall call you to Account? When we make Representations to you, if you please, you hear us; but if you will not, who shall condemn you? There is none, but he who has declared himself to be Justice itself.* Among the Maxims of the Essenes, Porphyry mentions this, ⁵⁸ *That it is not without a particular Providence of GOD, that the Power of Commanding falls to the Lot of some Persons.* And ⁵⁹ Irenæus says excellently, *By whose Orders ⁶⁰ Men are born; by his Command also are Kings ordained, proper for them who are governed by them.* We have the same Thought in ⁶¹ the Constitutions of Clement, *You shall fear the King, knowing that he is chosen of GOD.*

Neither is it an Objection to what I have said, that we read of some People punished for the Offences of their Kings; for this does not happen, because they do not punish or ⁶² restrain their King, but because they seem to give, at least a tacit Consent to his Vices; or perhaps, without respect to this, GOD may make use of that Sovereign Power which he has over the Life and Death of every Man, to chastise their King, in regard to whom it is a great Punishment to lose his Subjects.

1 Kings xiv. 6.
2 Kings xvii.
7, &c.

IX. There are others, who fancy to themselves a reciprocal Dependence between the King and the People; so that, according to them, the People ought to obey the King whilst he makes a good Use of his Power; but likewise, when he abuses it, he becomes in his Turn dependent on the People. Now if by what they say, they mean only, that our Duty to our Sovereign does not oblige us to do any Thing manifestly unjust, they say but the Truth; but this implies no Right to compel ¹ the King, or to command him. But suppose they had a Design to divide the Government with the King, (of which we shall say something ² hereafter) there ought to be Bounds assigned to the Power of each Party, according to the Difference of Places, Persons, or Affairs, that the Extent of their respective Jurisdictions might be easily discerned.

IX. Mutual
Subjection re-
futed.

⁵⁶ The Author has the Passage of XIPHILIN in View; which I have quoted Note 30 of this Paragraph. He sets it down in a Note on this Place; where he also quotes two Expressions of two other Princes, to the same Purpose. King Vitigis, (in CASSIODORUS) declares, *that what regards the Royal Power (he should have said Dignity) is to be judged by the Powers above; since it is derived from Heaven, and is accountable to Heaven alone.* In the same Author a King says, *We cannot be subject to another, because we have no Judges.* This last Passage is in the *Formula Præfecturæ Urbanæ*, Var. VI. 4. The first Words of the former are taken from *Lib. X. 31.* But I do not know where our Author found, *Since, &c.*

⁵⁷ *Hist. Lib. V.*

⁵⁸ *De Abstin. Lib. IV. p. 389.* JOSEPHUS the Jewish Historian, who, with PHILO, is our best Guide in what relates to the Essenes, says exactly the same, *De Bello Judaic. Lib. II. Cap. XII.* So that it would have been more proper to have quoted the original Author.

⁵⁹ *Lib. V. Cap. XXIV.* This Passage, and those quoted both in the Text and the following Note, mean no more than that such or such Princes reign by the Permission of Providence. But this is not to the present Purpose: For the Question here is about Right, not Fact. Besides, Do not the worst of Tyrants exercise their Power by the Permission of Providence?

⁶⁰ HOMER says, *Dignity is derived from Jupiter. Iliad. Lib. II. v. 197.* The Egyptians, according to DIODORUS of Sicily, were of Opinion,

that Kings did not attain the Sovereign Power without a Divine Providence. Lib. I. Cap. XC. Ed. Steph. St. AUGUSTIN says, *The same who gave the Empire to Flavius and Titus Vespasian, Princes of the greatest Lenity, bestowed it on Domitian, remarkable for his Cruelty; in short, Julian, the Apostate, received it from the same Hand which conferred it on Constantine, the Christian Emperor, De Civit. Dei, Lib. V. Cap. XXI.* CASSIODORUS makes King Vitigis say, *That every Promotion to Dignity is to be considered among the Gifts of the Divinity; and that this is true in a particular Manner; in regard to that of a Sovereign. Var. X. 31.* The Emperor Titus declared, that *The Powers were established by Fate. Epitom. AUREL. VICTOR. Cap. X. Num. 10.* Or, as it is expressed by SÜETONIUS, that *The Dignity of Princes was bestowed by Fate. In Vit. Tit. Cap. IX. GROTIUS.*

See what I have said in the foregoing Note.

⁶¹ *Lib. VII. Cap. XVII.*

⁶² This Reason may sometimes take Place. See Mr. LE CLERC's Reflections on the Famine with which GOD punished the Israelites, on the Account of Saul's exterminating the Descendants of the antient Gibeonites, 2 SAM. xxi.

IX. (1) That is, while he remains really a King, and has not so far abused his Power, as to give just Occasion to consider him no longer in that Character. For this Restriction is always to be understood.

² See § 17. of this Chapter.

But

But the Goodness or Badness of an Action, especially in Civil Concerns, which are liable to frequent and intricate Discussions, are not fit to distinguish those Limits; from whence would necessarily follow the utmost Confusion; because, ³ under Pretence that an Action appeared Good or Bad, the King and People would each, by Vertue of their Power, assume to themselves the Cognizance of one and the same Thing; which Disorder, no Nation (as I know of) ever yet thought to introduce.

X. Cautions in
judging of the
Sovereign
Power.

X. Having confuted these Errors; it remains that we give some Cautions, in order to direct us how to judge rightly, to whom the Sovereign Power in every Nation belongs. Let this then be the first, That we be not deceived by the Ambiguity of Words, or the Shew of outward Things. For Example, Tho' among the *Latins*, a Kingdom and a Principality are generally Opposites; as when *Cæsar* said, ¹ the Father of *Vercingetorix* had obtained the Principality of *Gaul*, but was slain for aspiring to the Royalty: And when *Piso*, in *Tacitus*, said, ² that *Germanicus* was the Son of a Prince of the *Romans*, not of a *Parthian* King: And *Suetonius*, ³ that *Caligula* wanted but little of changing the Ornaments of a Prince into those of a King: And *Maroboduus* is said in ⁴ *Velleius* not to have been contented with the Principality, which he possessed with the Consent of those that depended on him, but ambitiously to have affected the Regal Power.

Yet we see these two Words often confounded together; for the *Spartan* Chiefs descended from *Hercules*, after ⁵ they were subjected to the *Ephori*, were yet called Kings (as we have ⁶ seen above). And in antient *Germany*, there were some Kings, who, as *Tacitus* says, ⁷ governed by the Deference paid to their Counsels, rather than by any Power they had of commanding. *Livy* relates, ⁸ that *Evan-der* reigned more by the Esteem People had for him, than by his own Authority. *Aristotle* ⁹, and *Polybius* ¹⁰, and *Diodorus* ¹¹, gave the Title of Kings to the *Suffetes*, or Judges of the *Carthaginians*: And *Hanno* is so called by *Solinus* ¹². *Strabo* ¹³ speaks of *Scepsis* in *Troas*, that having incorporated the *Milesians* into the State, it formed itself into a Democracy, leaving the Name of King to the Descendants of their antient Kings, and something of the Dignity.

³ That is, if the People had a Right to consider themselves as independent of the King, and proceed against him authoritatively, as often as the King should do any Thing that seems unjust, or prejudicial to the publick Good, a perpetual Source of Quarrels and Disorders would be opened; because it might easily happen, that the People, at certain Times would judge some Things unjust or prejudicial, which are not really so. So that the King, on such Occasions, being persuaded he had not abused his Power; and the People thinking the contrary; and no Judge being to be found for deciding the Difference; they must necessarily come to an open War. It is better therefore, that the Sovereign should sometimes do Things really Evil, with Impunity; and the Inconvenience on this Side is less than that on the other. But then it does not follow, that the People can never judge of the King's Actions; and that they are obliged to submit to, and suffer every Thing. This is contrary to the natural End of all Society, and to the Obligation under which whole Nations, as well as each Man, lye of preserving themselves.

X. (1) *De Bell. Gall.* Lib. VII. Cap. IV.

2 *Annal.* Lib. II. Cap. LVII.

3 *Vita Calig.* Cap. XXII.

4 *Lib. II. Cap. CVIII.* p. 115. *Edit. Oxon.* 1711.

5 The Kings of *Lacedæmonia*, as the learned *GRONOVIVS* observes on this Place, were not subject to the *Ephori*; but the *Ephori* were established to oppose the Kingly Power, when it degenerated into Tyranny: As the *Tribunes of the People*, among the *Romans*, were set up to check the Consular Power. This we learn from *VALERIUS MAXIMUS*, *Lib. IV. Cap. I.*

6 See the 39th Note on Paragraph 8.

7 *De Morib. Germanor.* Cap. XI. Num. 6.

8 *Lib. I. Cap. VII.* Num. 8.

9 *Politie.* Lib. II. Cap. IX. p. 334.

10 The *Carthaginians*, says that Historian, had Kings, and a Senate invested with Aristocratical Power. *Lib. VI. Cap. XLIX.*

11 He tells us the *Carthaginians* conferred the Title of King on their General *Mago*. *Biblioth. Hist. Lib. XV. Cap. XV.* p. 465. *Edit. H. Steph.* The same Title is given him twice or thrice in the same Place.

12 *XENOPHON*, of *Lampsacus*, relates that *Hanno*, King of the *Carthaginians*, travelled into those *Islands*, *Cap. LVI.* The Author here adds, in a Note, a Passage from the Writer of *Hannibal's* Life. He means *CORNELIVS NEPOS*, whose *Lives of illustrious Generals*, at that Time passed under the Name of *ÆMILIUS PROBUS*; but the Learned very much doubted their being the Work of that Grammarian of the middle Age: For two Kings were chosen yearly at Carthage, as the Consuls were at Rome. *Cap. VII. Num. 4. Edit. Cellar.* He likewise observes, that we may rank among those Kings, improperly so called, the Princes on whom their Fathers, who were real Kings, bestowed the Title of King, without divesting themselves of the Sovereign Power. Such was *Darius*, whom *Artaxerxes* condemned to die for a Conspiracy against him; as we learn from *PLUTARCH*, *Vit. Artax.* p. 1026. *Tom. II. Ed. Wech.*

13 It had before been formed into an Aristocracy; as appears from the Words immediately preceding those quoted by our Author. But afterwards they (the *Scepsians*) were changed into an Oligarchy, &c. *Geogr. Lib. XIII. p. 904. Edit. Anst. (607. Paris).*

The *Roman* Emperors, on the contrary, after they exercised openly, and without any Disguise, a most absolute monarchical Power, were nevertheless called Princes. There are also some Republicks, where the chief Magistrates ¹⁴ are honoured with the Ensigns of Royalty.

On the other Side, the States of a Kingdom, that is, the Assembly of those who represent the People, divided into three Orders, according to *Gunther* ¹⁵, *Praelati, proceres, missisque potentibus Urbes. Prelates, Nobles, and Deputies of Towns.* Those States, I say, in ¹⁶ some Places, are only, as it were, the King's Great Council, by whose Means the Complaints of the People, which the Members of his Privy-Council often conceal from him, come to his Ear; and the King has nevertheless a Power afterwards to ordain whatever he thinks fit, in regard to the Matters in Question. But in other Countries they have a Right to take Cognizance of the Actions of the Prince, and also to prescribe Laws, which shall oblige the Prince himself.

Many think, that in Order to know whether a Prince be Sovereign or not, we need only consider whether he mounts the Throne by Right of Succession, or by Means of Election; for according to them, successive Kingdoms only are Sovereign. But it is certain, that Maxim is not generally, and without Restriction, true. For Succession is not a Title that determines the Form of the Government, and the Extent of the Power of him that governs: It imports only a Continuation of the Rights of him, to whom one succeeds. When a Family is chosen to reign, the Right conferred upon it passes from Successor to Successor, with the same Power that the first Election had given, and no more. Among the *Lacedemonians* the Kingdom was Hereditary, even after the constituting of the *Ephori*. And of such a Kingdom, that is, of the chief Dignity of the State, *Aristotle* speaks, ¹⁷ *τῶν τῶν βασιλειῶν αἱ μὲν κατὰ γένος εἰσὶν, αἱ δὲ αἰρεταί.* Of those Kingdoms, some are Hereditary, others Elective. The same Author ¹⁸, and *Thucydides* ¹⁹, and *Dionysius* ²⁰ of *Halicarnassus*, observe, that in the Times of the Heroes, most of the Kingdoms of Greece were so. On the contrary, the *Roman* Empire, even after all Power was taken from the Senate and People, ²¹ was conferred by Election.

XI. Another Caution may be this, We must distinguish between the Thing itself, and the Manner of enjoying it; which takes Place not only in Things corporeal, but also in incorporeal: For a Right of Passage, or Carriage through a Ground, is no less a Thing ¹ than the Ground itself. But these some have by a full Right of Property, some by an usufructuary Right, and others by a temporary Right. Thus, amongst the *Romans*, the Dictator was Sovereign for a Time ². The Generality of Kings ³, as well those who are first elected, as those who succeed to them in the Order established by the Laws, enjoy the Sovereign Power by an usufructuary Right. But there are some Kings, who possess the Crown by a full Right of Property ⁴, as those who have acquired the Sovereignty by Right of Conquest,

XI. The second Caution.

See *Carolus Molinæus* on the Customs of *Paris*, tit. 1. § 2. gl. 4. n. 16.

¹⁴ As the *Doge* of *Venice*, who is crowned, and has the Title of *Serene*; tho' not a Sovereign Prince.

¹⁵ In *Ligurin*.

¹⁶ See *PUFENDORF*, B. VII. Chap. VI. § 12.

¹⁷ He there speaks of such as had only the perpetual Command of the Armies. *Polit. Lib. III. Cap. XIV. p. 356. Edit. Paris.*

¹⁸ *Ibid.* p. 357.

¹⁹ *Lib. I. § 53.*

²⁰ See the Passage quoted at Length, on *PUFENDORF*, B. VII. Chap. I. § 7. Note 1.

²¹ This Point of History is treated at large, B. II. Chap. IX. § 11.

XI. (1) See Note 5, on *PUFENDORF*, B. IV. Chap. IX. § 7. second Edition.

² We have an Instance of a King chosen for a Time in *NICEPHORAS GREGORAS*, *Lib. IV. GROTIUS*.

³ *Reges denique.* Thus it stood in all the Editions before mine: But I chose to read *Reges plerique, The Generality of Kings.* The Sequel of the Discourse necessarily requires this Correction;

and the Author himself uses the same Expression, § 14. *Pleraque Imperia summa non plenè habentur.* Besides, the Mistake was so gross, that Mr. DE COURTIN has, I perceive, corrected it in his Translation, without mentioning it.

⁴ Our Author's Distinction of *Patrimonial and Usufructuary Kingdoms*, has been adopted by *PUFENDORF*, B. VII. Chap. VI. § 16, 17. and by the Generality of Commentators and other Writers. But the late Mr. COCCEIUS, Professor in the University of *Franckfort*, on the *Oder*, rejects it, in a Dissertation *De Testamento Principis*, Cap. II. § 16. And, since him, Mr. THOMASIVS has reasoned on it very judiciously, in his Notes on *HUBER, De Jure Civitatis*, Lib. I. Sect. III. Cap. II. § 19. p. 69, 70. The Substance of what he says is this. It is acknowledged that the Sovereign Power may be disposed of in Traffick. This supposes nothing contradictory to the Nature of the Thing; and if the Compact between the Prince and the People, expressly allows the Prince a full Right of alienating the Crown, this may be called a *Patrimonial Kingdom*, in Opposition to which others

Conquest, or those to whom a People, in order to prevent greater Mischief, have submitted without Conditions. Neither can I agree with those, ⁵ who say the *Roman* Dictator had not the Sovereign Power, because it was not perpetual: For the Nature of moral Things is known by their Operations, wherefore those Powers, which have the same Effects, should be called by the same Name. ⁶ Now the Dictator,

others may be termed *Usufructuary*. But in Questions relating to this Matter, the Enquiry is commonly concerning Kingdoms founded without such a formal Compact; the Examples of such Compacts being very few; for we shall hardly find any but that made between the *Egyptians* and their King, mentioned in the sacred History, GENESIS, XXVII. 18, &c. and the Disputes of the Doctors about the Power of alienating the Crown, relate to Cases in which there has been no Compact between the Prince and People on that Point. In order to extricate themselves from this Perplexity, some have invented the Distinction under Consideration, which only confounds the Matter, and is reduced to a vitious Circle. For when it is asked, what Princes have a Power of alienating the Crown; the Doctors reply, such as are in Possession of a Patrimonial Kingdom; and when we desire to know what is meant by a Patrimonial Kingdom, we are told it is a Kingdom of which the Prince has a Power of alienating the Crown. Some indeed pretend that *successive* Kingdoms are Patrimonial; others give that Appellation to *despotic Kingdoms*; while others confer it on such as have been *conquered*, or established in some other Manner by a *forward Consent* of the People. But all this lays no solid Foundation of a Right of Property, strictly speaking, and attended with a Power of alienating the Crown. Succession, according to GROTIUS himself, only continues the Right of the first King. The *Turkish* Empire is the most despotic in the World; and yet the *Grand Signior* has no Power either to alienate the Crown, nor change the Order of Succession at Pleasure. Nor does it follow from a People's submitting by Force or Necessity, that they have by that Action invested the Prince with a Power of transferring his Right to whom he pleases. It is in vain to object that if, in that Case, the Prince had demanded such a Power, the People would have given it. For Silence, on the contrary, leaves Room for presuming that there was no such tacit Concession; because had the King pretended to acquire a Right of alienating the Crown, it was his business to explain himself, and make the People explain themselves on that Article; and the People not having spoken of it, as is here granted, is and ought to be supposed to have had no Thoughts of giving the King a Power, which enables him to change their Master as often as he thinks fit. A Door is opened to Chicanry, if Contracts are to be explained beyond their express Terms, under Pretence that the Parties would probably have extended their Engagements farther, if they had been pressed. Such Conjectures have no Place, but when the Question turns on the Meaning of an ambiguous Clause. In a Word, the Sovereign Power, however conferred, does not in itself imply a Right of Propriety: They are two very different Ideas, which have no necessary Connexion. As therefore a Prince, by transferring the Property of an Estate to a Subject, does not thereby give him a Right of Sovereignty over that Estate: So, when a whole People submits to the Dominion of any one, such a Grant does not of itself imply a Concession of a full Right of Propriety. So that the Conveyance of Property does of itself and in its own Nature include a Power of

alienating, unless such a Power is taken away by a Clause in the Contract; but, on the contrary, the Conveyance of Sovereignty does not of itself include a Power of alienating, unless it is specified by a formal Clause. Nothing therefore remains to be considered but the numerous Examples of Alienations made by Sovereigns. But either those Alienations took no Effect; or they were made or approved by an express or tacit Consent of the People; or have been supported by Force only. See my 20 Note on §. 12. Whatever becomes of this Question, I am of Opinion it ought to be laid down as a Principle, that where any Doubt arises, every Kingdom ought to be reckoned Non-patrimonial. See Mr. BOHMER's *Introductio ad Jus Public. Univers.* p. 228.

⁵ The Author means BODIN, who explains himself on that Subject in his *Treatise of the Commonwealth*, B. I. Chap. VIII, and who has been followed by several Authors, and among the rest by PUFENDORF, B. VII. Chap. VI. §. 15.

⁶ If therefore the People confer all the Right of exercising all the Parts of Sovereignty on any one for a Time, without consulting any one, or being accountable for his Conduct; it may be said he is a Sovereign during that Time. I do not understand why several Authors so obstinately maintain that there can be no Sovereignty for a Time. Either this is a mere Dispute about Words, or the Reasons alledged are no better than so many different Ways of begging the Question. The Power of commanding, even absolutely, is of such a Nature that it may be conferred for a Time, without ceasing to be such. If a private Person sells his Liberty for a Term of Years only, he will be as effectually a Slave during that Time, as if he had taken a Master for Life. It is true, in that Case the Master has no Right to sell him; but the Power of Alienation is not, according to the Law of Nature alone, a necessary Consequence of Slavery, much less of Sovereignty in general. It is pretended that the Limitation of Time destroys the Nature of Sovereignty; but then it is falsely supposed that all Sovereignty ought to be perpetual. It is said that a sovereign Power conferred for a Time, is of Course dependent; which I deny. It is indeed conferred by the People, and they designed to confer it only for a Time; but the Moment the Person, on whom it is conferred, is actually invested with it, he is above the People, and is no more dependent on them, during the Time fixed, than a Prince established for Life; all the Difference is, that when the Time is expired, his Superiority and Independence are at an End. It is farther objected, that such a Limitation confines the Sovereignty to certain Acts of Sovereignty. But it is sufficient that the Person established Sovereign for a Time, is thereby possess'd of a Power of exercising all the Acts and Parts of the Sovereignty, as he shall judge proper, and according to the Exigency of Circumstances, it is not necessary that he should actually have Occasion to exercise them all. If this is not granted, a King, who either has reigned, or, according to the Course of Nature, can reign but a very short Time, would not be a Sovereign. Those, who maintain that Perpetuity of Duration is a necessary Connection with the Nature of Sovereignty,

Dictator, during the whole Time of his Office, ⁷ exercised all the Acts of civil Government, with as much Authority as the most absolute King; and nothing he had done could be annulled by any other Power. And the Continuance of a Thing alters not the Nature of it, though if the Question be concerning Dignity, which is generally called Majesty, doubtless he that has a perpetual Right, has a greater Majesty, than he that enjoys it but for a Time, because the Manner of holding adds to the Dignity. The same Thing may likewise be said of such, as during the Minority, Lunacy, or Captivity of their Kings, are appointed Regents of the King-

reignty, are not aware that this Assertion will carry them farther than they would wish. For it would follow, that all Sovereignty ought to extend as far as it is possible, and consequently must be successive; because that is the only Way to render it perpetual, while Princes are under the same Necessity of dying, as the meanest of their Subjects. It would likewise follow, that however a Sovereign behaves himself, he cannot be deposed, even though he should carry his Tyranny to the utmost Excess; or at least, that a Prince, who is deposed, was not a Sovereign during the Time of his good Administration. But our Antagonists agree with us in owning that, in that Case, the most absolute Princes forfeit the Sovereignty; and as all Princes may commit such Abuses, it is evident that on that Account all Sovereignty is for a Time. Now if it is not contrary to the Nature of Sovereignty, that it should end at a Time, which indeed was not limited, but which might come, and was considered as possible to come, I do not see why it may not end at a fixed and determined Time. There are several other Conditions, on which we may conceive that the sovereign Authority is expressly so conferred on a Person, that the Execution or Defect of such Conditions may render it a Power for a Time. Let us suppose, for Example, that in an elective Kingdom, where it is not thought proper to establish a Regent, the People desirous of settling the Crown on the late King's Son, who is a Minor, choose another King, on Condition that he shall resign the Crown to the young Prince, if he lives to the Time of his Majority. This would certainly be a Sovereignty for a Time. Hence we may conclude, if such a Sovereignty, because not perpetual, is therefore less advantageous to the Possessor, and is esteemed less glorious; it is not in itself a less real Sovereignty. All that remains therefore is to enquire whether the Instances alledged are to the Purpose or not. See the following Note.

⁷ So that, says our Author in a Note on this Place, the People were obliged to have Recourse to Intreaties, for saving the Life of *Q. Fabius Maximus Rullianus*, General of the Cavalry (*Magister Equitum*) whom *L. Papirius Cursor*, the Dictator, had condemned for giving Battle without his Orders. *LIVY. Lib. VIII. Chap. XXIX, XXXV.* The Author, who had before spoken of the Dictatorship, as an Instance of temporary Sovereignty, (§. 8.) observes likewise in a Note, which I have reserved for this Place, that when *M. Livius Salinator* was Censor, he disfranchised all the Tribes (*æarias reliquit*) except one, and thus shewed he had a Power over the whole People. *LIV. Lib. XXIX. Cap. XXXVII. num. 13.* But how considerable soever the Power of the Censors was in certain Respects, it was not universal like that of the Dictators. Perhaps our Author made this Remark only with a View of shewing that, if the Censors were absolute, and above the whole People in what concerned their Office; much more ought we to consider the Dictators as such. • But whatever was his Design, I think he has Reason to mention the Dictators, as a sort of temporary Sovereigns by dis-

tinguishing, as he does, between the Power of the Dictators, such as it was originally in the first Ages of the Roman Commonwealth, and that which they enjoyed in later Times, when it had suffered such gradual Changes, as divested it of the Character of intire Independence. In Regard to the former, which is here under Consideration, ancient Authors, both *Latin* and *Greek*, give us an Idea of a real Sovereignty for a Time. We have already (§. 8. *Notes*, 45, 46.) produced Passages from *LIVY* on that Subject. *DIONYSIUS HALICARN.* speaking of *Titus Lartius*, the first Dictator, styles him a *Monarch*. He says, *he had an absolute, independent Power in Affairs of War and Peace, and all others. That he was called Dictator, because he might command and prohibit what he pleased. That the Romans did not think it proper to give him a Title (that of King) which was odious to a free State, and conveyed an Idea of Oppression. That the very Appellation of Dictator expressed the Extent of his Authority; and that the Dictatorship was in Reality an elective Tyranny, or Royalty. Lib. V. Cap. LXXXIII.* He had before observed that *the Senate decreed that this extraordinary Magistrate should be accountable to none for his Conduct: That his Authority should be equal to that of Tyrants, (or Kings) and that he should be superior to all Laws. ibid. Cap. LXX.* See also *POLYBIUS, Hist. Lib. III. Cap. LXXXVII.* and *EUTROPIUS, Breviar. Hist. Rom. Lib. I. Cap. XI.* In Reality the Dictator, according to the first Institution, exercised all the Parts of Sovereignty; and his Authority was limited only in certain Things of little Consequence, as might be easily made appear. All the Facts alledged, which seem to prove the contrary, are of a later Date; and, on examining what has been said by *BOECLER*, in his Notes on our Author, *Pag. 239, &c.* by *OBREHT*, in his Dissertation *De extraordinariis Populi Romani Imperiis*, §. 41, &c. *PUFENDORF*, as before quoted, and some other Writers, we shall find all their Objections fall to the Ground, by supposing this Distinction. A learned Man, who has published a short but good Dissertation *de Dictatoribus Populi Romani*, since I had written all I have here said on this Subject, maintains that, in the Cases in Question, the Dictators either did not exert their whole Power out of a Principle of Goodness, or were hindered in the Execution of their Office by the Senate, who thus exceeded the Bounds of their own Authority. See *Chap. VIII.* of that Dissertation, printed in 1717, in *Mr. JENS's, Ferulum Literarium.* *ARISTOTLE* furnishes us with a more ancient Example of a temporary Sovereignty, viz. that of the *Æsymnetæ*, among the old Greeks, which, he says, was, properly speaking, an elective Monarchy: and differed from those of the Barbarians, only in not being Hereditary. Some of them governed during Life; others for a certain Time, or in some particular Affairs. *Politic. Lib. III. Cap. XIV. p. 356. Edit. Paris.* *DIONYSIUS HALICARN.* compares the Power of the Dictators with that of the *Æsymnetæ*, and supposes the Romans took that Form of Government from the Grecians. *Antiq. Rom. Lib. V. Cap. LXXXIII.*

dom,

dom, ⁸ so that they depend not on the People, and cannot be deprived of their Authority before the Time fixed by Law.

See Procop.
Vandalic. 1.
1. c. 9.

But it is otherwise with those who are invested with a precarious Power, and which may be at any Time recalled, as were the Kings of the ancient *Vandals* in *Africk*, and of the *Goths* in *Spain*, whom the People might ⁹ depose, upon any Dislike. Whatever such a Prince does, may be abrogated by those who vested him with a Power so liable to Revocation; and consequently as the Exercise of his Authority has not the same Effects as the Acts of a true Sovereign, so neither is the Authority the same.

XII. Some Sovereign Powers held fully, with a Right of Alienation. Fr. Hotoman. Quæst. Illustr. Qu. 1.

1 Sam. xxii. 17

2 Sam. x. 2.

1 Kings ix. 22.

XII. Against what I have said before, that some Governments are held in full Right of Propriety, that is, by way of Patrimony, some learned Men make this Objection, that Free-men are not to be barter'd away. But as there is a Difference between the regal Power, and that of a Master over his Slave; so likewise there is a Difference between civil Liberty, and that which is personal: The Liberty of a private Person is one Thing, and that of the whole Body of the People another. For even the *Stoicks* ¹ acknowledge there is a kind of Servitude ἐν ὑποτάξει in Subjection; and in Holy Writ the Subjects of Kings are called their Servants. As then personal Liberty excludes the Dominion of a Master, so does civil Liberty exclude Royalty, and all manner of Sovereignty properly so called. ² *Livy* thus opposes them, *Before Men had tasted the Sweetness of Liberty, they desired a King.* Again, *It seemed a shameful Thing, that the People of Rome, when they served under Kings, were never attacked in War, nor besieged by an Enemy, but being a free People should be besieged by the Hetrurians;* and in another Place, *The People of Rome are not now under a King but at Liberty.* And again in another Place, he opposes those Nations that were free, to them that lived under Kings; and ³ *Cicero* said *Either the Kings should not have been expelled, or the People should have had their Liberty in Deed, and not in Words.* And after them ⁴ *Tacitus*, *The City of Rome was at first under Kings; but L. Brutus brought in Liberty, and the consular Government.* And elsewhere, *The Liberty of the Germans is more severe than the regal Power of Arfaces.* And ⁵ *Arrian* βασιλεύσι καὶ τῇσι πόλεσιν ὅσα αὐτόνομα. *To the Kings and free Cities, (those that live after their own Laws.)* And *Cæcina* in ⁶ *Seneca*, *The regal*

⁸ It is to be observed that the Author speaks only of such as are appointed Regents in the Cases here specified, which happen but seldom; for those who have criticized him on this Occasion, seem to suppose he speaks of all Regents in general: In the second Note on this Paragraph he refers us to an Instance of the extraordinary Case in Question, which is given at large in PUFENDORF, B. VII. Chap. VI. Note 4. The late Mr. HERTIUS, in a Dissertation *De Tutela Regia*, which is published in the first Volume of his *Commentationes & Opuscula*, &c. adds some others. JOHN de Brienne, Viceroy of Jerusalem, was made Guardian of Baldwin II, and crowned as Emperor, on Condition that when his Ward, who was to marry his Daughter, came to Age, he should faithfully resign the Empire to him. See CHARLES DU FRESNE'S *Gallo-Byzantine History*, B. III. ODO, or EUDO, Duke of Burgundy, being named Guardian to CHARLES the Simple, King of France, was crowned as King, that he might govern with more Authority. See Mr. DU CANGE'S *Glossary*, under the Word *Heredes*; ALBERIC'S *Chronicle*. An. 994. and BUSSIERES'S *History of France*, B. VI. p. 467. In the German Empire, PHILIP governed with the Title of King, during the Minority of his Nephew Frederic II. See Mr. D'URSPERG'S *Chronicle*, p. 319, and that of GODFREY the Monk, An. 1196.

⁹ The same is related of the ancient *Heruli* by PROCOPIUS, *Gothic*. Lib. II. Cap. XIV, XV. Of the *Lombards*, by PAUL WARNEFRID, Lib. IV, VI. Of the *Burgundians*, by AMMIAN MARCELLIN. Lib. XXVIII. Cap. V. Edit. Vales. Of the *Moldavians*, by LAONIC CHALCONDYL. Of the

King of *Agades* in *Africa*, by JOAN LEO, Lib. VII. In *Norway*, whoever killed a King, succeeded to the Throne, as we learn from GUILIELM. NEUBRIG. We have Instances of the same Kind among the *Quadi*, and *Jazyges* in the Fragments of DIO.

XII. (1) DIOGEN. LAERT. Lib. VII. § 122.
2 Lib. I. Cap. XVII. num. 3. Lib. II. Cap. XII. num. 2. Cap. XV. num. 3. Lib. XLV. Cap. XVIII. num. 2.

3 De Legibus. Lib. III. Cap. X.

4 Annal. Lib. I. Cap. I. num. 1. Idem De Morib. German. Cap. XXXVII. num. 6.

5 Histor. Indic. Cap. XI. Edit. Gronov.

6 Natur. Quæst. Lib. II. Cap. XLIX. We have an Instance of this Presage in the History of *Genoa*, by PETER BIZAR. B. XIX. The Author, in a Note on this Place, produces the following additional Passages to prove that the ancient Greek and Latin Writers opposed Liberty to Monarchical Government. *This Teres, the Father of Sitalces, was the first who enlarged the Kingdom of the Odrysæ so much, that he exceeded the other Kings of Thrace; for great Part of Thrace is free.* THUCYD. Lib. II. Cap. XXIX. Edit. Oxon. *Men are not to speak their Minds in the same Manner in a free State, as under Kings, SENECA Pater Suasor* 1. p. 4, 5. Edit. Elziv. 1672. JOSEPHUS distinguishes between Kings and free States, Antiq. Lib. XIII. Cap. XVII. CICERO says he had procured the Assistance of free States, and confederate Kings. Ad Famil. Lib. XV. Epist. IV. And PLINY speaking of some Nations as free, adds, that they were not subject to Kings, Hist. Nat. Lib. VI. Cap. XX.

Thunderbolts are those whose Force affects either the Assembly of the States, or the chief Places of a free City: The Meaning whereof is that the State is threatened with a regal Power. So those Cilicians who were not under Kings were called *E-leuthero Cilices*, ⁷ free Cilicians. And ⁸ Strabo says of *Amisus*, (a City of Pontus) that it was sometimes free, and sometimes under Kings. And every where in the Roman Laws, that treat of War, and Judgments of ⁹ Recovery, Foreigners are distinguished into ¹⁰ Kings and free People. It is said even of those, who do not enjoy this publick Liberty, as well as of those who are deprived of personal Liberty, that *they are not their own Masters*; but that they *belong* to those on whom they depend. Hence that in ¹¹ *Livy*, which Cities, which Lands, which Men were once under the Power of the *Ætolians*. And again, ¹² *Are the People of Collatia their own Master?* The Argument then which is here used, is not to the Purpose, since ¹³ the Question does not relate to personal but civil Liberty. But properly, when a People is alienated, it is not the Men themselves, but the perpetual Right of governing them, as they are a People. Thus when a Freed-Man is assigned to one of his Patron's ¹⁴ Children, the Freeman is not alienated, but the Right which one had over that Person is transferred.

And that is as weak, which alledges, that because a King conquers other Nations by the Blood and Sweat of his Subjects, therefore what he so conquers, should rather belong to them than to the Prince. ¹⁵ For it is possible, that the King may maintain ¹⁶ his Army out of his private Estate, or out of ¹⁷ the Revenues of the Crown Lands. For, though a King has but an usufructuary Right to those Lands,

⁷ Free Cilicians. CICERO mentions them *Ad Fam. Lib. XII. Ep. IV. & ad Attic. Lib. V. Ep. XX.*

⁸ *Geograph. Lib. XII. p. 822. Edit. Amsterd. (547. Paris.)*

⁹ See Paragraph 21.

¹⁰ In the Law Definition of *Postliminium*, which is called the Right of recovering a Thing lost, and restoring it to its former State, established between us, free Nations and Kings, by Laws and Customs. *DIGEST. Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. XIX.*

¹¹ *LIVY, XXXVIII. Cap. XI. Num. 9.*

¹² *Idem. Lib. I. Cap. XXXVIII. Numb. 2.*

¹³ Our Author's Argument, which is not delivered very clearly, stands thus. When it is said, that free Persons are not to be sold, this is to be understood of single Persons, not of the whole Body of a People. Now single Persons who are Members of a People, are free, though the whole People is not so; for the Liberty of a Man consists in his having no particular Master, who has a Power of commanding his Actions, and even to dispose of his Person, and Estate; and those, who are Members of a People not free, have, as such, but one common Master, who has a Right to command them as his Subjects. Thus when a King alienates his Crown, we cannot say he disposes of his Subjects, considering each of them in particular; for, after he has sold or given away his Kingdom, each Subject is still as free as before, and has only another Sovereign. As to the Body of the People, barely by having a King, really such, it ceases to be free; and thus, even according to the Maxim objected against our Author, such a People may be sold, their own Way, that is, the Prince, invested with a full Right to govern them as long as he lives, may transfer his Right to another; for in this consists the Alienation of the Sovereignty. But then it must be observed, that our Author does not pretend that every Sovereign Prince has, as such, a full Right to alienate the Sovereignty; he confines this Power to some only, that is, to such as have acquired the Kingdom by just Conquest, or by making his Advantage of a pressing Necessity, which obliged the People to put themselves under his Dominion without Reserve or Restriction; as is

evident from what he says, § 11, and § 14. But we have shewn, in Note 4 on § 11, that this Distinction of our Author is not well grounded; no Sovereign having a Right to alienate his Dominions, without a Concession from his Subjects, either formal, or tacit, but clear, in what Manner soever he obtained the Crown.

¹⁴ This Right rather relates to the Succession to the Freed-Man's Estate, than to his Person. See *INSTITUT. Lib. III. Tit. IX. De Adsignatione Libertorum.*

¹⁵ See *B. III. Chap. VIII. § 2.* and *PUFEND. B. VIII. Chap. V. § 8.* As the Objection, which is Mr. HOTOMAN'S (*Quæst. illustres. Cap. 1.*) would, if well grounded, prove only that the conquered People ought to be dependent on the victorious People, or on the State rather than the King, under whose Command the Conquest was made; and not that the Dominion gained over the vanquished People cannot be accompanied by a Right of Property. So too our Author's Reply to this Objection proves no more than that, when a Prince has carried on a War at his own Expence, as he explains the Matter, he acquires to himself, and exclusively of his Subjects, a Sovereignty over the People conquered, whether his Kingdom is patrimonial, or not. But it does not thence follow, that the most lawful Acquisition, made by Conquest, implies in itself a Power of alienating the People conquered. See § 11. Note 4.

¹⁶ The Emperor *Marcus Antoninus*, having drained his Treasury in the *Marcomannic War* would not lay any new Tax on the People, but exposed his Plate to publick Sale, with his Chrystal and Porcelane Vessels, his own, and his Wife's rich Clothes, and a great Quantity of Jewels. *GROTIUS.*

See *JULIUS CAPITOLINUS. Vit. M. Anton. Philosophi. Cap. XVII.* *EUTROP. Breviar. Hist. Rom. Lib. VIII. Cap. VI. Num. II. Edit. Cellar, AUREL. VICTOR. Epitome, Cap. XVI. Num. 9.*

¹⁷ For this *Ferdinand*, King of *Arragon*, appropriated to himself half the Kingdom of *Granada*, which he had conquered with the Revenues of the Kingdom of *Castille*, while his Wife *Isabella* was alive; as we learn from *MARIANA, Histor. Hispan. Lib. XXVIII. GROTIUS.*

as he has to the Sovereignty over the People who have chosen him, yet are those Revenues properly his own: Just as, by the civil Law, when one is obliged to restore an Inheritance, the Incomes are not restored, because they are accounted to arise from ¹⁸ the Thing itself, and not to make Part of the Inheritance. Therefore it may happen that a King may so enjoy a Government over ¹⁹ some People in his own proper Right, that it may be in his Power even to alienate it; and we find in History ²⁰ many Instances of Sovereignty accompanied by that Right. *Strabo* says, That the Island *Cythera* over-against *Tænarus* ²¹ did belong to *Eurycles* a *Lacedemonian* Prince, ἐν μερὶ κήσεως ιδίας, in his own proper Right. So ^{1 Kings ix. 11. 12.} King *Solomon* gave to *Hiram*, (for so *Philo Byblius*, who translated the History of *Sanctuniaton*, calls him in Greek) King of the *Phœnicians*, twenty Cities, not of those that were inhabited by the *Hebrews*. For *Cabul* (which Name is given to those Cities) was seated without the Bounds of the *Hebrews*; but of those Cities, which some conquered Nations, Enemies to the *Hebrews*, had held to that Time, and were partly subdued by *Solomon's* Father-in-Law, the King of *Egypt*, and given to him in Dowry with his Daughter, and partly conquered by *Solomon* himself. ^{Jos. xix. 27.} For it is plain, that those Cities were not at that Time inhabited by the *Israelites*, ^{2 Chr. viii. 2.} because when *Hiram* ²² had restored them, *Solomon* planted *Hebrew* Colonies in them.

Thus we read, that *Hercules* having conquered the City of *Sparta*, ²³ gave the Sovereignty of it to *Tyndareus*, on Condition, that if *Hercules* left any Children of his own, he should restore it to them. So *Amphipolis* ²⁴ was given in Marriage Dowry to *Acamas* Son of *Theseus*; and ²⁵ *Agamemnon* promises in *Homer* to give *Achilles* seven Cities. King *Anaxagoras* gave two Parts of his Kingdom to *Melampus*. And ²⁶ *Justin* tells us of *Darius*, that he bequeathed by Will his Kingdom to *Artaxerxes*, and to *Cyrus* the Cities, of which he was Governor. Thus, the

¹⁸ That is from such Things as compose the Substance or Essence of the Inheritance, and which were fully enjoyed by the Possessor, before Restitution. This is our Author's Meaning, and the true Sense of the Law, which he has in View; so that *ZIEGLER's* Criticisms on both are mere Chicanery. See the Law itself *DIGEST. Lib. XXXVI. Tit. I. Ad Senatusconf. Trebell. Leg. XVIII. § 2.*

¹⁹ Those who accompanied *Baldwin* in his Eastern Expedition, allowed him half of the Cities, Provinces, Imposts, and Plunder, they had taken. *GROTIUS.*

²⁰ In Regard to those Instances it should be observed, *first*, That we are not sufficiently acquainted with the Terms on which the Princes or States here mentioned acquired the Sovereignty over the respective People. There might have been some formal Clause, by which those People gave their Sovereign a Power of alienating the Sovereignty. *Secondly*, Those Alienations were frequently supported by Force alone, as has been observed, *Note 4.* on § XI. and became lawful only by Vertue of a subsequent Consent, given when the People, thus alienated, submitted without Opposition to their new Sovereign. *Thirdly*, There might have been a tacit Consent, entirely free, at the very Time of the Alienation; either when the People, to be alienated, expressed no Opposition to that Action, though not under the Constraint of superior Forces, or because, a Custom being introduced into the East, and other Countries, of annexing such a full Power of Property to the Right of absolute Sovereignty, as authorized the Prince to alienate his Dominions at Pleasure, those who submitted to such a Sovereign, were judged to have done it in Conformity to the established Custom, unless they expressly declared the contrary. So that all these Examples do not amount to a Proof that the Power of Alienation is necessarily attached to the most absolute Sovereignty, considered in itself, and however acquired.

²¹ *Geograph. Lib. VIII. p. 558. Edit. Amst. (363 Paris.)*

²² It is not certain that the Cities which *Hiram* gave *Solomon*, (for so it is in the Text, not restored) were the same he had received as a Gift from the King of the *Hebrews*. See Mr. *LE CLERC's* Commentary of the Passages, quoted in the Margin.

²³ The same *Hercules* having conquered the *Dryopes*, whose Country was situated near *Parnassus*, made a Present of them to *Apollo*; as we learn from *SERVIVS* on *Æneid. IV. v. 146.* *Ægimius*, King of the *Dorians*, gave *Hercules* part of his Dominions, as a Reward for his Assistance, in the War against the *Lapithæ*. *APOLLODOR. Biblioth. Lib. II. Cap. VII. § 7. Edit. Paris. Cyclops* King of *Salamis*, dying without Issue, left his Kingdom, by Will, to *Telamon*. *Idem. Lib. III. Cap. XI. § 7.* *Peleus* received a third Part of the Dominions of *Eurytion* King of *Phthia*, as a Portion with his Daughter. *Idem. Lib. III. Cap. XII. § 1.* *Porca* King of *Alba* bequeathed his Kingdom to *Numitor*, his eldest Son. *LIVY, Lib. I. Cap. III. Num. 10. GROTIUS.*

²⁴ This Fact is recorded by *DEMOSTHENES*, in his Oration *De malè obitâ legatione*, p. 251. *Edit. Bas. 1572.*

²⁵ *Iliad. Lib. IX. v. 149, &c.* See *SERVIVS* on *VIRGIL, Ecl. VI. v. 48.* and *PAUSANIAS, Corinthiac, Cap. XVIII. p. 60. Edit. Wech.* Thus likewise in *HOMER*, *Jobates* gave his Daughter to *Bellerophon*, with half his Royal Honours; which *SERVIVS* explains, with Part of his Kingdom. On *Æneid. v. 118.* *Peleus* gave *Phœnix* the Country of the *Dolopes*, lying on the Borders of *Phthia*, as *PHENIX* himself testifies. *Iliad. Lib. IX. v. 479, 480.* *Lanassa* marrying *Pyrrhus*, King of *Epirus*, had for her Portion the City of *Corcyra*, conquered by her Father *Agathocles*, King of *Syracuse*. *PLUT. in Pyrrho. GROTIUS.*

²⁶ *Lib. V. Cap. XI. Num. 2.*

Successors of *Alexander the Great* ²⁷ are to be considered as having succeeded him, every one in his allotted Part, in the full Right of Property, by Vertue whereof he governed those Nations, which had been formerly under the *Persians*, or else as having acquired that Sovereignty themselves, by Right of Conquest; therefore it is not to be wondered at, that they claimed to themselves the Right of Alienation.

When King *Attalus*, ²⁸ the Son of *Eumenes*, had made, by his Will, the People of *Rome* Heir to his Goods, they, under the Name of Goods, possessed themselves of his Kingdom. Of which *Florus* ²⁹ thus speaks, *Therefore the Romans entering upon it as Heirs, reduced it into the Form of a Province, not by Force of Arms, but in a fairer Way, by Right of Inheritance.* And afterwards, when *Nicomedes*, King of *Bithynia*, had made the People of *Rome* his Heir, they immediately reduced the Kingdom into the Form of a Province. And ³⁰ *Cicero*, in his second Oration against *Rullus*, says thus, *We have got a good Inheritance, the Kingdom of Bithynia.* So that Part of *Libya*, called *Cyrenaica*, was left by King *Apion*, by Will, to the *Romans*. *Tacitus*, in his fourteenth *Annal*, mentions some Lands ³¹ which formerly belonging to King *Apion*, were, together with his King-

*Appian Bell.
Mithridat. &
Bell. Civil.*

Eutrop. l. 6.

²⁷ AMMIAN. MARCELLINUS, speaking of *Persia*, says, tho' not conformably to the Truth of History, that *Alexander the Great* bequeathed that whole Kingdom to one of his Successors. *Lib. XXIII. Cap. VI. p. 398. Edit. Vales. Gron.* GROTIUS. See HENRY DE VALOIS's Note on that Passage.

²⁸ VALERIUS MAXIMUS tells us, *Attalus* did this out of a Principle of Gratitude, *Lib. V. Cap. II. Num. 3.* SERTORIUS affirmed, that on that Account, the Roman People had a very good Title to that Country. *PLUT. Vit. Sertor. p. 580. Tom. I. Edit. Wech. GROTIUS.*

²⁹ *Lib. II. Cap. XX. Num. 3.*

³⁰ *Orat. II. De Lege Agrari. contra Rull. Cap. XV. p. 413. Edit. Græv.*

³¹ APPIAN of *Alexandria* tells us, that *Apion*, a Bastard of the Race of the *Lagides*, left the Country of *Cyrene*, (to the Roman People) by his Will. *De Bell. Mithridat.* AMMIAN. MARCELLIN. speaks of this Legacy, *Lib. XXII. Cap. XVI. We became possessed of the drier Libya, by the Disposal of King Apion; we received Cyrene, and the other Cities of Libya Pentapolis from the Liberality of Ptolomy.* For that King of *Cyrene* was called both *Apion* and *Ptolomy*. See *Breviar. Liv. Lib. LXX.* That Prince himself came to the Throne by his Father's Will, as we learn from *JUSTIN, Lib. XXXIX. Cap. V. Num. 2.* EUSEBIUS in his *Chronicle* at the Year 1952, speaks of another *Apion*, mentioned by AMMIAN. MARCELL. who had made the Roman People Heirs of the *Dry Libya*. [But see HENRY DE VALOIS's Notes on that Place]. To these may be added the following Examples. King *Arfaces*, by his Will, divided *Armenia* in such a Manner, that the greater Part of it fell to his Son *Arfaces*, and the smaller to *Tigranes*. *PROCOPIUS. De Edificiis, Lib. III. Cap. I.* We learn from *JOSEPHUS*, that the Emperor *Augustus* having allowed *Herod* to leave the Kingdom of *Judea* to which of his Sons he pleased, that Prince altered his Will several Times. *Antiq. Jud. Lib. XV. XVI.* Among the *Goths* and *Vandals* the Kings disposed of their Conquests by Will. *Gizeric*, King of the *Vandals*, followed this Custom in Regard to his Spanish Dominions. *PROCOPIUS. Vandalic. Lib. I. Cap. VII.* *Theuderic*, King of the *Ostrogoths*, gave his Sister *Amalafreda* the Country of *Lilybæum*, in *Sicily*, for her Portion. *Ibid. Cap. VIII.* We find the same Practice established in other Nations. *Pepin* having conquered *Aquitain*, divided it among his Children. *FREDEGAR, Chron.* We have Testi-

mentary Disposals of *Burgundy*, in *AIMONIUS. III. 68, 75.* The King of *Fez* bequeathed *Fez* to his second Son. *LEO Afer, Lib. III.* See also what the same Historian says of *Bugia*, *Lib. V.* The Sultan *Aladin* left *Ozmin* several Cities by his Will. *LEUNCLAV. Hist. Turc. Lib. II.* The King of *Germianum*, who married his Daughter to *Bajazet*, gave her what he possessed in *Phrygia*. *Idem. Lib. V.* *Musal* divided the *Turkish* Dominions in *Cappadocia* among his Children. *NICETAS, Lib. III.* *Chuschin Bega* gave *Murat* the Cities lying near the *Euxine* Sea. *LEUNCLAV. Lib. I.* *Bajazet* gave *Stephen* the Cities of *Servia*, in Honour of his Wife, Sister to the said *Stephen*. *Idem. Lib. VI.* The Sultan *Mahomet* bequeathed his Kingdom to *Murat*. *Idem. Lib. XII.* *Jacup Beg*, Prince of *Germianum*, appointed the Sultan *Murat* Heir of his Dominions. *Idem. Lib. XIV.* *Mahomet*, Emperor of the *Turks*, had thought of leaving his *European* Dominions to his Son *Amurat*, and those in *Asia* to his other Son *Mustapha*. *CHALCOCONDYL, Lib. IV.* The Emperor *Basil Porphyrogenetus* was by *David Curopalates* made Heir to his Possessions in *Iberia*. *ZONAR. in Basil Porphyrog.* I now come to the Practice of such Christians as were victorious in the East: *Michael Despota* divided *Theffaly* among his Children. *NICEPHOR. GREGORAS, Lib. IV.* The Prince of *Etolia* left *Athens* to the *Venetians*, and sold *Bæotia* to *Anthony*. *CHALCOCONDYL, Lib. IV.* The Prince of *Arcadia* gave his Daughter, *Messina*, *Ithome*, and those Parts of *Arcadia* that bordered on the Sea, for her Portion, on her Marriage with the Son of *Thomas* the *Grecian* Emperor. *Idem. Lib. V.* Prince *Charles* made a Will, by which he divided *Acarmania* among his natural Sons; and gave several Parts of *Etolia* to his Mother's Relations. *Id.* Thus the Kingdoms of *Jerusalem* and *Cyprus* were partly bequeathed by Will, and partly alienated by Contracts. Consult *BEMBO, Hist. Ital. Lib. VII.* and *PARUTA, Lib. I.* for what relates to *Cyprus*. The City of *Castro* in *Sardinia*, and others depending on *Cagliari*, were Gifts to the *Genoese*. *BIZAR, De Bello Pisano, Lib. II.* *Robert* gave *Dyrrachium* and *Aulone* to *Baimund*, his younger Son. *ANNA COMNENA, Lib. V. Cap. II.* *Alphonso*, King of *Aragón*, who had conquered the Kingdom of *Naples*, left it to *Ferdinando*, his natural Son: And *Ferdinando* bequeathed some Cities in that Kingdom to his Grandson. *MARIANA, Hist. Hisp. Lib. XXX.* GROTIUS. See Note 20. on this Paragraph.

dom,

dom, bequeathed to the Romans. And in ³² Cicero, *Every Body knows that the Romans are become Masters of the Kingdom of Egypt, by Vertue of the Will of the King of Alexandria.* Mithridates, in Justin, speaking of Paphlagonia, says, ³³ *Which fell to his Father, not by Force, and the Superiority of his Arms, but by a testamentary Adoption.* The same Author also relates, *that Orodes King of Parthia, was a long while debating, to which of his Sons he should leave his Kingdom.* And Strabo, l. 12. Polemo, Prince of the Tibarenians, (a People of Cappadocia) and of the Country adjoining, left his Wife Heiress of his Dominion; which also Mausolus had formerly done in Caria, tho' he had several Brothers alive.

XIII. Some are held not so fully.
Hist. Dan. l. 2.
cap. 4.

XIII. But as to Kingdoms which were originally established by the full and free Consent of the People, I confess ¹ it cannot be presumed, that it was ever their Design to allow the King to alienate the Sovereignty. Wherefore what Crantzius observed in Unguinus, as a Thing never heard of, that by his Will he had bequeathed Norway, ² we have no Reason to blame, since he might have in View the Customs of the antient Germans, amongst whom the Kings had no Power to alienate their States. For as to what is related of Charles the Great, Lewis the Pious, and also others afterwards among the Vandals and Hungarians, the testamentary Dispositions, which they made, were rather bare Recommendations to ⁴ the People, who were to choose their Successors, than a true Alienation. And of Charles, Ado expressly remarks, that he much desired to have his Will ⁵ confirmed by the chief Nobles of France. The

³² The Passage stands thus in CICERO, Orat. II. *De Lege Agrar. contra Rull.* Cap. XVI. p. 415. *For who among you does not know it is said, that that Kingdom fell to the Roman People by the Will of King Alexander?*

³³ Which (Paphlagonia) became hereditary to his Father, not by Force, or Superiority of Arms, but by Vertue of a Will, by which he had been adopted, and by Default of Heirs of the Family. Lib. XXXVIII. Cap. V. Num. 4.

XIII. (1) Vopiscus, a Roman Senator, declared that the Empire ought not to be left by Will, like Lands and Slaves. TACIT. Cap. VI. SALVIAN, speaking of Nebuchadnezzar, King of Babylon, makes the following Observation, *For he (the Prophet) spoke to the King; to the King not of one single City, but, as was then supposed, of the whole World; who therefore could not bequeath the Nations which he governed, to the Poor; bestow the several barbarous People under his Jurisdiction, on the Needy, like Money; or convert his extensive Kingdom into a Patrimony for the Indigent.* Break off thine Iniquities, says he, by shewing Mercy, that is, give the Poor Money, because you cannot bestow your Kingdom upon them: Distribute your Substance among them, because you cannot dispose of your Crown. Ad Eccl. Cathol. Lib. I. p. 356. Edit. Paris. 1645. GROTIUS.

I have set down the last Passage at Length, which our Author has quoted in such a Manner, that if I had not found it by Chance, after a long Enquiry, it would not have appeared whether SALVIAN was speaking of Kings in general, or of some one in particular. But that Author's Argument, thus considered intire, and the Passage of DANIEL, c. iv. which gave Occasion to it, will shew us that it is possible he never thought of the Subject in Question. It is very probable he only means, that a Prince is not obliged to sell his Subjects, in order to raise Money for the Relief of the Poor; and that it would not be proper or possible for him to leave them his Dominions; that therefore the King of Babylon ought to give Alms, not as a King, but as a very rich Man: Whence the good Priest concludes, in a Manner worthy of the Age in which he lived, that since Daniel exhorts the King, in general Terms, to redeem his Sins by Alms, without excepting any Thing in his Possession, that

could be given to the Poor, he by these Words directed the King to employ his whole Treasure in Alms, *When he only does not command him to give what he could not bestow, he seems to have commanded him to give his All.* So that no Consequence can be drawn from those Words for deciding whether Kings in general, and those of Babylon in particular, had, according to SALVIAN, a Power of alienating their Dominions at Pleasure.

² The Author here has HOTOMAN in View, who, in his *Quæstiones illustres*, Cap. I. criticises on the German Historian's Observation.

³ See the Capitularies of CHARLES the Bald, Cap. XII. *Conventus ad Carisiacum.* To this Purpose is the Will of Pelagius, by which he left Spain (or the Kingdoms of Leon, Asturias, and Castille) to Alphonso and Ormisinda; as also some Particulars in SAXO GRAMMAT. relating to Denmark. We are not therefore to be surprized that the Wills of some Princes have been set aside, because not ratified by the People; as that of Alphonso, King of Arragon. MARIANA, *Hist. Hisp.* Lib. X. p. 499. and that of Alphonso, King of Leon, by which he had appointed his Daughters his Heirs, exclusive of his Sons. Idem. Lib. XII. p. 577. GROTIUS.

⁴ ZIEGLER, on this Place, quotes the very Words of Charlemagne's Will, which we find after his Life, written by an anonymous Monk of Angoulême, and published by P. PITHOU, p. 203, &c. As likewise in the large Collection of MELCHIOR GOLDAST, Ann. 806. In which that Prince evidently supposes the Approbation of the People absolutely necessary: *But if either of those three Brothers shall have a Son, whom the People shall elect to succeed his Father, &c.* The Historians say also that Charlemagne, toward the Close of his Life, assembled the Grandees of all his Dominions, and that with their Approbation he associated Lewis King of Aquitain, afterwards called the Pious, or the Debonnaire, and declared him his Successor. EGINHART, in *Vita Caroli Magni*, Cap. XXX. See also ANSELM, *Annal. Francor.* Ann. 813, and THEGANUS, *De Gestis Ludov. Imper.* Cap. VI.

⁵ He made them confirm his Will by an Oath, as EGINHART assures us in another Work, or in his *Annals.* The learned BOECLER, who quotes the Passage in his *Short History of the ninth and tenth Ages*, Tom. III. *Dissert.* p. 20. is of Opinion that

The like is reported of *Philip* King of *Macedon*, that when he designed to disinherit his Son *Perseus*, and settle the Crown upon *Antigonus*, his Brother's Son, ⁶ he went over all the Cities of *Macedon* to recommend *Antigonus* to the Princes, as ⁷ *Livy* informs us. In Regard to what is said of *Lewis* the Pious, that he restored the City of *Rome* to Pope *Paschal* ⁸, it is nothing to the Purpose, since the *French* having received the Sovereignty over the City from the People of *Rome*, might well restore it to the same People, in the Person of him who represented them, as being Chief of the first Order of the State.

that the Succession was fixed and constantly observed at that Time; in which he is joined by several other Authors. But it is not easy to reconcile this with all the Precautions taken by *Charlemagne*, and his Successors, for securing the Disposals they made. The Matter was carried so far, that Religion, or rather Superstition was called in to their Assistance. *This Proposal* (of *Charlemagne*) *was received with great Satisfaction by all present; for they thought him divinely inspired on this Occasion, for the Good of the Kingdom; says EGINHART, De Vit. Car. Mag. Cap. XXX. See the other Authorities alledged by Mr. SCHMINKRE, in his last Edition of that Work.*

6 We have something like this in *CASSIODORE, Lib. VIII. Epist. III, &c.* Thus the Agreements made between *Sanchez* and *James*, concerning the mutual Succession to the Crown of *Aragon*, were confirmed by the Nobility; as we learn from *MARIANA, Hist. Hisp. Lib. X. p. 512.* That Historian says the same of the Will of *Henry* King of *Navarre*, by which he made *John* his Heir, *Lib. XIII. p. 597.* And of that of *Isabella* Queen of *Castille*, *Lib. XXVIII. (or Append. Hist. Hisp. p. 243).* *GROTIUS.*

7 *Lib. XL. Cap. LVI. Num. 7.*

8 Several Objections may be made in this Place. First, The Fact itself is false. We find no Account of this pretended Donation, either in *AIMONIUS*, in *EGINHART's Annals*, in *ANASTASIUS*, or in *THEGANUS, De Gestis Ludov. Imp.* nor in the uncertain Author of that Emperor's Life. The Whole is founded on a spurious Act, of which two different Copies are produced; one, which *RAPHAEL VOLATERRAN (Geogr. Lib. III.)* tells us, he took from the *Vatican Library*; the other appears in the *Canon Law, Distinct. LXIII. Laici, etiam Principes magni, Episcopos non elegant, Cap. XXX. See Mr. DU PLESSIS MORNAY's Mystery of Iniquity, pag. 336, &c. Edit. Saumur, 1612.* as also *HERMAN CONRING, De Germ. Imperio Rom. Cap. VII.* and *GRONOVIVS's* Notes on this Place. Secondly, It appears from History, that the Popes were not Sovereigns of the City of *Rome*, and its Dependencies 'till long after the Time of *Lewis the Debonnaire*. The Donation of *Constantine* is a Fable, as is owned by the most understanding and sincere Authors of the *Romish* Communion. Among others, see *LAUR. VALLA's* Oration, *De falsè creditâ & ementitâ, Const. M. Imp. Rom. donatione*, published in 1517, and dedicated to *Leo X.* When the Popes had engaged those Cities of *Italy*, which remained in the Hands of the Emperors of the *East*, to shake off the Yoke of those Princes, tho' they had found Means to make themselves Masters of the Revenues, and temporal Government of the City of *Rome*, and Places adjacent: This was not done in Quality of real Sovereigns, acknowledged as such. And when *Pepin* came in to their Assistance against the *Lombards*, he bestowed the City of *Rome*, and the other Parts of the Exarchate of *Ravenna* on the Popes, on that Foot only. Some Authors say that the Ro-

mans had promised *Pepin* the Imperial Crown. See the Life of *Charlemagne*, by *BOECLER*, in his History *De Reb. Sac. IX. & X. Tom. III. p. 23.* of the Collection of his Dissertations. *Charlemagne* confirmed the Donation made by his Father, and even before he was declared Emperor, took Cognizance of the Affairs of *Leo III.* who immediately after his Promotion to the Pontificate, had presented that Prince with the Keys and Standard of *Rome*, intreating him to depute a Person for receiving the Homage of the *Romans*, and giving an Oath of Allegiance; as appears by the very ancient Annals of *France, Ann. 796.* See the Notes on *EGINHART, Cap. XXVIII.* last Edition. In the Will of *Charlemagne*, as given us by *EGINHART, Cap. XXXIII.* *Rome* is mentioned as one of the metropolitan Cities of his Dominions. See *HENN. ARNISEUS, De Subjectione & Exemptione Clericorum, &c. Item de Translatione Imperii Rom. Cap. VI. VII.* *HERMAN CONRING. De Germanorum Imp. Romano, Cap. VII.* And a Book intitled, *Les Droits de l'Empire sur l'Etat Ecclesiastique, &c.* translated from the *Italian*, and printed in 1713. So that I do not see how it can be affirmed, that *Lewis the Debonnaire* restored the City of *Rome* to *Paschal*, since the Popes had constantly possessed it on the Foot already mentioned, from *Pepin's* Time; and before that had no greater Power, carrying the Resemblance of Sovereignty, which is the Power in Dispute. A learned *Italian* has lately ventured to maintain, not only that the Popes had no more than a dependent Jurisdiction; but also, that the *Romans* did not lose their Liberty by calling in the Kings of the *Franks*; that they gave *Charlemagne*, and his Successors, only the High Domain of *Rome*; that they submitted to the Pope as their Head, only in the same Manner as the *Venetians* do to the Doge; and that till the Year 1431, they defended their Liberties as far as was in their Power, against the supreme Pontifs of the Church. See *Mr. LE CLERC's Biblioth. Choisie, Tom. XXIII. Art. II.* But whatever becomes of this Question, or whatever Appellation is given to the Right of the Emperors over the City of *Rome*, it is evident from History, that they exercised it till the Reign of *Henry IV.* and the Pontificate of *Gregory VII.* that is, during the Space of almost three Ages. Thirdly, The Answer here made by our Author, seems neither exact nor to the Purpose. He undertakes to refute *HOTOMAN*, who had alledged the pretended Donation of *Lewis the Debonnaire*, as an Instance of the Power of alienating the Crown, which, according to him, belonged to the Kings of the antient *Germans*. Now, supposing the Truth of that Fact, which our Author admits, the Question is not, How the Sovereignty of the City of *Rome* was formerly translated to the Kings of *France*, nor in whose Favour they divested themselves of it? It should only be enquired whether *Lewis the Debonnaire* made that Restitution by his own Authority, or with the Approbation of the People.

XIV. *Some Power not supreme, yet fully held.*

See Mariana on the Principality of *Urge-ti*, *Hist. Hisp.* l. 12. c. 16.

XV. *This appears from assigning Tutors and Guardians in Kingdoms.*

See *Cothman*, to 1. conf. 41. n. 11.

XIV. But now, the Distinction we make between Sovereignty, and the Manner of holding it is so well founded, that not only the Generality of Sovereigns are not Masters of their States with a full Right of Property; but also there are several Powers not Sovereign, who have a full Right of Property over the Countries within their Jurisdiction; whence it happens, that Marquisates and Earldoms are more easily sold, and bequeathed by Will, than Kingdoms.

XV. Another Thing that proves the Reality of our Distinction, is the Manner in which the Regency of a Kingdom is regulated, during the Minority of the Heir to the Crown, or when the King is disabled by any Distemper from exercising the Functions of Government. For in Kingdoms not Patrimonial, the Regency belongs to those, to whom the publick Laws, or upon their Deficiency, the Consent of the People shall assign it. But in Kingdoms Patrimonial, ² it belongs to those

XV. (1) See MARIANA, speaking of *Alphonso V.* King of *Leon*. But the Will of King *John*, which names Regents of the Kingdom, was disapproved of by the *Grandeos*; as we learn from the same Historian, *Hist. Hisp.* Lib. XVIII. GROTIUS?

² PTOLEMY King of *Ægypt* made the *Roman* People Guardians to his Son. VALER. MAXIM. Lib. VI. Cap. VI. Num. 1. GROTIUS.

But these Examples may be eluded by other Instances of the contrary Practice. The late Mr. COCCEIUS, in a Dissertation *De Tutelis illustrium*, published in 1693. *Señ. II.* § 4. makes it appear, that in the same Kingdoms which our Author considers as patrimonial, the People sometimes disposed of the Regency, during the Minority of the Heir to the Crown: And, on the other Hand, that in those which are owned not to have been Patrimonial, the Regency has been named, either by the last King, or by his Relations after his Demise. For Instances of the latter Case, see a Dissertation by the late Mr. HERTIUS, *De Tutela Regiæ*, (in Tom. I. of his *Comment. & Opusc. &c.*) § 10, &c. and Note 6, on this Paragraph. For which Reason Mr. THOMASIUS, in his Notes on HUBER, *De Jure Civit.* p. 287, 288. seems to be of Opinion, that no certain Principle can be laid down in this Matter; as in Cases of disputed Successions. I agree with him, that the Lawyers will always find wherewithal to maintain both Sides of such Questions, as the Interest of the Party they espouse shall require. But, if we consider Things in themselves, and without Prejudice, it will not perhaps be so hard as is imagined, to establish the Right; tho' there may be no small Difficulty in applying it to the *Fact*, in the Dispute before us. If there is in Reality any *Patrimonial Kingdom*, that is, such as a Prince hath Power to alienate, and dispose of the Succession as he pleases, whether that Right was formally granted to the first King, or acquired by his Successors by a tacit but plain Concession of the People; it is certain that such a Prince has a Right to name those whom he would entrust with the Regency during his Successor's Minority; and when he has done it, no Difficulty remains. But, upon default of a particular Declaration of his Will, or any general Regulation of the Matter, I am of Opinion, that as the People are most nearly concerned in the right Government of the Kingdom, during the Minority of the Person, who is to be their Master, so it is their Business to regulate the Regency as they think proper, or at least in conjunction with those of the Royal Family. Tho' in that Case the People doth not become free, the Right of governing being still lodged in some Person; yet, since that Person is not yet in a Condition of exercising the said Right, there is a Sort of Interregnum, during which the People may provide

for their own Security and Advantage, as they might have done, if their King, who is old enough to govern, was absent, and it was impossible for him to give any Orders; as for Example, if he was a Prisoner in the Hands of an Enemy, and could find no Means of signifying to whom he would have the Care of the Government committed. The People may and ought to be supposed to have reserved to themselves this temporary and provisional Right; and if the King refuses them the Exercise of it, he has no more to do than to take proper Measures in good Time, for settling the Regency as he pleases. Neither those of the Royal Family, nor even the Mother of the King under Age, have any Privilege in this Case, exclusive of the People. The Mother may indeed act as Guardian to her Son, in what concerns his Education, and the Administration of his private Patrimony; but the Administration of the Government is of a very different Nature; and as even those Princes, who have a Power of alienating their Dominions, can never do it in a Manner disadvantageous to their Subjects, so neither can they deprive the People of the Right of providing for their own Preservation and Interest, during a Minority, when the deceased King has made no Provision of that Kind. As to the other Relations of the Royal Minor, who have a Right to the Succession, according to their respective Ranks, that Right cannot yet operate, because it is only in Expectation; and even the Interest of the actual Heir requires that the Administration of the Government should not be regulated absolutely by their Will; because this might prompt them and give them an Opportunity, to anticipate the Time of their Succession. What I have here laid down ought with more Reason to take Place in Kingdoms established by an entirely free Consent of the People, and without any Concession of a Power of Alienation: For even in such Kingdoms, the People may allow the King a Right to regulate the Regency, where there is no fundamental Law relating to the Affair. See Note 6, on this Paragraph. And thus the different Manner, of establishing a Regency, is of itself of no Service toward proving the Distinction of *patrimonial*, and *usufructuary Kingdoms*; as our Author pretends. But, to do him Justice, it should be observed that he speaks only of the Regency of a Kingdom (*Tutela Regni*) not of the Guardianship of a King under Age, or of the Power to direct his Actions, and take Care of his private Patrimony. These two Rights are indeed usually united; but they may be separated, and lodged in different Hands. So that, the Objection of some Commentators on this Place doth not affect our Author, *viz.* That, according to his Principles, a private Person will have more Power than a King, in Relation to the Guardianship of his Children. "It is neither new, nor singular" (said

those whom the Father, or nearest Kindred shall chuse. Thus we see in the Kingdom of ³ *Epirus*, which had been founded by the Consent of the People, Guardians were nominated by the People to their young King *Aribas*; and by the Nobles of ⁴ *Macedon* to the posthumous Son of *Alexander* the Great: But in *Asia* the Less, that was won by the Sword, ⁵ *Eumenes* appointed his Brother Guardian to his Son *Attalus*: So did *Hiero* in *Sicily* nominate ⁶ such as he thought fit to be Guardians to his Son *Hieronymus*. Plut. de Amore Fratern.

But whether the King is Proprietor of every particular Spot of Ground in his Kingdom, as the Kings of *Egypt*, after the Times of *Joseph*, or as the Kings of *India*, according to *Diodorus* and *Strabo*, or whether he is not, this is extrinseck to Sovereignty, and has no Relation to the Nature of it: Thus there neither results from it another Form of Sovereignty, nor another Manner of holding it. Gen. xlviii. Lib. 2. Lib. 15.

XVI. The third Observation is this, That ¹ Sovereignty is not less Sovereignty, tho' the Sovereign at his Inauguration solemnly promises some Things to GOD, or to his Subjects, even such ² Things as respect the Government of the State. I do not here speak of the Observation of the natural and divine Law, or even of the Law of Nations, to which all Kings stand obliged, tho' they have promised no- XVI. Sovereignty not lost by any Promise made of Things which belong not to the Law of God or Nature.

“ (said a Gentleman, some Years ago, in the Parliament of *Paris*) to see, in private Families, the Education of Minors, separated from the Regulation and Administration of their Estates; and History is full of Instances, where the Regency of a Kingdom, and the Guardianship of the Royal Minors have been entrusted in different Hands.” *Recueil General des Pieces touchant l' Affaire des Princes Legitimes & Legitimesz.* Tom. I. p. 66.

³ JUSTIN. Lib. XVII. Cap. III. Num. 10.

⁴ Idem. Lib. XIII. Cap. II. Num. 14.

⁵ The learned GRONOVIVS finds Fault with our Author, for having ranked the *Lesser Asia*, where *Eumenes* reigned among the patrimonial Kingdoms, acquired by Right of Conquest; for, says he, that Prince did not conquer *Asia*, but received it as an Inheritance from his Father *Attalus*, and his Dominions were enlarged by the *Romans*, in return for his Assistance, in the War with *Antiochus*. But our Author does not pretend that *Eumenes* himself conquered the *Lesser Asia*; he only means that that Country was originally a Conquest. In *Asia* Minore, bello partâ, Rex *Eumenes* Attalo, filio suo, fratrem suum tutorem dedit. That is, In the *Lesser Asia*, which had been gained by Conquest, King *Eumenes*, &c. Now it is certain, that *Alexander* the Great had conquered *Asia*, and that, after his Death, it descended to his Successors with the same Right; and consequently, was a patrimonial Kingdom, according to our Author's Principles. See STRABO, *Geograph.* Lib. XIII. p. 925, 926. Edit. Amst. (623, 624. Edit. Paris.) To which it should be added, that what the *Romans* gave *Eumenes*, they had acquired by Force of Arms; and in making that Donation, they transferred their Right to him. The Commentator's Criticism therefore is ill grounded; but he might have made one more just, by observing, that, according to PLUTARCH, quoted by our Author in his Margin, *Eumenes* not only appointed his Brother *Attalus* Guardian to the Heir of the Crown, and Regent of the Kingdom during the Minority, but really and absolutely left him the Kingdom itself, and obliged him to marry his Widow. For which Reason the Philosopher gives it, as an excellent Instance of fraternal Friendship, that *Attalus*, the Brother here mentioned, would not prefer any of the Children which he had by his Sister in Law, then his Wife, but took Care of his Nephew's Education, and, as soon as he came to Age, placed him on the Throne, Tom. II. p. 489, 490. This Want of Exactness in our Author is therefore the more remarkable, because the Fact thus related,

conformably to the Sense of the Greek Writer, was still more to his Purpose, as it shews what Liberty Kings, who looked on the Kingdom as their own Patrimony, took in disposing of it. STRABO indeed relates the Matter in a different Way; he speaks of *Attalus* as having been named Guardian only of the King's Son, and Regent of the Kingdom; but he tells us that *Attalus* dying, after a Reign of twenty one Years, left the Crown to his Nephew. *Geogr.* Lib. XIII. p. 926. Edit. Amst. (624. Edit. Paris.)

⁶ The Author takes this Fact from LIVY, Lib. XXIV. Cap. IV. The learned GRONOVIVS takes Notice of two Mistakes on this Occasion. First, That this *Hieronymus* was Grandson to *Hiero*; as appears from the very Words of the Roman Historian; for *Gelo*, the Father of *Hieronymus*, was dead. Secondly, That the Kingdom in Question was not patrimonial, since this *Hiero*, the second of that Name who had reigned in *Sicily*, was made King by the formal and express Consent of the People; as we learn from JUSTIN, Lib. XXIII. Cap. IV. Num. 1, 2. So that Instance is so far from confirming our Author's Principles, that it actually destroys them.

XVI. (1) See PUFEND. B. VII. Chap. VI. § 10, &c.

² The Emperor *Trajan*, when he was chosen Consul by the free Votes of the People, took an Oath that he would discharge that Office faithfully, SUBMITTING himself and his whole Family to the Divine Vengeance, if he knowingly and wilfully violated the Laws. PLINY, *Paneg.* Cap. LXIV. Num. 3. Edit. Cellar. *Adrian* swore he would never punish a Senator, till he had been condemned by the Senate. SPARTIAN, *Vit. Hadrian.* Cap. VII. The Emperor *Anastasius* took an Oath to observe, and put in Execution, the Decrees of the Council of *Chalcedon*; as we learn from ZONARAS, CEDRENIUS, and other Writers. The later Greek Emperors took an Oath to the Church. See ZONARAS, in the Life of *Michael Rangabes*, and elsewhere. We have an Example of the Promises made by the Gothic Kings in CASSIODORUS, *Var.* Lib. X. 16, 17. GROTIUS.

All the Instances here alledged by the Author, are not to his Purpose. For the Question is into what Engagements Princes enter before they are actually invested with the Sovereign Authority, or when they ascend the Throne; not what Promises they make after that Time, which may be less binding.

thing;

thing; but of the Observation of certain Rules, to which they would not be obliged but by their Promise. The Truth of what I say appears by the Example of a *Master of a Family*, who has promised his Family something that regards the Direction of it: For tho' he is bound to perform his Promise, yet he does not therefore cease to be the Head, and in some Manner, the Sovereign of his Family, as far as the End and Constitution of that little Society permits. A *Husband* likewise loses nothing of his Authority over his Wife, for having promised her somewhat, which he stands obliged to fulfill.

B. 2. ch. 11.

Yet I must confess, where such Promises are made, Sovereignty is thereby somewhat confined, whether the Obligation only concerns the Exercise of the Power, or ³ falls directly on the Power itself. In the former Case, whatever is done contrary to Promise, is unjust; because, as we shall shew elsewhere, every true Promise gives a Right to him to whom it is made. ⁴ In the latter, the Act is unjust, and void at the same Time, through the Defect of Power. It does not however follow from thence, that the Prince who makes such Promises, depends on a Superior; for the Act is not made void in this Case, by a superior Authority, but by Right itself. Among the *Persians* their ⁵ Monarch was, *Ἀποκράτης καὶ ἀνυπεύθυνος*, absolute, and accountable to none, as *Plutarch* declares, and adored as ⁶ an Image of the Divinity; nor, as it is in *Justin*, ⁷ was he changed but by Death. He was a King that spoke thus to the *Persian* Nobility, ⁸ *I have called you together, that none might think I have followed only my own Counsel, but remember it is your Duty to obey, rather than advise.* And yet upon his Accession to the Crown he took an Oath, as ⁹ *Xeno-*

³ Our Author's Meaning, and the Grounds of his Distinction, are these: Sometimes the People require, for Example, that the King shall raise Taxes only on certain Things, as on Lands or Commodities. In which Case the King has a Power of raising Taxes, which is a Branch of the Sovereign Authority; he is not obliged to consult the People, or enquire whether they think it necessary to impose extraordinary Taxes, or raise them in this or that Quantity; but then he can lawfully lay them only on such Things as are specified by the fundamental Laws. So that then the Limitation falls on the *Exercise of the Power*, not on the Power itself. The same is to be said, when the People have stipulated, that the King shall, in all civil and criminal Cases, cause the Laws of the Country to be observed, without depriving him of a Power to make others, which shall not be contrary to them: That he shall chuse his Magistrates only out of a certain Rank of Men: Or that he shall enter into no Offensive War, but on certain Conditions, and in certain Cases. But sometimes the People stipulate, that the King shall levy no Taxes, make no Laws, chuse no Magistrates, or engage in no War, without the Consent of the People; and then the Limitation of the Royal Authority affects the *Power itself*. For, tho' the Prince is possessed of all the Parts of the Sovereignty, there are some which he cannot exercise without the People's Consent. This deserves particular Notice; because the Commentators understand our Author's Words as if he supposed a Division of the Sovereignty. Such a Division is mentioned in the following Paragraph; and the Difference is, that when the Sovereignty is really divided, the People exercise that Part of it which they have reserved to themselves, independently of, and without any Obligation to consult the King; whereas, in the Case under Consideration, the People cannot, for Example, make War of their own Heads; but have only a Right to require that the King shall not enter into one without their Consent; and when such a Consent is given, the King, not the People, makes the War.

⁴ I see no Ground for this Distinction. All that the King doth in both Cases, contrary to his Engagements, seems to me equally unjust, and

void in itself. The King, for Example, hath no more Right to impose Taxes on Commodities, or other Things excepted by the fundamental Laws, than to raise any without the Consent of the People, when he hath entered into a solemn Obligation to observe that Condition, which limits one Part of the Sovereignty. The Engagement is as real, and as strong, in the former as in the latter Case; and consequently, the King has no more Right to violate one than the other: So that, if what he hath done is not annulled, it is either for want of sufficient Strength in the People, or the Effect of their tacit Toleration and Ratification, who may waive their Right for Peace sake, or on other Considerations.

⁵ PLUTARCH, *De trib. generib. Rerum pub.* Tom. II. p. 826.

⁶ PLUTARCH makes *Artabanus* a General under King *Artaxerxes*, speak thus, *Tho' we have a great Number of good Laws, the most excellent of all is to honour the King, and adore him as the Image of GOD, who preserves all Things.* Vit. Themistoclis, Tom. I. p. 125. Edit. Wech. See BARN. BRISSON, *De Regno Persarum*, Lib. I. p. 22, &c. Edit. Sylburg.

⁷ Lib. X. Cap. I. Num. 2.

⁸ VALERIUS MAXIMUS, from whom our Author takes this Fact, gives it as an Example of great Insolence, Lib. IX. Cap. V. extern. Num. 2. See BRISSON, *De Regno Pers.* Lib. I. p. 24. Edit. Sylburg.

⁹ The Passage here meant by our Author occurs in the *Cyropædia*, where the Historian tells us that *Cambyfes*, having declared *Cyrus* his Successor in the Presence of the Nobility, whom he had convened for that Purpose, made that Prince promise on Oath to defend the Persians against their Enemies and maintain their Laws, to the utmost of his Power; and engaged the Persians, in the same solemn Manner, to support and defend the Crown and Dominions of *Cyrus* against all Attempts. To which he adds, that the Persians and their Kings entered into the same Engagements in his Time. Lib. VIII. Cap. V. § 12, 13. Edit. Oxon. It is surprizing that the learned BRISSON should omit this Circumstance in his Collection *De Regno Pers.*

phon and ¹⁰ *Diodorus Siculus* observe ; and it was not ¹¹ allowable for him to change the Laws that had been made in a certain Manner, as both *Daniel's* History and *Ch. vi. v. 8,* ¹² *Plutarch* in his Life of *Themistocles* inform us. ¹³ *Diodorus Siculus* too, B. xvii. ^{12, 15.} and a long Time after, ¹⁴ *Procopius* in his first Book of the *Persian* War, ¹⁵ where there is a remarkable Story to this purpose. *Diodorus Siculus* ¹⁶ says the same Thing of the Kings of *Æthiopia*. The same Author tells us, ¹⁷ that the Kings of *Egypt*, who doubtless exercised a Sovereign Authority no less than the other *Eastern* Kings, were obliged to observe many Things, which if they did not perform, they could not during their Lives be called to an Account ; yet after their Deaths, their ¹⁸ Memories might be arraigned, and being found guilty were refused solemn Burial ; as ¹⁹ the Bodies of wicked Princes amongst the ancient *Hebrews*, were ^{2 Chr. xxiv. 25} not interred in the *Royal* Sepulchres ; by this wonderful Temperament, the Sacred-^{— xxviii. 27.} ness of *sovereign Majesty* was preserved, and yet their Kings were restrained from breaking their Engagements for fear of a future Condemnation. ²⁰ *Plutarch* also tells

¹⁰ I do not know where *DIODORUS* of *Sicily* mentions this Oath ; and very much doubt his saying any Thing of it.

¹¹ *JOSEPHUS*, in his Account of Queen *Vashti* (*Vasta*) tells us there was a Law that would not allow the King to be reconciled to her. *Antiq. Lib. XI. Cap. VI. p. 374. Edit. Lipf.* Such Laws were called *Laws of the Kingdom*, as is observed by Rabbi *JACCHIADES*, on *DANIEL* vi. 13. See *MARIANA, Hist. Hisp. Lib. XX.* concerning the Laws of the Kingdoms of *Spain*. *GROTIUS.*

MR. BRISSON has also omitted this remarkable Circumstance. Our Author, in his Notes on the Book of *ESTHER*, Chap. i. v. 18. supposes that the Formality required for making the Laws and Ordinances of the *Persian* Monarchs immutable, consisted in their being sealed not only by the King, but also the *Grandeess* of the Kingdom ; and grounds his Conjecture on what is related in *Daniel's* Revelations, Chap. vi. v. 17.

¹² *Plutarch* in the Life of *Themistocles*. We have no such Life in *PLUTARCH*. I am very much mistaken, if he had not his Eye on a Passage in that of *Artaxerxes*. The Fact is this. The *Persians* had a Law that when the King had nominated and solemnly declared his Successor, the Person so named should have a Power of making what Demands on him he pleased, and the King should be obliged to comply with him, if what he asked was possible. *Darius*, being thus appointed by his Father *Artaxerxes*, making Use of that Privilege, demanded *Aspasia*, one of the King's Concubines. The King was displeased at the Request ; however, as the Historian observes, he delivered the Lady, being compelled to it by the Law ; but took her again soon after. Tom. II. 1025. *Edit. Wech.*

¹³ Here our Author only refers to the XVII Book of *DIODORUS* of *Sicily* ; but probably he had the following Passage in View ; where the *Greek* Writer makes a Remark on a Thing that *Darius* did out of Fear, after he had lost the Day near the River *Issus*. His Horses being frightened carried him in his Chariot into the Midst of his Enemies ; whereupon he laid hold of the Reins himself, and thus was forced to put himself into a Posture unsuitable to his Dignity, and contrary to the Laws, which the Kings of *Persia* were obliged to observe. *Hist. Lib. XVII. Cap. XXXIV. p. 580. Edit. H. Steph.*

¹⁴ The Law, here meant by our Author, and reported by *PROCOPIUS*, *Lib. I. De Bell. Persico*, Cap. V. forbid leaving the Crown to a Person, who had any bodily Imperfection or Deformity ; or I am rather inclined to believe he was thinking of another Law, against depriving a Family of an Office, to bestow it on a Stranger. *Ibid. Cap. VI.*

¹⁵ The same Historian speaks of a Law relating to the Fort of *Lethe*, which was altered by the

King of *Persia* ; but doth not approve of the Change. *Ibid. Cap. V. GROTIUS.*

¹⁶ *Lib. III. Cap. V. p. 102. Edit. H. Steph.*

¹⁷ See *Lib. I. Cap. LXX, &c. p. 44, 45. Edit. H. Steph.*

¹⁸ By the *Roman* Laws, the Bodies of Tyrants were to remain unburied ; as we learn from *APPIAN, De Bello Civili. Lib. III. p. 873. Edit. Toll. (537. H. Steph.)* The Emperor *Andronicus Paleologus* forbade the Burial of *Michael*, his Father, for having embraced some Doctrines of the *Latin* Church. *NICEPH. GREG. Lib. VI. GROTIUS.*

¹⁹ See *JOSEPHUS*, speaking of the two *Jehorams* ; the one King of *Judah*, the other King of *Israel*. *Antiq. Lib. IX. Cap. III, V.* And what he says of *Joash*, King of *Judah* ; *ibid. Cap. VIII. GROTIUS.*

This Circumstance of the Burial of the three Kings is recorded, of the first in 2 *CHRON. xxi. 20.* of the second, in 2 *KINGS, ix. 26.* of the third, in 2 *CHRON. xxiv. 25.* But we read in 2 *KINGS, xii. 21.* that *Joash* was buried with his Fathers in the City of *David*. Our Author endeavours to reconcile these two Accounts in his Notes on the *Old Testament*, by saying that the Words last quoted mean that some Honour was shewn to his Corpse, but not the greatest usually bestowed on such as had always reigned well ; which was to be buried in the Sepulchre of the Kings. The Commentators on the Work before us pretend that this Custom was not constantly observed ; and that, when it was practised, it was not always by Way of Punishment, inflicted by Men. Their Opinion is founded on this Observation ; that very few of the many Kings of *Judah* and *Israel*, spoken of in the sacred History, obey'd *GOD's* Commandments, and yet it is not probable that only such as did were buried in the Sepulchre of the Kings, some of them, say they, even seem to have given Orders for their being deposited in other Places ; on which Occasion they quote 2 *KINGS, ix. 28.* and *xxi. 18, 26.* But besides that those Princes were wicked, though some more so than others, there may have been some particular Reasons, why the Bodies even of those whose Crimes deservedly reflected Dishonour on their Memory, might not actually be treated in this Manner. But, however that may be, it is certain that the sacred History represents it as a Punishment on the *Jewish* Kings, that they were not buried with their Ancestors. One of the Prophets expressly declares it such to *Jeroboam* ; thy Carcass, says he, shall not come unto the Sepulchre of thy Fathers, 1 *KINGS, xiii. 22.* [these Words are not directed to *Jeroboam* ; but spoken by one Prophet to another.] See also the following Chapter, v. 13.

²⁰ His Words are these : At *Passaron*, in the Territories of *Molossia*, it was customary for the Kings

tells us in the Life of *Pyrrhus*, that the Kings of *Epyrus* were accustomed to take an Oath, that they would govern according to the Laws.

See an Exam-
ple in *Crant-*
zius Hist. Suec.
l. 9.

Ap. PHOTI-
UM.
L. 16.

But what shall we say of Promises, accompanied by this Clause, that if the King breaks his Faith, he shall forfeit the Crown? Even in that Case, the Power does not cease to be supreme, but the Manner of holding it will be limited by such a Condition, and the Sovereignty will not be unlike a temporary one: *Agathar-chides* said, a King of the *Sabæans*, was ἀντισέβων, the most absolute Prince in the World, and yet if he were found without his own Palace, he might be stoned to Death; which *Strabo* also observes out of *Artemidorus*.

Thus, Lands held as *Feoffments of Trust* are no less our own,²¹ than if we possessed them with full Property; but yet they are capable of being lost. Such a commissory Clause may be added not only in Compacts between the People and the King, on whom they confer the sovereign Authority, but also in other Contracts. We see²² some Treaties of Alliance made on that Condition with neighbouring Nations: or even by those Treaties it is stipulated, that the Subjects²³ shall not assist their King, nor obey him, if he violates his Engagements.

XVII. It may
sometimes be
divided.

XVII. The fourth Observation is this, Though the sovereign Power be but one, and of itself undivided, consisting of those Parts above mentioned, with the Addition of Supremacy, that is, τῷ ἀντιπρὸς ἑαυτὸν, accountable to none, (1) yet it sometimes happens, that it is divided, either into *subjective Parts*, as they are called, or *potential*; (that is, either amongst several Persons, who possess it jointly; or into several Parts, whereof one is in the Hands of one Person, and another in the Hands of another). Thus though there was but one *Roman Empire*, yet it² often happened, that one ruled in the *Eastern Part*, and another in the *Western*; nay, and sometimes the Empire was divided among three. So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction. This however does not take place, (as I have shewed already) as often as the King is obliged by some Promise; but only then, when either³ the Partition is expressly made, (of which also we have treated above) or when the People being (as yet) free, shall require certain Things of the King, whom they are chusing, by way of a perpetual Ordinance; or if any Thing be added, whereby it is implied, that the King may be compelled or punished.⁴ For every Ordinance flows from a Superior, at least in Regard to what is ordered. And Compulsion is not always indeed an Act of a Superior, for naturally every Man has Power to compel his Debtor; but it is repugnant to the State of an Inferior; therefore from Compulsion there at least follows an Equality, and consequently a Division of the sovereign Power.

Kings to sacrifice to Jupiter Ἀγεας, and take an Oath to the People of *Epirus*, to govern according to the Laws; and for the People to maintain his Power, according to the same Laws. In *Pyrrh.* p. 385. Tom. I. Edit. Wech. GROTIUS.

²¹ Est quidem Fundus, non minus quam, &c. Thus the Passage stands in all the Editions of the Original before mine; where I have inserted the Word *noster* after *fundus*; which the Sense evidently requires; and then it runs thus: *Lands held as Feoffments of Trust are no less our own, than if we possessed them with full Property, &c.* I am very much mistaken, or our Author had that Law of the *DIGEST* in his Mind: *Non idèd minus rectè quid NOSTRUM esse vindicabimus, quòd ABIRE A NOBIS DOMINIUM SPERATUR, si CONDITIO Legati aut Libertatis extiterit*, Lib. VI. Tit. I. *De rei vindicat.* Leg. LXVI.

²² Our Author himself elsewhere asserts that this commissory Clause is tacitly included in all Treaties of Alliance. B. II. Chap. XV. § 15.

²³ See MARTIN CROMER. *Polonic.* Lib. XIX, & XXI. We have likewise an Instance of this Sort of Stipulation in the Chronicle of LAMBERT DE SCHAFFNABURG, on the Year 1074. in the Reign of *Henry IV.* Emperor of *Germany.* GROTIUS.

XVII. (1) See what I have said on PUFENDORF's *Law of Nat. &c.* B. VII. Chap. IV. § 1. and on the Abridgment of *The Duties of a Man and a Citizen.* B. II. Chap. VII. § 9. Note I. in the third and fourth Editions.

² This Example is not well applied. See PUFEND. B. VII. Chap. V. § 15. who has given some more exact.

³ In the Reign of the Emperor *Probus*, the Senate confirmed the Laws made by the Prince: took Cognizance of Appeals; created Proconsuls; and assigned the Consuls their Deputies. VOPISCUS, in *Probo.* Cap. XIII. See also GALLIUS, Lib. II. *Observ.* LVII. Num. 7. and Cardinal MANTICA, *De tacitis & ambiguis conventionibus*, Lib. XXVII. Tit. V. Num. 4. GROTIUS.

The last Words of the original Passage are *Legatos Consulibus darent.* But as the learned SALMASIUS has shewn in a Note on that Place, the true Reading is *Legatos ex Consulibus darent*; that is, named the *Consular Lieutenants*, for Governing even those Provinces which were reserved to the Emperor.

⁴ See on this Subject PUFEND. B. VII. Chap. IV. § 14.

Many alledge here a great Number of Inconveniencies, to which the State is exposed by this Partition of Sovereignty, which makes of it as it were a Body with two Heads; but in the Matter of civil Government, it is impossible to provide against all Inconveniencies; and we must judge of a Right, not by the Ideas that such or such a Person may form of what is best, but by the Will of him, that conferred that Right; as we have already observed. A very ancient Example of this Division is brought by *Plato* in his third Book of Laws. For the ⁵ *Heracidae* (the Posterity of *Hercules*) being settled at *Argos*, *Messena* and *Lacedemon*, their Kings were obliged to govern according to Laws prescribed to them; and whilst they did so, the People were bound to continue the Kingdom to them and their Posterity, and not to suffer any one to take it from them. Moreover, besides the reciprocal Engagement of each People and their King, the three Kings ⁶ stood engaged one to the other, the three Nations one to the other, and each King to the two neighbouring Nations, as also each Nation to the two neighbouring Kings; all of them together promising mutual Assistance.

XVIII. But they are much mistaken, who suppose, because Kings will not allow some of their Acts to be of Force, till they are ratified by the Senate, or some other Assembly, that there is a Partition of Sovereignty. For whatever Acts are thus annulled, ought to be reputed as annulled by the King's Authority, who by that Means ⁽¹⁾ would take Care, that nothing deceitfully obtained of him, shall pass for his Will. Thus, *Antiochus* the third ² wrote to the Magistrates, that they should not obey him, if he commanded any Thing contrary to Law; and there is a Law of *Constantine*, which enacts that Orphans and Widows should not be forced to come to the Emperor's Court for Judgment, ³ even though the Emperor's Order were produced. Wherefore this is like those Wills, which have this Clause added to them, *that no Will hereafter made shall be of Force*. For such a Clause implies, that a posterior Will would not proceed from the real Intent of the Testator. But as this Clause may be made void by ⁴ an express Revocation, so may the Act of a Prince by his express Command, or any special Declaration of his posterior Will.

XIX. Neither will I here (in order to establish the Truth of what I have now said concerning the Partition of Sovereignty) make use of the Authority of *Polybius*, ⁽¹⁾ who reckons the Roman Republick amongst those States, whose Government was mixt. For at the Time in which he wrote, the Government was merely ² popular, if we consider the Right and not the Manner of acting; since not only the Authority of the Senate, which he refers to Aristocracy, but also that of the

XVIII. *ill*
inferred from
this, that some
Princes will
have their Acts
confirmed by
the Senate.
See Boetius ad
c. 1. de Const.
in Decret.

XIX. Some
other Examples
ill drawn.

⁵ *De Legib.* Lib. III. p. 683, 684. Tom. II. Edit. H. Steph. The Commentators pretend that this Example is not well applied; because as they tell us, it turns only on an Alliance. But on a careful Examination of it, we shall find that, pursuant to the Alliance, the Subjects had a Power of exercising some Acts of Sovereignty, independently of their Prince.

⁶ We have several Examples of this Sort in the History of the Northern Nations. See JOANNES MAGNUS, *Hist. Sued.* Lib. XV. & XXIX. CRANTZIUS, *Sued.* Lib. V. PONTANUS, *Hist. Dan.* Lib. VIII. GROTIUS.

XVIII. (1) It is very probable, however, that in those Kingdoms, where a certain Assembly must approve of the Edicts and Ordinances of the Prince, this Approbation had originally more Force, and was a Kind of Limitation of the legislative Power, wisely established for preventing Abuses. But in Process of Time, the Kings found Means to reduce it to a *Verification*, that is, to a bare Formality; none of the Members of the Assembly daring to give his Opinion on such Edicts; of which sometimes only the Titles are read, and to which no one pretends to make Objections, for Fear of incurring the Prince's Displeasure, who requires a blind Obedience.

² PLUT. *Apophtheg. Reg. & Imperat.* Tom. II. p. 183. Edit. Wech.

³ *CoD. Lib. III. Tit. XIV. Quando Imperator*, &c. *Leg. unic.* [where such as were weak and infirm were also excused Attendance.] See likewise *Lib. X. Tit. XI. De Petitionibus Bonorum sublat.* *Leg. I.* GROTIUS.

⁴ This express Revocation is necessary, according to the Practice of the Bar received in several Places. But the most able Lawyers are of Opinion that this Custom is founded only on a Misinterpretation of some of the *Roman Laws*. See CUIJAS, *Observ.* Lib. XIV. Cap. VII. & ANTON. FAURE, *De Erroribus Pragmat.* Decad. XXXVII. Error. VII, &c. However, if we may judge of it by the Law of Nature alone, I should think our Author in the Right; and that his Decision equally preserves the Force of the derogatory Clause inserted in the former Will, and the Liberty of the Testator to change his Mind. So that, unless it doth not appear that the former Will was not conformable to his real Intentions, or there is Room to believe he forgot the derogatory Clause, it ought to be expressly revoked; if that is not done, there is Reason to presume the Testator supposed that this very Clause would sufficiently evince the Invalidity of the posterior Will, which lets it remain.

XIX. (1) *Hist.* Lib. VI. Cap. IX, &c.

² See Note 38. of the following Paragraph.

Consuls, which he compares to Monarchy, were both dependent on the People. What I have said of *Polybius*, I say likewise of other Authors, who, in writing on Politicks, may think it more agreeable to their Purpose, to regard the external Form of Government, and the Manner in which Affairs are commonly administered, than the Nature itself of Sovereignty.

XX. True Examples.

XX. More to the Purpose is that of *Aristotle* who says ⁽¹⁾ there are some Sorts of Royalty of a mixt Kind between an absolute Monarchy ², which he calls *παμβασιλείαν*, (the same is *πανελῆς μοναρχία* in *Sophocles's Antigone*; *αὐτοκρατῆς βασιλεία*, *ἢ ἀνυπεύθυνος*, in *Plutarch*; *ἐξουσία αὐτοῦλης*, in *Strabo*) and a Kingdom like that of *Lacedemon*, which is only the first Dignity of the State; of such a Mixture we have an example (I think) in the *Israelitish* Kings, for without Doubt in most Things they ruled with an absolute Power. For the People desired a King ³, such a one as the neighbouring Nations had; but the Power of the *Eastern* Kings was very absolute. Thus *Æschylus* brings in *Atossa* speaking to the *Persians* of their King, *ἐκ ὑπεύθυνος πόλει*, not accountable to the State for his Actions. And that of ⁴ *Virgil* is well known, *The Egyptians, Lydians, Parthians and Medians, have not a more profound Respect for their King*. And in ⁵ *Livy*: *The Syrians, and People of Asia are Men born to Slavery* ⁶; to which

L. xxxvi.

XX. (1) *Polit. Lib. III. Cap. XV.* where he speaks of such mixt Kingdoms, where the Kings have less Power than absolute Monarchs, but more than the Kings of *Sparta*, who were but little better than a Kind of Generals for Life; for beside this perpetual and absolute Command in War, which was not always Hereditary, they had no Power but in what related to Religion. See *ibid* Cap. XIV. He speaks of three Sorts of Governments between those two. The first are such as are established among some of the Barbarians, where the Kings are hereditary and invested with a Power, almost as extensive as that of Tyrants, (or absolute Monarchs.) Those Kingdoms are however, established by Law, and the free Consent of the People. The second is that of the *Æsymnites*, of which I have already spoken in Note 7. of § XI. The third is a Kingdom like those of the Heroic Times; where the Crown was bestowed by the Consent of the People, and made hereditary, in Return for the Obligations they had to those first Kings. Those Princes commanded the Armies, were entrusted with the Affairs of Religion, and all judiciary Matters, *ibid*. p. 357. From this Account it is not easy, at first Sight, to determine what Difference *Aristotle* makes between his Kingdom on the Plan of the Barbarians, *ἡ βασιβασιλικὴ βασιλεία*, and his absolute Monarchy, *ἡ παμβασιλεία*; for if, in the latter, the King has a Power of doing whatever he pleases: Cap. XVI. the former, according to our Philosopher, is despotic, and differs from Tyranny also, as that is a Power usurped, against the Will of the People. *GIPHANIUS*, in his imperfect Commentary on *ARISTOTLE's Politics*, printed at Frankfort in 1608, with a new Version, is of Opinion that his Author designedly treated this Subject obscurely, to avoid giving Offence to his Pupil *Alexander*. This Conjecture is plausible enough; though the Philosopher expresses himself obscurely in several other Places, where he had not the same Reason. I imagine that the Idea by him fixed to what he calls *παμβασιλεία*, a full and absolute Monarchy, of which he gives us no Example, is the same that my Author entertains of a *patrimonial* Kingdom; this appears from a Passage before quoted, on § 8. where he compares the Authority of an absolute Prince to that of a Father, who may dispose of his Estate, as he pleases. He also observes, in the following Chapter, that such a King regulates the Succession

to the Crown by his own Will. For, treating of the Inconveniencies attending such a Royalty, he says it is very dangerous for a Prince to leave the Crown to his Children, even though virtuous. But, says the Philosopher, will he not make his Children his Successors, when it is in his Power? This indeed is a difficult Conquest of himself, and such as requires a Degree of Virtue above the common Force of human Nature. Cap. XV. p. 659. On this Foot then the Kingdom formed on the Plan of the Barbarians, how despotic soever, must have been hereditary, only as far as the People allowed them to be so. But, whatever becomes of that Question, it appears from the Passages already quoted that the Kingdoms, mentioned by *ARISTOTLE*, as being of a middle Sort between the *Spartan* Kingdoms and absolute Monarchy, did not admit of a real Division of the Sovereignty, like those Governments, which our Author distinguishes by the Appellation of *Mix'd*.

2 *Ἀυτοκρατῆς βασιλεία*. *DIONYS. of Halicarn.* speaking of the *Lacedemonians*, says they were not *αὐτοκρατορες*, absolute, and independent, Lib. II. Cap. XIV. p. 85. Edit. Oxon. (87 Sylb.) *GROTIUS*.

3 The People, to use the Words of *JOSEPHUS*, thought it not absurd or unreasonable to submit to the same Form of Government, as was established among the neighbouring Nations. *Antiq. Lib. VI. Cap. IV. p. 174. Edit. Lipf. GROTIUS*.

4 This is spoken of the Bees. *Georg. Lib. IV. v. 2100, &c.*

5 *Lib. XXXVI. Cap. XVII. Num. 5.*

6 *CICERO* speaks of the *Jews* and *Syrians* as People born to Slavery. *De Prov. Consular. Cap. V.* *EURIPIDES* says that among the Barbarians, all are Slaves except one Man. *Helena, 2. 283.* In which he imitates a Thought of *ESCHYLUS*, who declares no one is free but Jupiter alone. *Prometh. vinc't.* which *LUCAN* applies to *Cesar*. *Lib. II. v. 280, 281.* *SERVIUS & PHILARGYRIUS*, on *VIRGIL, Georg. IV. v. 210.* quote a Passage from *SALLUST*, where that Historian observes, that the Eastern Nations have naturally a profound Veneration for the Name of a King. The Emperor *Julian* speaks of the servile Temper of the *Syrians, Persians, Parthians*, and all the Barbarians of the East and the South, who were governed by despotic Princes, in Opposition to the Love which the ancient

which agrees that of *Apollonius* in *Philostratus*; Ἀσσύριοι, καὶ Μῆδοι τὰς τυραννίδας προσκυνῶσι; *The Assyrians, and Medes adore arbitrary Government*; and that of *Aristotle*, οἱ περὶ τὴν Ἀσίαν ὑπομένουσι τὴν δεσποικὴν Ἀρχὴν ὅδεν δυσχεραίνοντες: *The Asiatics submit to despotick Power without Difficulty*; and in *Tacitus*, that of *Civilis Batavus* to the *Gauls*, *Let Syria and Asia serve, and the East accustomed to Kings*. For at that Time there were Kings in *Germany* and *Gaul*; but as the same Author observes, they governed in a precarious Manner, more by a persuasive, than commanding Power.

Polit. l. 3.
c. 14.
Hist. iv.

We have also observed before, that the whole *Hebrew Nation* depended on their King; and *Samuel* describing the Right of Kings, fully shews, that there remained ⁸ no Power in the People against the Injuries of their Kings, which the ⁹ Ancients rightly gather from that of the *Psalmist*. *Against thee, thee only have I sinned*. Upon which *St. Jerom* descants; *Because as a King, he feared no Man*. And *St. Ambrose*, he was subject to no Laws, for Kings cannot transgress (against Men,) and being secure under their own Power, can be punished by no Law. Therefore he did not sin against Man, because he was accountable to no Man for his Actions. We may read the same in *Isidore of Pelusium*, in his 383 Epistle of the last Edition: I know indeed that the *Jews* themselves grant ¹⁰, that if their Kings offended against those Laws, which were written concerning the Duty of a King, they were scourged for it; but that sort of Punishment carried no Infamy with it, and the King suffered it voluntarily, to give thereby some Marks of his Repentance; nor was it a publick Officer that scourged him, but such a Person as he himself chose, and the Number of Stripes were regulated according to his own Pleasure. As for the rest, their Kings were so free from all coercive Punishment, that the very Law

Pf. li. 5.

Deut. xxv. 9.
of

cient *Germans* had for Liberty. In *S. CYRIL*. p. 138. Edit. Spanhem. *CLAUDIAN* tells the Emperor *Honorius*, that he commands a free People, and not such as the *Arabians*, *Armenians* and *Syrians*. De IV. Consulatu Honorii. v. 306. *GROTIUS*.

⁷ He makes *Apollonius* of *Tyana* say, that *Damis* being an *Assyrian*, and a Neighbour to the *Medes*, who adored arbitrary Government, entertained no noble Sentiments of Liberty. Vit. Apollon. Lib. VII. Cap. XIV. Edit. Oxon.

⁸ But see the following Chapter, § 3.

⁹ *St. JEROM*, on this Place, observes, that as *David* was a King, he feared no Man. To which he elsewhere adds; he had no Superior. Epist ad Rusticum, de Pœnitentiâ. Tom. I. p. 221. Edit. *Erasm. Basil.* *St. AMBROSE* reasons in the same Manner on this Passage: For he was a King, and obliged by no Laws; for Kings cannot transgress (against Men) and being secure under their own Power, can be punished by no Laws: He did not therefore sin against Man, to whom he was not subject; but tho' his Post secured him, he was subject to GOD by the Ties of Faith and Religion. Apol. David. Cap. X. See also *ARNOBIUS* the younger on the same Psalm, and *ISIDORE* of *Pelusium*, Lib. V. Epist. 383, in the late Edition of his Works. *Vitiges*, King of the *Goths*, said, *The Actions of Kings are to be judged at the Tribunal of GOD*; for as their Power is derived from Heaven, so they are obliged to justify themselves to Heaven alone. *CASSIODORE*. See § 8. Note 56. *GROTIUS*.

I am surprized that our Author, both here and in his Treatise *De imperio summarum Potestatum circa sacra*, Cap. IX. § 20. could adopt so unreasonable an Explication of *DAVID's* Words, as that given by the Fathers of the Church, and the loose Conclusion, they draw from them. To speak with *MILTON*, in his *Defensio pro Pop. Angl.* Cap. II. p. 51. and the learned *RABOD HERMAN SCHELIUS* in his posthumous Treatise *De jure Imperii*, p. 255, is there any Probability that *David*, when he spoke these Words, penetrated with Sentiments of Humiliation and Repentance, thought of the

Prerogative of Kings; and that he intended to boast of a pretended Power, which authorized the Commission of Rapin, Murder, and Adultery, and left his Subjects no Room for Complaint? I cannot think the most zealous Defenders of arbitrary Power, how extravagantly soever they may compliment Kings with Impunity, and however strong an Obligation they may impose on Subjects of Non-Resistance, would venture to maintain, that a Prince, who takes away the Life of an innocent Man, or takes away a Subject's Wife, sins against GOD alone; and that he is not guilty of a real Injustice in Regard to the Person killed, or the Husband. Now it appears evidently from the whole Sequel of the Discourse that *David* here speaks of the Morality of Action, not of the Punishment or Consequences of it. It is certain therefore that he means no more than that he had not only injured his Neighbour, but also offended GOD himself, so that, though the Sin was not committed directly against the Divine Majesty, it principally regards GOD, as being a Violation of his most indisputable Laws. Hence it is that the prodigal Son declares to his Father, *I have sinned against Heaven and against Thee*. LUKE xv. 18, 21. This would be sufficient to shew that the Words against Thee only are not to be taken literally. But the Critics have alledged some other Texts of Scripture, where this Manner of speaking has not an exclusive Signification, but is reduced to against you yourself, or you principally. See *GLASSII Philolog. Sacr.* Lib. III. Tract. V. Can. XXVI. Note 2. *GRONOVIVS* produces several Examples of the same Kind, taken from Latin Authors, who probably imitated the Grecian Writers in that Particular. See that learned Gentleman's Notes on *SENECA's Hippolytus*, v. 874. He might have added the Expression, *unicè amare aliquem*, which occurs in good Authors, and signifies not to love one Person alone, but to love a Person very much, or preferably to others.

¹⁰ This is a mere Fable, as has been most evidently proved by several Authors. See *SELDEN. De Synedriis.* Lib. III. Cap. IX. *SALMASTIUS.* in his *Defensio Regia.* Cap. II. and Cap. V. Mr. LE CLERC's

of Excalceation (*the pulling off the Shoe*) because it had something of Dishonour in it, did not affect them. The Sentence of the *Hebrew Barnackman* is still extant in the Sayings of the *Rabbins*, under the Title of *Judges*, *No Creature judges the King, God only has that Power*.

Yet notwithstanding all this, there were some Cases which, I suppose, the Kings had no Right to judge, and were referred to the ¹¹ *Sanhedrim* (the Council) of 70 Elders, which being instituted by *Moses* at God's Command, continued without any Interruption to the Days of *Herod*. Wherefore both *Moses* and *David* called the Judges ¹² *Gods*, and their Judgments ¹³ *God's Judgments*. And the Judges are said to judge by the Authority of *God*, and not by the Authority of *Men*; and there is a plain Distinction made between the Things of *God*, and the Things of the *King*. Where by the Things of *God*, (as the most learned among the *Jews* interpret it) are meant, the Judgments, that were to be rendered ¹⁴ according to the Law of *God*. I do not deny, but that the Kings of *Judah* did ¹⁵ of themselves take Cognizance of some criminal Affairs, in which *Maimonides* prefers them ¹⁶ to the Kings of the ten Tribes of *Israel*; and that plainly appears from many Examples, as well in Holy Writ, as in *Hebrew* Authors; but it seems that the Cognizance of some Causes was not allowed to them, as concerning Crimes committed by a Tribe, or by the High ¹⁷ Priest, or by a Prophet; and this is plain from the Story of the Prophet *Jeremy*, whom when the Princes demanded to put to Death, the King answered them, *Behold he is in your Power, and the King can do* ¹⁸ *nothing against you*, that is, in such sort of Affairs. Moreover, when any one had been accused before the *Sanhedrim*, upon any other Account whatsoever, it was not in the King's Power to screen him from the Judgment of that Tribunal: and therefore *Hyrchanus*, finding there was no Way to hinder *Herod* from being tried, sought out Expedients to elude the Sentence.

Ex. xxii. 8.
Deut. i. 17.
Ps. lxxxii. 1.

² Chr. xix. 6, 8.
¹ Chr. xxvi. 32
² Chr. xix. 11.

Luke xiii. 33.

Jer. xxxviii. 5.
Joseph. Antiq.

CLERC's *Defense des Sentimens sur l' Histoire Critique du P. Simon*. Lett. VI. p. 145, &c.

¹¹ The Continuation of this grand Council, which had been disputed by several able Writers, is entirely destroyed by Mr. LE CLERC, in his *Sentimens sur l' Histoire Critique du P. Simon*. Lett. X. and in a Dissertation on that Subject, published at the End of his Commentary on the historical Books of the Old Testament, so that all our Author says here falls to the Ground. See an occasional Proof, in *Note 14.* on this Paragraph.

¹² This is a figurative Expression, from which we can conclude no more than that the Judges were invested with some Authority.

¹³ Those Magistrates were obliged to judge according to the Law of GOD, delivered by *Moses*. And this is the whole Foundation of such Expressions, which by no Means imply that they had an Authority independent of the King.

¹⁴ In Religious Affairs and private Causes, as well civil as criminal, which could be decided by the Law of *Moses*, the Kings were not allowed to make any Alteration by their own Authority, but were obliged to judge according to that Law, which was the fundamental Law of the State; so that all Affairs, which depended on it, might in that Sense, be called Causes relating to GOD. But in all other Cases, their Power was unlimited; and here the Term of *Royal Causes* took place. They appointed proper Persons to take Cognizance of both those Sorts of Causes; as is evident even from the Place in the Book of *Chronicles*, quoted in the Margin; which likewise serves to refute the Fable of the Perpetuity of the grand Council among the *Jews*; for we there find Judges appointed by *Josaphat*, in all the Cities of *Judah*, without excepting *Jerusalem*. From all which let us conclude, that there was no Division of Sovereignty in the Monarchy of the *Hebrews*, but only a Limitation of the legislative Power, and of the Power

in Matters of Religion; notwithstanding which, their Kings were in other Respects as absolute, as any other Eastern Power. So that our Author's Application of this Example is not just. We shall see in *Note 17.* what gave Occasion to the Mistake into which he has fallen after several other Writers.

¹⁵ And this was carried so far, that he ordered the Execution of the Criminals, without any Formality of Justice. *David* exercised the same Severity on the Man, who boasted of having killed *Saul*. *2 Sam. i. 15.* and on the Assassins of *Isobotheth*, *ibid. iv. 15.*

¹⁶ See SELDEN, *de Synedriis*. Lib. II. Cap. XIV. § 1.

¹⁷ But do we not read that *Solomon* deposed *Abiathar*, the High Priest. *1 Kings ii. 27.* Our Author, and those whom he has followed, confound the Government of the *Hebrews* before the *Babylonish* Captivity, with the State of the Commonwealth of *Israel* under the *Asmonean* Princes, who, though they wore the Crown, and had assumed the Title of King, were obliged, for confirming their Authority, to share it with the *Sanhedrim*, which had been established since the *Jews*, having shook off the *Syrian* Yoke, began to be governed by the High Priests, in Conjunction with the Heads of their own People; according to the judicious Conjecture of Mr. LE CLERC in his Dissertation, § 7. In Regard to Crimes committed by a whole Tribe, or by the High Priest, or by a false Prophet. See SELDEN, *de Synedriis*. Lib. III. Cap. IV. &c.

¹⁸ The Question there is not concerning the Rights of the Royal Power, as has been observed by Commentators. *Zedekiah* only declares that, in that Conjunction, he is obliged to yield to the importunate Demands of the Heads of the People, who looked on *Jeremiah* as a Traitor, and one, who held a Correspondence with their Enemies the *Chaldeans*.

In Macedonia, those that descended from Caramus, as Callisthenes says in *Arrianus*: ¹⁹ *ἐ βία ἀλλὰ νόμῳ Μακεδόνων ἀρχοῖτες διετέλεσαν*, reigned according to the Laws, and not by Force; and *Curtius* ²⁰, in his fourth Book, though the Macedonians were used to regal Government, yet they lived in a greater Appearance of Liberty than other Nations: For the King himself could not judge of capital Crimes: And the same Author in the 6th Book ²¹, By an ancient Custom amongst the Macedonians, the Army took Cognizance of capital Crimes, in Time of War; and the People in Time of Peace; so that in this Respect the Kings had no Power, but by the Way of Persuasion. There is also in another Place of the same Author another Instance of this Mixture ²², The Macedonians decreed, that according to the Custom of their Nation, their King should never hunt on Foot, or without being attended by some of the Nobles and of his Favourites. And *Tacitus* of the Goths, They were under the Government of ²³ Kings, who kept them a little more in Subjection, than those of other Nations in Germany, but so as not to leave them an entire Liberty. He had said before (in speaking of the Germans in general) that their Kings, who were only the chief or principal Men of the State ²⁴, governed rather by Persuasion, than by their Authority. But elsewhere he describes an absolute Monarchy in these Words ²⁵, They (the Suiones) are under the Dominion of a Prince, whose Authority is absolute, and not precarious. And *Eustathius* describing the Republick of the Corcyreans ²⁶, said it was a Mixture of regal and aristocratical ²⁷ Government. I observe that there was something like this in the Times of the Roman Kings: For then almost all Affairs were managed by the King. *Romulus* (says ²⁸ *Tacitus*) governed us as he pleased; and it is certain, that in the first Beginnings of the City, the Kings had all Power, says ²⁹ *Pomponius*. Yet *Dionysius Halicarnassensis* ³⁰ affirms, that even at that very Time, some Things were reserved in the People. But if we had rather believe the Roman Authors, in some Cases, Appeals might be made from the King to the People, as *Seneca* ³¹ gathers out of *Cicero's* Book of a Commonwealth; and

¹⁹ *De Expedit. Alexandri. Lib. IV. Cap. XI.* The Author speaks rather of the Manner, how Alexander's Predecessors had acquired the Throne, viz. without Usurpation or Violence, than of the Manner how they exercised the Royal Authority.

²⁰ This Passage is followed by the ensuing Words: They opposed him (Alexander) in his Pursuit of Immortality with more Vigour than was expedient either for themselves or the King. *Lib. IV. Cap. VII. Num. 31.*

²¹ *Lib. VI. Cap. VIII. Num. 25.*

²² *Lib. VIII. Cap. I. Num. 18.* PUFENDORF, in a Dissertation *De rebus gestis Philippi*, which appears among his *Academical Dissertations*, § 16. pretends that from those Passages it follows only that the Power of the Kings of Macedon was limited. But, on a careful Examination of those Authorities, and others which he quotes, it will, in my Opinion, appear that they suppose somewhat more than a bare Limitation; at least if we consider the Origin of those Customs, and the Manner how they had been long practised.

²³ *German. Cap. XLIII. Num. 7.*

²⁴ *Ibid. Cap. XI. Num. 6.*

²⁵ *Ibid. Cap. XLIV. Num. 3.*

²⁶ *On Odys. Lib. VI.*

²⁷ LAONICUS CHALCOCHONDYLAS says, there was such a Mixture among the Pannonians, and English, *Lib. II. in the Kingdoms of Arragon, and Navarre, Lib. V.* The Magistrates were not created by the King of Navarre; he placed no Garrisons, without the Consent of the People; and had no Power to command any Thing contrary to the established Customs; as we learn from the same Writer in the Place last quoted. Rabbi LEVI, the Son of Gerson remarks, on *1 Sam. viii. 4.* that some Kings are absolute, and others subject to the Laws. What PLINY says, in his Account of the Island of Taprobane, is curious: That the People chose a King distinguished by Age and Clemency, and one who had no Children. If he had any Issue af-

ter his Accession, he was deposed, to prevent the Kingdom's becoming Hereditary. That thirty Ministers or Counsellors were assigned him by the People; and no Man received Sentence of Death, but by a Plurality of Voices. But an Appeal was allowed from that Council to the People; who named seventy Judges. If no more than thirty of them voted the Person not guilty, they lost their Dignity, which was a great Blame to their Character. That, their King was dressed like Bacchus; and the others like Arabians. That, when the King committed a Fault, he was punished with Death, though not actually killed, but denied all Commerce, and even Discourse with his Subjects. *Hist. Nat. Lib. VI. Cap. XXII.* SERVIVS, on *Eneid. v. 682.* says, after CATO, that the Government of Carthage was a Mixture of Democracy, Aristocracy, and Monarchy. GROTIUS.

²⁸ *Annal. Lib. III. Cap. XXXVI. Num. 5.*

²⁹ DIGEST. *Lib. I. Tit. II. De origine Juris, &c. Leg. II. § 14.* But Mr. DE BYNKERSHOEK thinks this is spoken of the Power of the Magistrates, whose several Functions were exercised by the Kings. He owns, however, that Pomponius had before mentioned that Will of the Kings, which at that Time supplied the Place of all Laws, when he says, *Omniaque manu à Regibus gubernabantur. § 1.* See the *Prætermissa*, ad. L. 2. D. *De origine Juris*, p. 16, 17. of the *Opuscula*, published in 1719.

³⁰ I have already given the Passage in Note 4, on Paragraph 6. PUFENDORF, in a Dissertation *De formâ Reipub. Romanæ*, § 4, &c. maintains that the old Kings of Rome were invested with all the Parts of Sovereignty. But, on examining his Reasons, it will appear that they are not strong enough to destroy the Testimony of the Greek and Latin Authors, who give us a different Idea of the Power of those first Rulers.

³¹ *Epist. CVIII. p. 538. Edit. Elziv. maj. 1672.* We have an Instance of the same Kind in LIVY,

and also out of some pontifical Books, and *Fenestella*. *Servius Tullius*, who ascended the Throne through the Favour of the People, rather than by Vertue of a just Title, still more diminished the royal Authority; for, as *Tacitus* says, *he enacted some Laws* ³², *to which the Kings themselves were to submit*. Wherefore no wonder if ³³ *Livy* makes only this Difference between the Power of the first Consuls, and of the Kings, that the Consulship was but for one Year.

The like Mixture of Popular and Aristocratical Government was in *Rome* ³⁴ during an Interregnum, and in the Times of the first Consuls. ³⁵ For in some Things, and those of Moment, what the People commanded was of no Force, ³⁶ without the previous Approbation of the Senate. And there remained something of this Mixture even later, whilst the Power, as the same *Livy* ³⁷ says, was in the Hands of the *Patricians*, that is, of the Senate; and the *Relief*, or the Right of Opposition, in the Hands of the *Tribunes*, that is, of the People. But afterwards, the Power of the People being increased, the Consent of the Senate was no more than a mere Ceremony, and a vain Image of their antient Right; since the Senators ratified the Deliberations of the Assembly of the People, even before they knew what would be resolved in it, as *Livy* ³⁸ and *Dionysius* observe. To conclude, *Isocrates* pretends that the Government of *Athens* was, in the ³⁹ Time of *Solon*, *A Democracy mixed with an Aristocracy*. These Things being premised, let us examine some Questions, which are often produced on this Subject.

XXI. *A Confederated on unequal Terms may have the Supreme Power.*

Justin, l. 43.
c. 5.
Valer. Max. l. 5. c. 2.

XXI. The first is, Whether a Power inferior to any other by Vertue of a Treaty of *unequal Alliance*, may have the Sovereignty? ¹ By *unequal Alliance* I mean, not such as is made between two Powers whose Strength is unequal; as when ² the City of *Thebes* in the Time of *Pelopidas* made a League with the King of *Persia*, and the *Romans* with the *Massilians*, and afterwards with King *Masiniſſa*; nor such as stipulates some transient Act, as when an Enemy is reconciled, upon paying the Charges of the War, or performing any other Thing once for all. But I mean, when by the express Articles of the League, some lasting Preference is given from one to the other; or whereby the one is obliged to maintain the Sovereignty and Majesty of the other; as it was in the ³ League between the *Ætolians* and the *Romans*, that is, to hinder any Attack on their Sovereignty, and to make

LIVY, in regard to *Horatius*, who had killed his Sister, *Lib. I. Cap. XXVI*. See the same Historian, *Lib. VIII. Cap. XXXIII. Num. 8*.

³² *Annal. Lib. III. Cap. XXVI. Num. 5*.

³³ *Lib. II. Cap. I. Num. 7*. See *CICERO*, *De Legib. Lib. III. Cap. III*.

³⁴ *DIONYSIUS of Halicarnassus* tells us, that *In those early Times, on the Demise of the King, the People gave the Senate Power to establish what Form of Government they pleased; that the Senate named the Interreges, or Regents of the State; that those Magistrates made Choice of the best Man they could find, either among their own Countrymen, or among those of other Nations, to be their King; that, if the Senate approved of the Person thus chosen, the People gave their Consent, and the Auguries proved favourable, he entered on the Government.* *Antiq. Rom. Lib. IV. Cap. XL. p. 233. Edit. Oxon. (242. Sylb.)* See the Passage of *LIVY*, to be quoted in *Note 38* on this Paragraph.

³⁵ That is, *In the Election of Magistrates, making Laws, and entering into War*; as we learn from *DIONYSIUS of Halicarnassus. Antiq. Rom. Lib. II. Cap. XIV. p. 85. Edit. Oxon. (87. Sylb.)* See the two following Notes, and § 6. *Note 4*.

³⁶ *The People had no Right to make a Law, or command any Thing, without the previous Approbation of the Senate.* *Vit. Coriolani, Tom. II. p. 227. Edit. Wech.* *CHALCOCONDYLAS* observes, that there was a like Mixture in the Republick of *Genoa* in his Time, *Hist. Lib. V. GROTIUS*.

³⁷ *Lib. VI. Cap. XXXVII. Note 4*.

³⁸ *Lib. I. Cap. XVII. Num. 9.* *DIONYSIUS of Halicarnassus* says, that in his Time the Resolutions

of the People had the Force of a Law, without the Cognizance of the Senate; but that the Orders of the Senate were subject to the People's Determination. *Antiq. Rom. Lib. II. Cap. XIV.* Our Author means to speak of those Times, when § 19. he maintains, against *POLYBIUS*, that the Government of *Rome* was *Democratical*: So that some of his Commentators have unjustly accused him of contradicting himself in this Point. We may see in *GRONOVIIUS's* Observations on *B. I. Chap. XXV.* how the People by degrees incroached on the Right of the Senate, and at last swallowed it up. It will not be improper to read a Dissertation of *PUFENDORF*, already quoted, *De formâ Reip. Rom.* tho' he does all in his Power for saving the Authority of the Senate. See also *PAUL MERULA, De Leg. Romanor. Cap. II. § 12. and Cap. III. § 1.* And *RABOD HERMAN SCHELIUS, De Jure Imperii, p. 41, &c.*

³⁹ In his *Panathenaic Oration*, where he says that *Lycurgus* copied that Form of Government, as much as was possible.

XXI. (1) See *PUFENDORF* on this Subject, *B. VIII. Chap. IX. § 3, 4.* compared with our Author, *B. II. Chap. XV. § 7. &c.*

² *PLUTARCH*, from whom the Author has certainly taken this Fact, says that *Artaxerxes* granted, among other Things, *That the Thebans should be considered as the King's hereditary Friends.* In *Vit. Pelopid. p. 294. Edit. Wech.*

³ *LIVY*, who gives an Account of this Treaty, adds, that this was to be done, *sine dolo malo, without Fraud, Lib. XXXVIII. Cap. XI. Num. 2.*

their Dignity, which is denoted by the Word Majesty, to be respected; *Tacitus* ⁴ calls that *the having a Reverence for the Roman Empire*; which he thus explains, *Tho' placed on their Banks, and beyond the Limits of our Empire, yet in Mind and Will they act with us.* So *Florus*, ⁵ *Other People, who were not under the Dominion of the Romans, were sensible of their Grandeur, and revered the Conquerors of Nations.*

⁶ *Andronicus Rhodius* rightly observes after *Aristotle*, that this is proper to Friendship between Unequals, that the more Honour be given to the more powerful, and the more Assistance to the more weak.

To the Inequality in Question may be referred some of those Rights, which are now called Right of ⁷ Protection, Right of ⁸ Patronage, and a Right termed ⁹ *Mundiburgium*; as also that which ¹⁰ Mother Cities had over their Colonies among the *Grecians*. For, as *Thucydides* ¹¹ says, those Colonies enjoyed the same Right of Liberty with the other Cities; but they owed a Reverence to the City whence they derived their Origin, and were obliged to render her τὰ γέρα τὰ νομιζόμενα, Respect, and certain Expressions of Honour.

Livy, ¹² concerning that antient League between the *Romans*, who were become absolute Masters of *Alba*, and the *Latins* descended from *Alba*, says, that in that Treaty the *Romans* were acknowledged Superiors. We know what *Proculus* replied to this Question, viz. that ¹³ every People that does not depend on another is free, even tho' by a Treaty of Alliance they are bound to maintain and reverence the Majesty of another People. If then a Nation bound by such a Treaty remains yet free, and not subjected to the Power of another, it follows, that it still retains its Sovereignty; and the same may be said of a King. For there is no Difference between a free People, and a King that is really so. And *Proculus* adds, that such a Clause inserted in a Treaty of Alliance, imports only that one Nation is superior, and not that the other is not free. The Word Superior ought to be understood here, not in regard to Power and Jurisdiction, (for he had said before, that the People inferior by the Treaty do not depend on the other, that are superior to them) but in regard to Reverence and Dignity, which the following

⁴ *De morib. German. Cap. XXIX. Num. 3, 4.* Neither this Passage, nor that in the following Note, speaks of any Alliance, but only of the Impression made by the *Roman* Grandeur on other Nations.

⁵ *Lib. IV. Cap. XII. Num. 61.*

⁶ *Paraphr. Lib. VIII. Cap. XVIII. p. 567. Ed. Hein. 1617.*

⁷ *Protectionis.* This Term is used when one Prince or State takes another less powerful Prince or State under *Protection*, and engages in its Defence, either without any Consideration, or on Condition of receiving a certain Tribute. We have several Examples of this Kind in the *German Empire*, and elsewhere. See the late Mr. *HERTIUS's* Dissertation *De specialibus Romano-Germ. Imperii Rebuspub. &c.* § 34. in the second Volume of his *Comment. & Opusc.* and his *Paræmiæ Juris Germanici*, Lib. II. Cap. V.

⁸ *Advocatia.* *Advocati* were those who engaged to defend a Church or a Monastery. See the Origin of this in the *Bibliothèque Universelle*, Tom. I. p. 97, &c. The learned *GRONOVIVS* on this Place, quotes several Authors who treat on this Subject. We have likewise a great Number of curious and instructive Observations on the same, in a Dissertation written by the late Mr. *HERTIUS*, *De consultationib. legib. & judiciis in specialib. Rom. Germ. Imperii Rebuspub.* § 17. Tom. II. of his *Commentationes & Opusc. &c.* It will be sufficient to produce one considerable Example of this Kind of *Patronage*, which comes to our Author's Purpose; which is that of the Emperor of *Germany*, who styles himself *Supreme Patron of the Roman Church*, tho' he is not supreme Head of that Church, and has long had no Right over the

Temporalities of the Pope. See likewise the *Jus Ecclesiastic. Protestantium*, by Mr. *BOHMER*, Professor of Law at *Hall*, Lib. III. Cap. V. § 36, 37. where he gives a compendious History of the Right of *Patronage*, and points out such Authors as treat of it most satisfactorily.

⁹ *Mundiburgium.* Thus the Word was written in the Editions published in our Author's Life Time, and immediately after his Death. In those which appeared since, we have *Mundiburnium*, from which the *French* have made *Mambournie*. But, however it is written, the Term, according to some, is derived from the old Teutonic *Munto*, to defend or protect, and *Burde*, charge or burthen. Others assign it a different Derivation; but all agree in its Signification, and call it a Sort of Right of Protection. See *CUJAS*, on *B. II. De Feudis*, Tit. IV. *FRANC. GUILLIMAN. De Rebus Helvet.* Lib. I. Cap. IX. Num. 14. *Edit. Lips. 1710.* *JEROM BIGNON* on *MARCULPHUS*, Lib. I. Cap. XXIV. p. 504, 506. Mr. *DU CANGE's Glossary*, and Mr. *HERTIUS's* Dissertation, before quoted. It is pretended, that this Word was used particularly, when speaking of a Prince's Right of protecting a Bishop or an Abbot.

¹⁰ See the learned *HENRY DE VALOIS's* Notes on the *Excerpta Constantini Porphyrog.* in the Collection made by Mr. *DE PEIRESC*, p. 6, 7. And our Author, *B. II. Chap. IX. § 10.*

¹¹ The Person introduced by the Historian, makes this Exemption; *So long as the Colony is well treated.* Εὖ μὲν ἀρχαῖσα. Lib. I. § 34. *Ed. Oxon.*

¹² *Lib. I. Cap. LII. Num. 4.*

¹³ *DIGEST. Lib. XLIV. Tit. XV. De Captivis & Postlimin. &c. Leg. VII. § 1.*

Words do explain by a proper Similitude. *As we know* (says he) *our Clients to be free, tho' they be not equal to us in Authority, Dignity, nor* ¹⁴ *every Right; so they that ought to maintain and respect the Majesty of our State, are to be considered as free.*

Clients are under the Protection of their *Patrons*: So Nations, who are inferior by a Treaty of Alliance, ¹⁵ are under the Protection of the People who are their Superior in Dignity. They are *under their Protection, not under their Dominion*; as *Sylla* speaks ¹⁶ in *Appian*, on their Side, and not under their Subjection, as *Livy* ¹⁷ says. And *Cicero*, in his second Book of Offices, speaking of those Times when Virtue reigned amongst the *Romans*, says, ¹⁸ *They were the Protectors, and not the Masters of their Allies.* To which agrees that of *Scipio Africanus* the Elder, ¹⁹ *The People of Rome had rather engage Men by Kindness than by Fear, and gain foreign Nations by Protection and Alliance, than subject them by hard Bondage*; and what *Strabo* ²⁰ relates of the *Lacedemonians* after the Coming of the *Romans* into Greece, *they continued free, contributing nothing but what they were obliged to do as Friends and Allies.* As private Protection takes not away personal Liberty, so publick Protection does not the Civil, which cannot be conceived without Sovereignty. Therefore you may see *Livy* opposes the State of those who ²¹ are under the Protection of another People, to that of those who are under their Dominion. And *Augustus* threatned ²² *Syllæus* King of the *Arabians* (as *Josephus* relates)

¹⁴ *Jure omni.* This is the common but corrupt Reading, which our Author here follows. I should rather choose to read with HALOANDER, *neque viribus, tho' not equal to us in Strength.*

¹⁵ See Cardinal TUSCHUS, *Prætic. Conclus.* 935. We have an Instance of this in the *Dilimnites*, (or *Dolomites*, a People of *Persia*) who tho' free, and governed by their own Laws, furnished the *Persians* with Troops; as we learn from AGATHIAS, *Lib. III. Cap. VIII.* [See likewise PROCOPIUS, *De Bell. Goth.* *Lib. IV. Cap. XIV.* and Baron SPANHEIM's *Orbis Rom. Exercit. II. Cap. XVII. p. 452.*] Thus the Empress *Irene* designed to divide the Empire among her Husband's Children, in such a Manner as to make those who should be born afterwards, inferior to them in Dignity; but each of them Master of himself, and independent. See KRANTZIUS's *Saxonic. Lib. X.* concerning the Cities which put themselves under the Protection of the House of *Austria*. HERODIAN, speaking of the *Ostrogoths* and *Armenians*, observes that *the former were Subjects* (to the *Romans*) *the latter their Friends and Allies*, *Hist. Lib. VII. (Cap. V. Edit. Oxon. 1678.)* GROTIUS.

The Greek Passage, here quoted without the Author's Name, may be taken from THEOPHANES, and relate to the Terms of the Marriage, proposed between *Irene* and *Charlemagne*.

¹⁶ It appears from the Passage here quoted, that the Nations there mentioned had been given to Eumenes, (King of *Pergamus*) and to the *Rhodians*, then in Alliance with the *Romans*. *Bell. Mithrid. p. 356. Edit. Amst. (212, H. Steph.)* So that those People were not independent, and such as we are to suppose our Author is speaking of.

¹⁷ The Historian speaks there of the *Olcadians*, a People of *Spain*, in regard to the *Carthaginians*, *Lib. XXI. Cap. V. Num. 3.*

¹⁸ The Passage at length stands thus: *Our Magistrates and Generals endeavoured to acquire a glorious Character, by defending the Provinces, and their Allies, with Equity and Honour. So that the Romans might more properly be termed Protectors, than Governors of the World.* *De Offic. Lib. II. Cap. VIII.* See also *Lib. I. Cap. XI.*

¹⁹ *Livy, Lib. XXVI. Cap. XLIX. Num. 8.*

²⁰ *Geograph. Lib. VIII. p. 562. Edit. Amst. (865, Paris.)*

²¹ *In fide & in ditione.* Thus, speaking of the *Sidicinians*, who were neither under the Protection (in fide) of the Roman People, nor subject to their Jurisdiction, (nec ditione) *Lib. VIII. Cap. I. Num. 10.* And elsewhere, in *fidem se tradere*, is opposed to *in servitutem*; as when *Pheneas*, who appeared at the Head of the Embassy sent from the *Etolians*, said to a Roman Consul, *Non in servitutem, sed in Fidem tuam nos tradimus*; we do not offer ourselves as your Slaves, but put ourselves under your Protection, *Lib. XXXVI. Cap. XXVIII. Num. 4.* But the Consul soon let the World know, that in those Days the *Romans*, by *in fidem tradere* understood surrendering at Discretion, and submitting to their Jurisdiction. See SPANHEIM's *Orbis Rom. Exercit. II. Cap. X. p. 299.* That Expression became ambiguous, as the *Romans* began to act like Masters with their Allies. See our Author's Observation, *B. III. Chap. XX. § 50.* in which there is no Contradiction, as BOECLER would insinuate, who shewed me the Passages here quoted. He himself observes, that the Latin Writers, when they would speak justly, make an Addition of some Word, for avoiding the Ambiguity; as in the following Passages, *Quorum in Fide, & Clientela Regnum (Numidia) erat.* FLORUS, *Lib. III. Cap. I. Num. 3:* *Manus ad Cæsarem tendere & voce significare cæperunt* (*Bellovacis*) *se in ejus Fidem & Potestatem venire.* CÆSAR *De Bello Gall. Lib. III. Cap. XIII.* *Bellovacos omni tempore in Fide atque Amicitia Civitatis Ædudæ fuisse.* Idem. *Ibid. Cap. XIV.* But the first of these Expressions, according to SPANHEIM, in his *Orbis Rom.* as above quoted, p. 307. signifies as much as the second.

²² Here are several Mistakes in this Sentence, which the learned GRONOVIVS has observed. First, *Syllæus* was not King of the *Arabians*, but only Minister or General to *Obodas*, King of Part of *Arabia*. Secondly, This Menace regards *Herod*, whom *Syllæus* had accused to *Augustus*, concerning his Expedition into *Arabia*; whereupon *Augustus* wrote to the King of the *Jews*, that he had till then treated him like a Friend, but for the future would use him as a Subject. JOSEPHUS, *Antiq. Jud. Lib. XVI. Cap. XV. p. 572.* Thirdly, Our Author doth not give us a just Idea of the Condition of the Kings of *Arabia*; for those Kings, as well as all the others from the *West* to *Euphrates*, at that Time depended on the

relates) if he did not leave off injuring his Neighbours, he would take Care that he should be made a Subject of a Friend; which was the Condition of the Kings of *Armenia*, who, as *Pætus* writes to *Vologeses*,²³ were under the *Roman* Jurisdiction, and consequently more Kings in Name than Reality; as were also the Kings of *Cyprus*, and some others, formerly Subjects²⁴ to the *Persian* *Περσῶν*, as *Diodorus* calls them.

Here may be objected what *Proculus* adds,²⁵ *Those who are Members of confederate States are summoned to appear before us; they are tried at our Tribunals, and are punished by Vertue of the Sentence passed against them.* But to make this more plain, we must know there are four Kinds of Differences, or Subjects of Complaint. First, If the Subjects of the King or State under Protection, are accused of having done any Thing contrary to the Treaty of Alliance. Secondly, If the King, or the States themselves be accused. Thirdly, If the Allies under the

the *Romans* so much, that they received the Crown from them; and even a Son could not succeed his Father without their Consent. *JOSEPHUS*, in the very Place I have quoted, and in the following Chapter, tells us how much *Augustus* was provoked at *Aretas*, for entering on his Reign, after the Demise of *Obodas*, without waiting for his Approbation; and what Submission that Prince was obliged to make for appeasing the Emperor. It is well known likewise, that *Archelaüs*, Son to the *Herod* already mentioned, went to *Rome* immediately after his Father's Death, to solicit the Confirmation of the Kingdom of *Judea*, which he gained only under the Title of *Ethnarch*; and some Years after, on the Complaints of the *Jews*, the Emperor banished him to *Vienna*. See the late Mr. *PERIZONIUS*'s Dissertation, *De Augustæ Orbis terrarum Descriptione*, § 3, 5, 6.

²³ *TACITUS*, who relates this Fact, makes *Pætus* say, *The Armenians had always been subject to the Roman Power, or to a King chosen by the Emperor.* *Annal. Lib. XV. Cap. XIII. Num. 4.* *FLORUS* tells us, that after the Defeat of *Tigranes*, *Pompey* required no other Subjection of the *Armenians*, than that of receiving their Governors from the *Romans*, *Lib. IV. Cap. XII. Num. 43.* See *SPANHEIM*'s *Orbis Romanus*, p. 452.

²⁴ *Biblioth. Hist. Lib. XVI. Cap. XLVI. p. 534.* *Edit. H. Steph.*

²⁵ *DIGEST. Lib. XLIX. Tit. XV. De Captiv. & Postlimin. &c. Leg. VII. § 2.* See what *PUFENDORF* says to this, *B. VIII. Chap. IX. § 4.* in the first Note, where I have joined what he had written in two different Places. The Difficulty will vanish on reading *SPANHEIM*'s *Orbis Rom. Exercit. II. Cap. X.* The Alliance and Liberty of the Kings and People in Question, were widely different from what our Author conceives them to have been. The Inequality of those Alliances, implied not a bare Inferiority of Respect, but a real Dependence and Subjection; as is evident from several Places in *LIVY*, who makes a clear Distinction between *Fœdus æquum*, and *Fœdus iniquum*. When the People of *Campania* applied to the *Romans* for their Assistance against the *Samnites*, and at the same Time a perpetual Alliance, they said, *bad they made this Application at a Time when Fortune was favourable to them, as the Alliance would have been of a more early Date, so it would have been bound by a weaker Tye: For then, as they should have remember'd they contracted it on equal Terms, (ex æquo) they perhaps had been as truly Friends, but less subject and devoted (minus subiecti atque obnoxii) to the Romans.* *Lib. VII. Cap. XXX. Num. 2.* The Rest of their Speech speaks this Dependence, tho' they had not yet declared their Disposition to put themselves at Discretion under the *Roman Power*; which they had Orders to do,

only on a Refusal of forming an Alliance with them on the Terms proposed. The same *Historian* informs us, that the *Apulians* gained an Alliance (*Fœdus*) not on equal Terms, (*neque æquo fœdere*) but on Condition that they should be subject to the *Roman People*, (*in ditione Populi Romani*). *Lib. IX. Cap. XX. Num. 8.* It was only in the Time of the first Consuls, and before the *Sicilian War*, that the *Romans* made Alliances, not prejudicial to the Sovereignty of their Allies; but from that Time they were only nominally such. The People, whom they termed *Free, Allies and Friends*, were so called, because the *Roman People*, with the Property of their Lands, gave them a Permission to be governed by their own Laws, and the proper Magistrates of their respective Countries. But then they were to acknowledge that all this was a Concession from the *Roman People*; and that People made this Dependence appear by diminishing or taking away that Liberty as they pleased. In Note 22 on this Paragraph we have given an Example of their Manner of treating Kings; and the Lawyer *SCÆVOLA* makes it Treason maliciously to hinder the King of a foreign Nation from obeying the *Roman People*. *DIGEST. Lib. XLVIII. Tit. IV. Ad. Leg. Jul. Majestatis, Leg. IV.* A plain Proof that the *Romans* considered the allied Kings, and much more the Cities and Nations called *Free and Allied*, as dependent on them. Those People could neither undertake a War, or enter into an Alliance, without Permission from the *Romans*: They were obliged to find Quarters and Provisions for their Generals and Armies, and from Time to Time receive such Governors as were sent to regulate Affairs: They paid Tributes and Imposts, unless they had obtained a particular Exemption, and even that Exemption did not secure them from paying in certain extraordinary Cases. Add to all this, that those Nations, as well as the allied Kings, were obliged to furnish the *Romans* with Troops on every Demand; and this was the Reason why *all the World was to be enrolled*, *LUKE ii. 1.* On which see Mr. *PERIZONIUS*'s Dissertation, already quoted. We are not to be surprized therefore, that the *Romans*, when they thought proper, took Cognizance of Charges brought against the Members of allied Cities or Nations, and exercised the Power of Life and Death on them. It must be owned however, that the Lawyer, whose Words gave Occasion to the Objection discussed by our Author, lays down a bad Definition of the Liberty of the People in Question, as being really independent, (*qui nullus alterius potestati subiectus est*) and, consequently, all our Author's Distinctions are superfluous; in the Application he makes of them; so that it is sufficient to examine them in themselves.

Protection of the same King or State do quarrel among themselves. Fourthly, If Subjects complain of Injuries done by their Sovereign.

Livy, l. 23.

As to the First, If any Thing has been committed contrary to the Articles of Treaty, the King or State are obliged either to punish the Offender, or to deliver him up to them that are injured; which takes Place not only between unequal Confederates, but also equal; and even between such as are not engaged in any League, as we shall shew in ²⁶ another Place. The Sovereign is also obliged to endeavour to have Satisfaction made, which in *Rome* was called the ²⁷ Delegate's Office. And *Gallus Ælius* in *Festus* says, A Recovery is when the Law decides between King and People, Nations and Foreign States; how Things may be restored by the Assistance of a Judge Delegate, how they may be recovered, and how private Mens Cases may be prosecuted among themselves. But one of the Confederates has no Right directly to seize or punish the Subject of another; therefore *Decius Magius*, a *Campanian*, being seized by *Hannibal*, and sent to *Cyrene*, and from thence to *Alexandria*, declared, that he was seized by *Hannibal* contrary to the Articles of the League, and thereupon was set at Liberty.

As to the second, The superior Ally has a Right to compel the inferior to stand to the Articles of the Treaty, and upon refusal to punish him. But neither is this peculiar to unequal Alliances; the same Thing takes Place between equal Allies. For, to have a Right to punish any one that has rendered himself guilty, it is sufficient that one is not subject to him; which ²⁸ shall be treated of elsewhere; wherefore Kings or Nations not allied, have also that Right in regard to one another.

As to the third Case, As in an equal Confederacy, Controversies are generally referred to ²⁹ a Convention of the Associates, who are not interested in the Affairs in Question, as we find was formerly practised amongst the *Greeks*, *Latins*, and *Germans*, or to the Decision of Arbitrators, or even to the Judgment of the chief of the Confederacy, as to a common Arbitrator: So in an unequal Confederacy, it is commonly agreed that the Things in Dispute shall be determined before him, who is the Head of the League. Therefore this does not imply any Jurisdiction; for even Kings have often their Causes tried before Judges appointed by themselves.

As to the fourth and last, Associates have no Right of Judging: When therefore *Herod* accused his own Sons before *Augustus* of certain Crimes, they replied, ³⁰ You might have punished us by your own Right, both as a Father, and as a King. And when *Hannibal* was accused at *Rome* by some *Carthaginians*, ³¹ *Scipio* told the Senate, it did not belong to them to meddle in Affairs belonging to the Republick of *Carthage*. And 'tis in this ³² *Aristotle* says an Alliance differs from a State, that 'tis the Business of Allies to take Care that no Injuries be done by one to the others, but not that the Subjects of a confederate State do not injure one another.

It may again be objected, that Historians make use of the Word *to command*, in speaking of the Prerogatives of a superior Ally; and that *to obey*, in speaking of the Engagements of the inferior Ally. But this should not affect us; for this is, when the Things concern either the common Good of the Allies, or the private Advantage of the Superior in the League. As to Things of common Concern, when the Assembly does not sit, even in an equal League, he that is chosen Prince of the League (*נָגִיד בְּרִית*, *Dan. xi. 22.*) commonly commands the other Allies, as *Agamemnon* did the *Grecian* Princes; and afterwards the *Lacedemonians* did the *Grecians*, and after them the *Athenians*. We read in ³³ *Thucydides's* Oration of

²⁶ B. II. Chap. XXI. § 4.

²⁷ *Reciperatores*. See *TORRENTIUS's* Commentary on *SUETONIUS*, in *Nerone*, Cap. XVII. and that of *THEOD. MARCILLY*, on the Life of *Vespasian*, Cap. X.

²⁸ B. II. Chap. XX. § 3.

²⁹ This Sort of Assembly is called *Konodmlov*, in an antient Inscription, where we find the Articles of a Treaty between the *Priansi* and the *Hieropotamii*, by which those People reciprocally bestowed the Right of Citizens one on the other. *GROTIUS*.

He should have said *Hierapytnii*. Mr. JOHN

PRICE, a learned *Englishman*, first published this curious Inscription, in his Notes on *APULEIUS's* *Apology*, p. 59, &c. Edit. *Parif.* 1635. It is also found among the *Oxford Marbles*, p. 116. See *SPANHEIM's* *Orbis Rom.* Exercit. I. Cap. IV. and Exercit. II. Cap. XVI.

³⁰ *Antiq. Jud.* Lib. XVI. Cap. VIII.

³¹ *VALERIUS MAXIMUS*, Lib. IV. Cap. I. Num. 6. See another Instance in *POLYBIUS*, *Excerpt. Legat.* CV. *GROTIUS*.

³² *Politic.* Lib. III. Cap. IX. p. 348. Edit. *Parif.*

³³ Lib. I. Cap. CXX. Edit. *Oxon.*

the Corinthians. The Chiefs of an Alliance ought not to challenge any Advantage in what concerns their particular Interest: But it is just, that in the Administration of common Affairs they have the Pre-eminence. Isocrates says, that the antient Athenians, whilst they were the Chiefs of Greece, ³⁴ were contented to take Care of common Affairs, but as for the Rest, they left to every People their Liberty: And elsewhere, ³⁵ being persuaded that they ought to have the Command of the War, and not to rule over their Allies. And again, Managing their Affairs like Confederates, not despotically. The Latins express by the Word *imperare*, to command, that Right of the principal Ally; but the Greeks more modestly use the Term *τάσσειν*, to regulate. The Athenians having the Conduct of the War against the Persians, as ³⁶ Thucydides relates it, did regulate which Cities should contribute Money against the Barbarians, and which Ships. So they who were sent from Rome into Greece, ³⁷ are said to be sent to regulate the State of the free Cities. But if he, who is only chief of the Confederacy, governs the common Affairs in the Manner I have now said, we must not wonder, that in an unequal Alliance, the superior Ally does the same Thing. Therefore *Imperium*, in this Sense, that is, *ἡγεμονία*, chief Command, does not take away the Liberty of others. The Rhodians, in their Oration to the Roman Senate, extant in Livy, thus addressed them, ³⁸ The Grecians formerly were strong enough to command: Where the Command is now, they wish it may be forever; they are contented to defend their Liberty with your Arms, not being able to do it with their own. Thus Diodorus tells us, after the taking the Fort of Cadmea, by the Thebans, many Grecian Cities ³⁹ joined in a League, to maintain in common their Liberty, under the Conduct of the Athenians. Dion Prusænsis, speaking of those very Athenians in the Time of Philip of Macedon, said, ⁴⁰ Having at that Time abandoned the Command in War, they only retained their own Liberty. Thus ⁴¹ Cæsar calls those People Confederates, whom a little before he had said were under the Command of the Suevians.

But as to those Things which respect the particular Interest of each Ally, if the Demands of the superior Ally are often called *Commands*, that does not imply any Right to require such Things with Authority; but that Way of Speaking is used, because those Demands produce the same Effect, as Commands properly so called, and the same Regard is paid to them. In this Sense the Intreaties of a King are called *Commands*, and the Advices of a Physician *Prescriptions*. ⁴² Before this Consul (C. Posthumius) no Body, says Livy, B. 42. was ever chargeable, or any Ways burdensome to our Confederates; our Generals were abundantly supplied with Mules, Tents, and all Baggage necessary for War, that they should not COMMAND the Allies to furnish them.

In the mean Time it is true, that it often happens, that if he who is superior in the League, be much more powerful than the Rest, he by ⁴³ Degrees usurps a Sovereignty, properly so called, over them, especially if the League be perpetual, and that he has a Right to plant Garrisons in their Towns; as the Athenians did, when they suffered their Allies to appeal to them, ⁴⁴ which the Lacedæmonians never

³⁴ In Panegy. p. 62. Edit. H. Steph.

³⁵ Ibid. p. 56, 62.

³⁶ Lib. I. Cap. 96. Edit. Oxon.

³⁷ As the younger PLINY says to one of his Friends, Remember you are sent into the Province of Achaia, — that you are sent to regulate the State of free Cities. Lib. VIII. Ep. XXIV. Num. 2. Edit. Cellar. See SPANHEIM'S Orbis Rom. p. 311, 381, 394, 395.

³⁸ Lib. XXXVII. Cap. LIV. Num. 24.

³⁹ Lib. XV. p. 471. Edit. H. Steph.

⁴⁰ I do not know in what Piece of the Grecian Orator these Words occur.

⁴¹ Sub imperio Suevorum. These People are here mis-named. CÆSAR calls them Nervii. De Bello Gall. Lib. V. Cap. XXXIX. The learned GRONOVIVS observes also, that the Word *Imperium* is not to be taken in an improper Sense, because the Nations here mentioned, were really subject to the Nervii, but that of Allies, (*Socii*) which the Ro-

mans sometimes gave to the People of their own Provinces.

⁴² Lib. XLII. Cap. I. Num. 9.

⁴³ I find THUCYDIDES making this Observation on the Athenians, who seeking one specious Pretext to Day, and another to Morrow, and having gained the Ionians with their Allies, induced those People to intrust them with the Command of a War on the Medes. Lib. VI. Cap. LXXVI. Edit. Oxon.

⁴⁴ The learned GRONOVIVS suspects that the Author's Memory failed him on this Occasion, and that he attributes to the Athenians what PAUSANIAS says of the Romans, viz. that after the War with Perseus, they obliged several of the Achæians to appear at Rome, and answer to the Charges exhibited against them, of having favoured that vanquished Prince. Whereupon the Historian observes, that this Way of proceeding seemed strange to the Grecians; since nothing of that Nature had been

never did. Whereupon *Isocrates* compares the Rule which the *Athenians* exercised over their Confederates ⁴⁵ to that of Kings. Thus the ⁴⁶ *Latins* complained, that under the ⁴⁷ *Pretence* of a Confederacy with the *Romans*, they were brought into Servitude. So did the *Ætolians*, ⁴⁸ that they had nothing left but the bare Shadow, and empty Name of Liberty; and the ⁴⁹ *Achæans* afterwards, *that they had a League in Shew; but in Reality a precarious Slavery*. So in ⁵⁰ *Tacitus Civilis Batavus* complains of the same *Romans*; *that they used them not as at first, like Confederates, but as mere Slaves*: And in another Place, ⁵¹ *they falsely called that Peace, which was indeed a miserable Slavery*. *Eumenes* also, in *Livy* ⁵², said the Confederates of the *Rhodians* were only so in Name, but really their direct Vassals. Also the ⁵³ *Magnesiensians* complained that *Demetrius* was free in Shew; but in Effect all Things were managed as the *Romans* pleased; and *Polybius* ⁵⁴ remarks, that the *Thessalians* were in ⁵⁵ Appearance free, but in Truth under the Dominion of the *Macedonians*.

When Things go in that Manner, and Usurpation is changed at last into Right, by the tacit Concession of those who suffer it, of which we shall treat in another Place ⁵⁶; then those who had been Allies become Subjects, or at least there is made a Partition of the Sovereignty, which, as I said before, may happen sometimes.

been attempted by the *Macedonians*; who when at the Height of their Power and Grandeur, refer'd such Cases to the *Amphictyons*, or States General of Greece. Achaic. or *Lib. VII. Cap. X. p. 216. Ed. Wech.* I am persuaded our Author has really committed a Mistake, and that his Commentator has discovered what gave Occasion to it. It might be observed, that our Author probably imagined he had read what he relates, in *ISOCRATES*, whom he afterwards quotes. But the Greek Orator is so far from saying any Thing like it, that he maintains, on the contrary, that in regard to the Practice in Question, and several other Things of which the *Athenians* were accused, *he could make it appear, that the Lacedæmonians had acted much worse, and more oppressively than they*. To which he adds, *that the Lacedæmonians had put more Grecians to Death, without the Formality of a Trial, than had been impeached and tried by the Athenians since they inhabited that City*. *Orat. Panath. p. 245, 246. Edit. H. Steph.*

⁴⁵ Our Author probably had his Eye on a Passage in his *Oration on Peace*, where he reproaches his Countrymen, the *Athenians*, with *pretending to be of Opinion, that Tyranny, or Monarchical Government, was oppressive, and pernicious, not only to the Subject but even to the Prince himself*; and at the same Time acting as if they looked on the *Empire of the Sea as productive of the greatest Advantages, tho' in Reality, it differs not in the least from a Monarchy*.

⁴⁶ The Author in his Margin quotes *DIONYSIUS of Halicarnassus*, *Lib. VI.* but almost the same Words he uses may be found in *LIVY, Lib. VIII. Cap. IV. Num. 2.* where the Historian makes a *Prætor of the Latins* say, *For if we can now bear Slavery, under the Shadow of an equal Alliance, &c.*

⁴⁷ Thus *PLUTARCH* says of *Aratus*, the *Athenian General*, that *he was accused of imposing Masters on the Cities (of Achaia), giving them the soft Appellation of Allies*. *Vit. Arat. (Tom. I. p. 1045. Edit. Wech.) Dillius Vocula*, Lieutenant-General of the Roman Forces, speaking of some People of the *Belgick Gaul*, says they had till that Time been under an easy Slavery, *molle Servitium*. *TACIT. Hist. Lib. IV. (Cap. LVII. Num. 4.) FESTUS RUFUS*, (or as he is called by others, *SEXTUS RUFUS*) speaking of the *Rhodians*, (and the Inhabitants of other Islands) observes that, *at first they*

enjoyed Liberty; but in Process of Time accustomed themselves to obey the Romans, who engaged them to it by kind Usage. *Cap. X. Edit. Cellar. JULIUS CÆSAR*, having spoken of some People as Friends and Clients of the *Ædui*, tells us, *they had formerly been under the Jurisdiction (of those of Auvergne, Bell. Gall. Lib. VII. Cap. LXXV.)* To which may be added, *FREDERIC MINDANUS, De processibus, Lib. II. Cap. XIV. Num. 3.* *ZIEGLER, (ad auream Praxim CALVOLI) §. Landassii, Conclus. I. Num. 86. GAILIUS, Lib. II. Observ. LIV. Num. 6.* See also *AGATHIAS, Lib. I.* where the *Goths* are informed what they may expect of the *Franks* in Time. *GROTIUS.*

In the Passage, here quoted from *CÆSAR's Commentaries*, there is no Mention of Friendship. Perhaps he at the same Time was thinking of another Place, which is as much to his Purpose, and where that Word is inserted, *De Bell. Gall. Lib. VI. Cap. XII.* The Passage of *AGATHIAS*, here referred to, is in *Lib. I. Cap. XI.* But the Writer doth not say the *Goths* were informed, &c. He speaks of *Aligernes*, a *Gothick Prince*, who being desirous of siding with the *Romans*, is determined to take that Step from the Consideration of the servile State to which he saw his Countrymen were on the Point of being reduced by the *Franks*, under the Shadow of an Alliance and Protection.

⁴⁸ He (Alexander Prince of the *Ætolians*) accused the *Romans* of Fraud, who under the pompous but empty Name of Liberty, kept Garrisons in *Chalcis* and *Demetrius*. *LIVY, Lib. XXXIV. Cap. XXIII. Num. 8.* They were now loaded with more splendid and heavier Chains, &c. *Lib. XXXV. Cap. 38. Num. 10.*

⁴⁹ *Idem. Lib. XXXIX. Cap. XXXVII. Num. 13.*

⁵⁰ *Hist. Lib. IV. Cap. XIV. Num. 5.*

⁵¹ *Ibid. Cap. XVII. Num. 3.*

⁵² *Lib. XXXVII. Cap. 53. Num. 4.*

⁵³ *LIVY, Lib. XXXV. Cap. XXXI. Num. 12.*

⁵⁴ *Hist. Lib. IV. Cap. LXXXVI.*

⁵⁵ Such were the *Lazi*, a People of *Colchis*, in the Reign of the Emperor *Justinian*. *PROCOPIUS. Persic. Lib. II. (Cap. XV.) GROTIUS.*

See *SPANHEIM's Orbis Romanus. Exercit. II. Cap. XVII. p. 447, 448.*

⁵⁶ See *B. II. Chap. IV. § 14.*

XXII. There are also Powers, ¹ who pay something to another, either to secure themselves from their Insults, or to get Protection, *ξύμμαχοι φόρος ἀποδίδειν*, ² *Tributary Confederates*, as it is in *Thucydides*; such were the ³ Kings of the *Jews*, and of the ⁴ neighbouring Nations, after the Time of *M. Anthony*, *ἐπὶ φόροις τεταμένους*, as *Appian* speaks; yet I see no Reason to doubt, but that such Sort of Allies may have Sovereignty, tho' the acknowledging their Weakness takes off something from their Dignity.

XXIII. Many think it more difficult to determine, whether feudatory Princes may be Sovereign? But that Question may be easily decided by what has been said before. For in this Contract, ¹ (which is peculiar to the *German* Nation, and no where found but where they have planted themselves) two Things are to be particularly considered, First, The personal Obligation of the Vassal. Secondly, The Right of the Lord to the Thing itself.

The personal Obligation is the same, whether a Man holds the Sovereignty by a feudal Right, or any Thing else, tho' lying ² in another Place. But such an Obligation, as it takes not from a private Man personal Liberty, so neither does it lessen the Sovereignty in a King or State, which is Civil Liberty. Which may be plainly seen in *Franc Fiefs*, which consist in personal Obligation only, but ³ give no

XXII. (1) The Emperor *Justinian* paid the *Perfians* a certain Sum yearly. See *PROCOPIUS Persic. Lib. II. (Cap. X.)* and *Gothick. Lib. IV. (or Hist. Miscellan. Cap. XV.)* This was in soft Terms called *A Tribute for securing the Caspian Gates*. The *Turks* give the *Arabians* of the Mountains Money, to secure them from their Incursions.

See to the same Purpose *CASAUBON's* Note on *SPARTIAN, in Hadriano, Cap. VI.* and what *MR. HERTIUS* says, partly after him, though he doth not mention his Name, in his *Elementa Prudentiæ Civilis, Part I. Sect. XII. § 11. and Part II. Sect. XX. § 9.*

² *Lib. I. Cap. XIX. Edit. Oxon.*

³ *De Bello Civil. Lib. V. p. 1135. Edit. Amst. 715.* *H. Steph.* *JOSEPHUS* tells us that *Marcus Antonius*, speaking of *Herod*, declares it was not reasonable that Prince should be called to Account for what he had done, as King; for then he would not be a King: and that it was just that those, who invested him with that Dignity and Power, should allow him to enjoy them. *Antiq. Jud. Lib. XV. Cap. IV. p. 516.* The *Jews*, says *St. CHRYSOSTOM*, on their Declension, and Subjection to the *Romans*, were neither entirely free, as before, nor absolutely Slaves, as now. They were ranked among the Allies of that People; paid Tribute to their own Kings, and received Governors of their Nomination. They likewise followed their own Laws, and punished their Delinquents according to the Custom of their own Country. *De Eleemosyna II. GROTIUS.*

The Example of the Kings of the *Jews*, and those of the neighbouring Nations, is not well applied. For at that Time the Authority of all those Princes was merely precarious. See my 22d and 25th Notes on § 21. The very Passages, alledged by our Author in this Place, are directly against him. What is here related of *Marcus Antonius* was said on Occasion of some Complaints laid before him against *Herod*, on the Account of the Death of *Aristobulus*, his Brother-in-Law; and it is evident from those very Words, that all that Prince's Power was dependent on the *Romans*; tho' in the Case then under Consideration, *Anthony*, being gained by Presents, would not take Cognizance of the Charge urged against *Herod*, tho' but too well grounded; and that is the Reason why he laid so much Stress on the Quality of King, in Regard to *Herod's* Subjects. *St. CHRYSOSTOM* expressly says, the *Jews* were subject to the Command of the *Romans*, *ὑπὸ τὴν τῶν Ῥωμαίων ἐταθήσαν ἀρχὴν*, and that they had no more than the specious Title of Allies,

in the Sense already explained. After all, *JOSEPHUS* expressly observes, that after *Jerusalem* was taken by *Pompey*, the *Jews* lost their Liberty, and became Subjects (*ὑπήκοοι*) to the *Romans*. *Antiq. Jud. Lib. XIV. Cap. VIII.* See *SPANHEIM's Orbis Rom. Exercit. II. Cap. XI.*

⁴ The Kings of those neighbouring Nations were not more independent than those of the *Jews*. See Note 22 on the foregoing Paragraph. But the learned *GRONOVIVS* quotes an Author who has produced more exact Instances of Princes, who, without ceasing to be Sovereigns, paid Tribute to foreign Nations, to prevent Incursions into their Countries. See *AMM. MARCELL. Lib. XXV. Cap. VI. p. 468. Edit. Valef. Gron.* with *FRID. LINDENBROGIUS's* Note on the Place.

XXIII. (1) See my 4th Note on *PUFENDORF, B. IV. Ch. 8. § 12.*

² As when the Kings of *England* paid Homage to those of *France*, for the Provinces they possessed in that Kingdom. See *BODIN, De Repub. Lib. I. Cap. IX. p. 171, 172. Edit. Francof. 1622.*

³ *Nulla jure in rem. Without any Right to the Thing itself.* What our Author says here, agrees neither with the Idea which the Feudists give of *Franc Fiefs*, nor with the Nature of Fiefs in general. By the Term *Franc Fief* is meant, that which is exempt from all Charges and Services, which require considerable Labour or Expence; so that the Obligation of the Vassal is reduced to Fidelity and Loyalty, which consist only in honouring the Lord, under whom he holds, securing him from Damage, and doing him all the Good in the Vassal's Power, as it is specified in the Form of the Oath of Fidelity. *FEUDOR, Lib. II. Tit. VI. De formâ Fidelitatis, and Tit. VII. De novâ formâ Fidelitatis.* But this Exemption from Charges and Services doth not deprive the Lord of a *Franc Fief* of a Right to the Thing itself, which the Vassal holds in Fief, or hinder it from returning to him, when the Vassal is guilty of Felony, or leaves no Heirs. The Exclusion of such a Right destroys the very Nature of a Fief, properly so called. Tho' the Vassal of a *Franc Fief* had a Power to alienate the Thing without the Consent of the Lord, which the Doctors do not allow, still the Right of the latter would be perpetual over those, in whose Favour the Fief should be alienated. I am very much mistaken, if our Author has not here, and elsewhere, (as *B. III. Chap. XX. § 44.*) confounded what are called *Franc Fiefs*; with certain Engagements improperly termed *Fiefs*, on the Account

See Bald.
Procem. Di-
gest. Natta,
Confil. 485.

no Right to the Thing itself. For these are nothing else but a Species of that unequal League, of which we have treated already, wherein one promises Services, and the other Defence and Protection. But suppose a Vassal has promised his Lord to serve him against all and every Man, which they now call ⁴ *Feudum Ligium*, (for formerly that Word was of a larger Signification) that takes off nothing ⁵ from the Right of Sovereignty which the Vassal has over his own Subjects; not to mention, that there is always a tacit Condition supposed, *viz.* that the War undertaken by the Lord ⁶ be just: Of which we shall treat in another Place.

Lib. 12.

As to the Right of the Lord to the Thing itself, enjoyed by a feudal Title, it is such indeed, that if the Family of the Vassal be extinct, or if he falls into certain Crimes, he may lose the very Right of Sovereignty: Yet the Power he has over his Subjects does not cease to be Sovereign; for as I have often said, there is a Difference between the Thing, and the Manner of holding it. And I find many Kings constituted by the Romans with this Condition, that upon the failing of the Royal Family the Sovereignty should return to themselves; as *Strabo* observes of *Paphlagonia*, and some other Kingdoms ⁷.

XXIV. We

Account of some Resemblance between them in the Respect and Homage paid. An ingenious Gentleman, who has published curious Extracts from RYMER's *Fœdera*, observes, as a certain Fact, that Homage was frequently paid for simple yearly Pensions, without expressing the Cause of such Homage. We have Examples of this Kind, says he, in the first Volume of this Collection, p. 1. and in some other Places, in Regard to the Counts of Flanders, who paid Homage to the Kings of England, for a Pension of 400 Marks. *Bibliothèque Choisie*, Tom. XX. p. 99, 100. By the Agreement made May the 17th, 1101, between Henry I. King of England, and Robert Count of Flanders, the King obliges himself to give him 400 Marks of Silver yearly in Fief, on Condition that Robert should be obliged to send 500 Horse into England, for the King's Service, when he should have Occasion for them. *Biblioth. Choisie*, Tom. XVI. p. 10, &c. I find BODIN had long ago made a like Observation. Our Ancestors, said he, abused the Word Liege in all their ancient Treaties of Alliance and Oaths. I remember I have seen 48 Treaties of Alliance and Forms of Oaths, collated with the original Records, by which the three Electors on this Side of the Rhine, and several other Princes of the Empire, entered into Obligations with the Kings Philip de Valois, John, Charles the Fifth, Sixth, and Seventh, and Lewis the Eleventh, promising and swearing, in the Presence of the King's Deputies, to serve him in his Wars against all Powers, except the Emperor and King of the Romans, acknowledging themselves Vassals and Liege-Men of the King of France: Some of them styling themselves Counsellors, others Pensioners, and all Liege Vassals, except the Archbishop of Treves, Elector of the Empire, who only calls himself Confederate. And yet they held nothing from the Crown; for only the Pensioners of France took an Oath to serve the King, in the Things, and on the Conditions specified in the Instrument. The Oath of the Duke of Guelders and the Count of Juliers runs thus, Ego Devenio Vassallus ligius CAROLI, Regis Francorum, pro ratione quinquaginta millium scutorum auri, ante festum D. Remigii mihi solvendum. That is, I become the Liege Vassal of CHARLES, King of the Franks, on the Consideration of fifty thousand Crowns of Gold, to be paid me before the Feast of St. Remigius. This Instrument is dated in the Month of June, 1401. This same Way of speaking was used even between Sovereign Princes; as in the Treaty of Alliance made between Philip de Valois, King of France, and

Alphonso, King of Castille, in the Year 1336, on which Occasion Proxies appeared from both Parties, to require and give Assurance of mutual Homage and Fidelity. But this is an Abuse of the Words Vassal and Liege; for which Reason they are no longer admitted into the Oaths taken by the King's Pensioners, nor into Treaties. De la Repub. B. I. Chap. IX. p. 175, 176. the French Edition, printed in 1608. I have set down this Passage at length, as it is of singular Use for explaining our Author's Meaning, and discovering the Origin of his Mistake, which none of his Commentators have observed. Since I penned this Note, I have found something in another Work of our Author to confirm my Conjecture. It is in Chap. V. of his Treatise, *De antiquitate Reip. Batav.* where he maintains, that even tho' the old Counts of Holland were Vassals of the Empire of Germany, the Hollanders would still be a free and independent People. To prove this Proposition he observes, that according to the Lawyer *Proculus*, Clients are not the less free, because not equal in Dignity to their Patrons; nor a People, because obliged by a Clause in a Treaty of Alliance to reverence the Majesty of their Ally, provided they are not subject to his Dominion. Hence, says he, comes the Name of Franc Fief. But our Counts never owned themselves subject to this Sort of Obligation of Fief.

⁴ *Ligius Homo*, or *Lidges*, a Term supposed to be derived from the German *Ledig*, empty, originally signified no more than a Vassal. See Vossius, *De Vitiis Sermonis*, Lib. III. Cap. XX. under the Word *Liga*; and the late Mr. HERTIUS's Treatise *De Feudis oblatis*, Part II; § 6. in Vol. II. of his Comment. & Opusc. &c. But in Process of Time it has stood for a Liege-Man, or Liege-Vassal, one who entered into an Engagement to respect his Lord more than all other Men, and serve him against every other; so that such a Vassal cannot be Vassal to two Masters in the same Manner, and ought to acknowledge no other Sovereign.

⁵ In Reality, such an Engagement no more prejudices the Sovereignty of the Vassal Prince, than when a Prince, by a Treaty of Alliance, promises another, to whom he is not feudatary, to assist him in all his Wars.

⁶ See B. II. Ch. XV. § 13. and Ch. XXV. § 4.

⁷ But those Kingdoms were more than Feudatary. See Notes 22 and 25, on § 21. STRABO calls the Kings meant by our Author, *Subiecti* (Υποκῶνται) to the Romans, Lib. VI. p. 440. Edit. Amst. I shall set down the whole Passage, because

XXIV. We must also distinguish in *Sovereignty*, as well as *Property*, between the Right itself, and the Exercise of that Right, or between the first Act and the second. ¹ For as a King, when an Infant, has a Right to govern, but cannot exercise that Right; so has a Prince that is Lunatick, or a Prisoner, or that lives in a foreign Country, so that he is not at Liberty to exercise himself the Acts of Sovereignty: For in all such Cases they have their Lieutenants or Vice-Roys to act for them. Therefore *Demetrius*, living confined under *Seleucus*, forbade any Credit to be given to his Letters, or Seal, but ordered that all Things should be administered as if he were dead.

XXIV. *A Man's Right distinguished from the Exercise of that Right.*

Plut. in Demetrius.

it is corrupted in one Place, where I do not find any one has observed the Fault. The Geographer plainly distinguishes between the Kings of *Asia*, whose Families were extinct, and those who, revolting from the *Romans*, and being conquered by that People, had given them Occasion to reduce their Dominions into the Form of *Roman* Provinces. Among the former he reckons the Kings of *Pergamus*, those of *Syria*, *Paphlagonia*, *Cappadocia*, and, as it is in the original Text and the *Latin* Version, those of *Egypt*. The Examples of the latter are *Mithridates*, surnamed *Eupator*, and *Cleopatra*, Queen of *Egypt*. τὰ δ' ὅμοια καὶ περὶ τὴν Ἀσίαν συνέβη· κατὰρχαὶ μὲν ὑπὸ τῶν βασιλέων διωκεῖτο ὑπηκόων ὄντων· ὕστερον δ' ἐκλιπόντων ἐκείνων, καθάπερ τῶν Ἀσιατικῶν βασιλέων, καὶ Σύρων, καὶ Παφλαγονίων, καὶ Καππαδόκων, καὶ Αἰνυπίων, ἡ

(I add this Particle, which is absolutely necessary) ἀφισαμένων, καὶ ἐπειὰ κατὰλυμένων, καθάπερ ὅπῃ Μιθριδάτης συνέβη τῷ Εὐπάτορι, καὶ τῇ Αἰνυπίας Κλεοπάτρῃ, ἀπ᾿ αὐτὰ ἐπὶ τὴν Φασίδην καὶ Εὐφράτην, πλὴν Ἀρσάκων τινῶν, ὑπὸ Ῥωμαίοις ἐστὶ, &c. I am of Opinion, that instead of Αἰνυπίων, STRABO wrote Βιθυνῶν. It is well known, at least, that the *Romans* inherited *Bithynia* by the Will of *Nicomedes*, the last King of that Country; as they in the same Manner acquired the Kingdom of *Pergamus*, whose Kings are here termed Ἀσιατικοὶ βασιλεῖς. See § 12. of this Chapter, where these two Facts are quoted on the Credit of good Authors.

XXIV. (1) See B. III. Chap. XX. § 3. of this Work.

CHAP. IV.

Of a War made by Subjects against their Superiors.

PRIVATE Men may certainly make War against private Men, as a Traveller against a Robber, and Sovereign Princes against Sovereign Princes, as *David* against the King of the *Ammonites*; and so may private Men against Princes, but not their own, as *Abraham* did against the King of *Babylon*, and other neighbouring Princes; so may Sovereign Princes against private Men, whether their own Subjects, as *David* ¹ against the Party of *Ishbosheth*, or Strangers, as the *Romans* against Pirates.

1. The Question stated.

2 Sam. x. Gen. xiv.

The

I. (1) This Example is criticised by Commentators, who will not allow it to be just. *Ishbosheth*, say they, had been acknowledged King by the eleven Tribes, over which he reigned two Years, 2 SAM. ii. 10. *David* himself was so far from considering him as a rebellious Subject, that he gives him the Character of a just Man. Ibid. iv. 11. and punishes his Murderers. The Promise, which GOD had made of transferring the Crown to *David*, and his Descendants, specifies no fixt Time; nor was it to be fulfilled 'till after the Death of *Saul* and *Ishbosheth*. Hence it is concluded, that those who sided with *Ishbosheth* were his Subjects, and not *David's*. But it appears from the sacred History, that tho' *David* had been privately appointed by *Samuel*, and that but Few were at first acquainted with the Will of GOD, who designed he should succeed *Saul*; it afterwards became publicly known, and reached the Court of the Prince on the Throne. *Jonathan* says to *David*, in the Wilderness of *Ziph*, *Thou shalt be King over Israel, and I shall be next unto thee; and that also my Father Saul knoweth.* 1 SAM. xxiii. 17. *Saul* himself

makes the same Declaration, when he acknowledges the Generosity of the Man, whom he had persecuted with so much Rage and Cruelty, *I know well that thou shalt surely be King, and that the Kingdom of Israel shall be established in thy Hand: Swear now therefore unto me by the LORD, that thou wilt not cut off my Seed after me, and that thou wilt not destroy my Name out of my Father's House.* Ibid. xxiv. 20, 21. From which Words it is evident, that he looked on *David* as the Man who was to be his immediate Successor, according to a Promise from Heaven. When the eleven Tribes made their Submission to *David*, they owned they knew the Lord had said to him, *Thou shalt feed my People Israel, and thou shalt be a Captain over Israel.* 2 SAM. v. 2. So that, by Vertue of that Divine Election, all who were acquainted with it, were obliged to receive *David* as their lawful King, on *Saul's* Demise. For the Case was not the same among the *Hebrews*, as among other People, who being directed by no extraordinary Revelation, bestowed on their Kings all the Power they had over them. The *Israelites* were but lately come out of

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Nehem. Ch.
ii. & iv.

Acts iv. 19.
— v. 29.

II. War a-
gainst Superi-
ors, as such is
unlawful by
the Law of
Nature.

The only Question is, whether private or publick Persons may lawfully make War against those that are set over them, whether as supreme, or subordinate. First, it is agreed on all Sides, that they that are commissioned by the higher Powers may make War against their Inferiors, as *Nebemiah* did by the Authority of *Artaxerxes*, against the neighbouring petty Princes. Thus the ² *Roman* Emperors allowed the Proprietor of an Heritage to drive away Harbingers or Quarter-masters. But the main Question is, What is lawful for Subjects to do against their Sovereign, or those that act by his Authority. This is allowed by all good Men, that if ³ the civil Powers command any Thing contrary to the Law of Nature, or the Commands of God, they are not to be obeyed. For the Apostles, when they alledged, that we must obey God rather than Man, did but appeal to a Principle of Reason, engraved on the Minds of Men, which ⁴ *Plato* expresses almost in the very same Words. But if for this, or any other Cause, any Injury be done us by the Will of our Sovereign, we ought rather to bear it patiently, than to resist by Force.

II. Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance, as we said before. But civil Society being instituted for the Preservation of Peace, there immediately arises a superior Right in the State over us and ours, so far as is necessary for that End. Therefore the State has a Power to prohibit the unlimited Use of that Right towards every other Person, for maintaining publick Peace and good Order, which doubtless it does, since otherwise it cannot obtain the End proposed; ¹ for if that promiscuous Right of Resistance should be allowed, there

the *Theocracy*; and though GOD, in Compliance with their imprudent and obstinate Demand, had granted them a Change of that happy Form of Government into a Human Monarchy, he did not thereby divest himself of the Right of making the immediate Choice of their Kings, when he pleased. It was thus that *Saul* the first King of *Israel* ascended the Throne. *David*, therefore, having been anointed by *Samuel*, in *Saul's* Life-time, had an incontestible Title to the Succession; and consequently, the eleven Tribes, who owned *Ishbosheth*, might be considered as so many rebellious Subjects against the lawful Sovereign; and the more so, because they need only have consulted their usual Oracle, the *URIM* and *THUMMIM*, in Order to know the Will of GOD. If *David* punished the Murderers of *Ishbosheth*, as having killed a just, or innocent, Man; it was not because he did not look on him as an Usurper of his Right; but he calls him innocent in Regard to *Rechab* and *Baanab*, who had dispatched him by their own private Authority, without any Injury received from him. And he himself would spare the Lives of *Saul's* Children, on the Account of the Oath he had taken to their Father; in Consideration of which he pardoned *Ishbosheth*, and would never have hurt him. See Mr. LE CLERC, on 2 SAM. iv. 11.

² *Licentiam enim Domino (Prædii) aëtori, ipsique plebi Serenitas nostra commisit, ut eum, qui præparandi gratiâ ad possessionem venerit, expellendi habeat facultatem, nec crimen aliquod pertimescat: quum sibi arbitrium ultionis suæ sciat esse concessum; restitque sacrilegum prior arceat, qui primus invenit.* COD. Lib. XII. Tit. XLI. *De Metatis & Epidemeticis.* Leg. V.

³ See Book II. Chap. XXVI. § 3.

⁴ In *Socrates's* Apology, where he makes that Philosopher express himself in the following Manner: *I honour and love you; [speaking to the Athenians] but will obey GOD, rather than you.* Tom. I. p. 29. Edit. H. Steph.

II. (1) We are here to consider, first *single Persons*, and then the *Body of the People*. In Regard to *single Persons*, it is certain that the End of civil Society in general requires that each of them should not have a Right to resist the supreme Power, as often as he thinks himself aggrieved by it. For,

besides that a Superior may be wrongfully accused on that Article, whoever submits to human Authority, must be sensible that the Person, in whose Favour he divests himself of part of his Liberty, is and always will be Man, that is, subject to Mistakes, and Failures in the Discharge of his Duty; and is therefore to be supposed to acknowledge him for his Master on that Foot. Consequently, he at the same Time grants him a Right, not to treat him in any Manner unjustly (no Man can ever give or have a real Right to commit the least Injustice) but to require that he shall not be divested of his Authority, for every Abuse of it. A Man, who never abuses his Power, ought to be considered as a Man not to be found; and no Authority would be lasting, or sufficient for producing the Effect, for which it is designed, if it could be so easily lost. But it doth not thence follow, that a particular Person either doth or ought necessarily to engage to suffer every Thing from his Superiors, without ever opposing Force with Force. Were it so, those who enter into any Society, where they are to obey, would without Dispute be in a worse Condition, than before; and nothing could oblige them to divest themselves of that natural Liberty, of which every Man is so jealous. Even such as submit to a Conqueror, would have done better, had they continued in a State of War with him. We must distinguish therefore between doubtful, or supportable Injustices, and manifest or insupportable Injustices. The former are to be born; but, strictly speaking, there is no Obligation to bear the latter; and if we sometimes ought to bear them, it is by no Means out of Regard to the Person, who commits them, but for the Good of Society. So that, if there is no Room to apprehend that Resistance will occasion greater Evils and Disorders, than those to which the Society already is exposed, or those to which it is in Danger of being exposed, we may safely employ our whole Right against the Man, who, by an Excess of Madness, has disengaged us from the Tie of Subjection, and entered into a State of War with us. Now, that there are some manifest and enormous Injustices, in regard to which a private Person cannot deceive himself, and conceive an unwarrantable Prejudice against his Prince will be easily granted, if we enquire well into the Nature of Things,

there would be no longer a State, but a Multitude without Union, such as the ² Cyclops were, every one gives Law to his Wife and Children. A Mob where all are Speakers, and no Hearers. Or the ³ Aborigines, whom Sallust mentions as a wild and savage People; without Laws, without Government, loose and dissolute. And in another Place the ⁴ Getulians, who had neither Customs, Laws, nor Magistrates. So we find that the Resistance in Question, is looked upon as unlawful, according to the Usage of all States. All human Societies (St. Augustine ⁵ tells us) unanimously agree to obey Kings. So Æschylus, ⁶ *ῥαρχὺς μόναρχος καὶ ἐχ' ὑπεύθυνον κατὰ*, A King absolute, accountable to none. And in Sophocles, ⁷ *ἄρχοντες εἰσιν, ὡς δ' ὑπευκτέον* τὴν μὴ; They are Princes, we must obey; why not? And in Euripides, ⁸ *τὰς τ' ἀρχαίων ἀμαθίας χρεὼν φέρεω*; We must bear with the Follies of Princes. Agreeably whereto is that we quoted above out of Tacitus; and in another Place he says ⁹, The Gods have bestowed a sovereign Power on Princes, leaving Subjects the Glory to obey. And, The bad Treatment we receive from a King, must be looked on as good

Things, and the Conduct of Sovereigns, become Tyrants. Who can doubt, for Example, whether a Prince, who attempts to kill one of his Subjects, or deprive him of his Goods, without any Crime committed by the Sufferer, and without the Formality of a Trial, for no other Reason but his own good Pleasure, or for some Reason evidently unjust, as for his refusing to believe what he knows to be false, particularly in Matters of Religion; who, I say, can doubt that this is one of those enormous and insupportable Abuses of the supreme Authority, the Toleration of which, is so far from being necessary for the Sake of preserving Order, and for the public Peace, that it is directly contrary to and destructive of both? Have we not even commonly very great Reason to believe, that a Prince who proceeds those Lengths in Regard to one or more particular Persons, will not stop there, and that the rest may expect the like Treatment? If the public Interest requires those, who obey, should suffer some Thing, it no less requires that those, who command, should be afraid of putting their Patience to the utmost Trial. A Man, who imagines himself allowed to do what he pleases to his Inferiors, is capable of doing every Thing. It is true, indeed, that commonly speaking, one, or some few particular Persons, would resist to no Purpose, and only draw greater Evils on their own Heads. But this is a prudential Consideration, which makes no Diminution in their Right, to oppose a Superior, who by enormous and insupportable Acts of Injustice, and the Violation of his Engagements to them, has discharged them of their Obligations to him. What I have already laid down, takes Place, and that much more, in Relation to a whole People, or the greater Part of it. The greater the Number of the Oppressed is, the more the Oppressor deserves to be brought to Reason. The Tyrant in that Case has less Reason to complain, as hardly any Thing but a horrible Excess of Ambition and Madness could have obliged the Body of the Nation to rise against him. See what I have said on PUFEND. Book VII. Cap. VIII. § 6. Note I.

² Odyss. Lib. IX. v. 114, 115. EURIP. In Cyclop. v. 120.

³ Bell. Catalin. Cap. VI.

⁴ Idem. Bell. Jug. Cap. XXI. Edit. Waff. Our Author, in a Note on this Place, adds the Example of the Bebrycians, and quotes these Words of VAL. FLACCUS:

— Non fœdera legum

Ulla colunt, placidas aut jura tenentia mentes.

Argonaut. Lib. IV. v. 102, 103.

But all the Poet means here is, that those People observed no Law of Justice or Humanity in their Behaviour to others; as appears from the Sequel, where he tells us, they killed all Strangers, who

landed in their Country, and sacrificed them to Neptune. The following Verses, from the same Author, sufficiently explain those already produced:

— Non hæc, ait, hospita vobis

Terra, Viri; non heic ullos reverentia ritus

Pellora: mors habitat, sacraque hoc litore pugnæ.

V. 146, &c.

But, to evince the Want of Exactness in the Application, it is sufficient to say that the Country of the Bebrycians was a Kingdom, where Amycus reigned, as the same Poet informs us. v. 99, 101.

⁵ Confess. Lib. III. Cap. VIII. This Passage, which is quoted in the CANON LAW, *Distinct. VIII. Can. 2.* only says that a Sovereign is to be obeyed. Who doubts it? The Question is only how far he is to be obeyed. All the Authorities, alledged by our Author, or others, when well examined, do not prove it has been the general Opinion of all Nations, that the Subject is to bear every Thing from the Sovereign, and that it is never allowable to resist him in any Case. The same Authors, in whom we find such Sentences, as the Partisans of absolute Non-resistance affect to heap together, in other Places sometimes bestow the most exalted Character on such as have had Courage enough to dispatch a Tyrant; as the learned SCHÆLIUS observes, in his Treatise *De Jure Imperii*, p. 336.

⁶ ÆSCHYLUS speaks of an independent King, who exercises his Power with Severity, as a Matter of Fact only.

⁷ SOPHOCLES makes Ajax say this in Regard to Menelaus and Agamemnon, acknowledging his Fault in giving Way to a violent Excess of Passion, because Achilles's Arms had been given to another. Ajax. v. 677.

⁸ This Passage is entirely misapplied. It doth not contain a Precept, though CICERO calls it so, in a Letter to Atticus. Lib. II. Epist. XXV. It only expresses the Necessity, to which Men are reduced of suffering the Follies of those, on whom they depend. Polynices excuses himself to his Mother for having married the Daughter of Adrastus, King of Argos, with a View of facilitating his Return to his own Country, and mounting the Throne from which he was debarred by his Brother Eteocles. On this Occasion, he sets forth all the Hardships of Banishment, and among the rest, that in that Situation, a Man is obliged to bear with the Follies and Extravagancies of those who reign, in the Place of their Exile. Phœniss. v. 396. so that he is very far from designing to speak of a Right inherent in Kings to commit such Follies with Impunity.

⁹ The Historian makes M. Terentius, a Roman Knight, speak in the Senate, and address himself to Tiberius, as if he was present, in this Manner: The Gods have given you, &c. Annal. Lib. VI. Cap. VIII. Num. I.

Treatment.

Treatment: Seneca ¹⁰ says, *We must bear patiently whatever the King commands, whether just or not*: a Thought which he borrowed from ¹¹ *Sophocles*. And likewise in *Sallust*, ¹² *To do any Thing with Impunity, is peculiar to a King*.

Hence it is, that the Majesty (that is, the Dignity and Authority) of the Sovereign, whether it be King or State, is fenced with so many Laws, and so many Penalties; which Authority could not be maintained, if it were lawful to resist. ¹³ If a Soldier resist his Officer that corrects him, if he lays hold on the Cane, he is degraded; but if he wilfully break it, or strike again, he is punished with Death. And in *Aristotle*, ¹⁴ *If a Magistrate strikes, he shall not be struck again*.

III. By the *Hebrew Law*, he that was disobedient, either ¹ to the High-Priest, or to the extraordinary Governor appointed by God, was to be put to Death. But that which in *Samuel* is spoken of the Right of Kings, ² to him that thoroughly considers it, appears not to be understood of a true Right, that is, of a Power to do honestly and justly, (for a far different Way of living is prescribed to a King, in that Part of the Law which treats of a King's Duty) nor of barely what he will do; for that would not have been extraordinary in him, when even private Men do likewise Injuries ³ to private Men; but it is to be understood of an Action, whether

III. Nor allowed by the Hebrew Law.

Jos. i. 18.

Deut. xvii.

^{12.}

¹ Sam. viii.

^{11.}

Deut. xvii.

^{14.}

¹⁰ *Æquum atque iniquum Regis Imperium feras*: These are the Words of *Creon*, King of *Corinth*, in *Med.* v. 195. The preceding Line, *Indigna digna habenda sunt, Rex quæ facit*, is only a Parody of a Sentence in *PLAUTUS*, *Indigna digna habenda sunt Herus quæ facit*. *Captiv.* Act. II. Sen. I. v. 6. I find that *LIPSIUS* has parodied the Verse of the Latin Poet in the same Manner in his *Politics*, Lib. VI. Cap. V. from whom perhaps our Author took it.

¹¹ *Antigon*, v. 681, 682.

¹² *Bell. Jugurth.* Cap. XXXVI. This is said by *Memmius*, a Tribune of the *Roman People*, and a zealous Assertor of public Liberty. He had no Intention to compliment Kings with a Right to do what they pleased with Impunity; he only meant that Affairs usually take this Course, that such is the Custom of Kings, and the Success of their evil Actions. Upon which *MILTON* (*Defens.* Cap. II. p. 34.) judiciously alludes the following Quotation from *CICERO*, which the Reader may compare with the Passage in the Book of *SAMUEL*, of which we shall speak in a Note on the next Paragraph. *None of us is unacquainted with the Practice of Kings, though we cannot speak of it from our own Experience. This is the Style of their Orders, Take Notice, and obey; if you add to your Requests Complaints: and this of their Menaces, If I find you here a second Time, you shall die. Terms, which we are not only to read and consider for our Amusement, but consider as a Lesson to caution us against coming under such a Power.* *Orat. pro C. Rabirio Postum.* Cap. XI. Our Author, in a Note on this Place, refers us to a Passage of *JOSEPHUS*, which he had before quoted, in Note 3. on § 22. of the foregoing Chapter.

¹³ *DIGEST.* Lib. XLIX. Tit. XVI. *De Re Militari.* Leg. XIII. § 4. See *RUFFUS's Leges Militares.* Cap. XV. published with *VEGETIUS.* by *Plantin*, in 1607.

¹⁴ *Ethic. Nicom.* Lib. V. Cap. VIII. p. 64. *Edit. Paris.* This Passage is not intirely to the Purpose. The Philosopher is treating of the Penalty of *Retaliation*; to shew that it would be sometimes contrary to Justice, he instances in the Case of a subaltern Magistrate, who should, without just Cause, strike one of his Inferiors; and maintains that it would not be suitable to the Character of such a Person, that he should be sentenced to receive Correction in the same Manner. It can be inferred only by Way of Consequence, from this Example, and that of Military Discipline, before

alleged, that, commonly speaking. Inferiors ought not to resist the supreme Power, or subaltern Officers, acting in his Name, and by his Authority.

III. (1) The Law speaks of such as should insolently despise (for so it is in the Text) the Decision of the Judges established by GOD, for explaining and applying the Laws of *Moses*, in doubtful Cases. So that this is wide of the Question in Hand, where we must always suppose a manifest Injustice. See *Mr. LE CLERC* on *DEUT.* XVII. 12.

² Our Author, with several Interpreters, supposes that, when *Samuel* told the *Israelites* how Kings would treat them, he spoke of *Right*, and not only of *Fact*. *PUFEND.* in *B.* VII. Chap. VI. § 9. gives us a Paraphrase on the Words of the Prophet, in which he explains them to us so as to make them mean no more than what a King, whether absolute or not, may lawfully require. But in Order to perform this to his Mind, he is obliged to soften the Force of the original Expressions, contrary to the Rules of Criticism. We need only consider the following Words: *He (the King) will take your Fields, and your Vineyards, and your Oliveyards, the best of them and give them to his Servants.* v. 14. These are manifest Acts of Tyranny; and the Story of *Naboth* sufficiently shews, that the most abandoned Princes dared not maintain that Subjects were obliged to suffer the Seizure of their Goods or Estates, even though they are paid for them beyond their just Value. Whence it appears, that it was not thought that *Samuel* in any Manner design'd to fix the Right of a King, or the Obligation of the Subject, but only to let the People know to what Calamities they would be exposed by the Abuse of the royal Power and Strength. The Prophet's View, which was to divert the *Israelites* from persisting in their Demands, requires no more; and the original Word, usually rendered *Right*, *jus*, frequently signifies in Scripture the *Manner of Proceeding*, or *Custom*. The Example, which I have given, after the Commentators, on *PUFENDORF*, as before quoted, is sufficient for putting this beyond Dispute. Besides, the divine Goodness and Sanctity do not, I think, allow us to imagine he designed to give the least Insinuation, which might give Kings Occasion to believe themselves warranted to do what they pleased, and neglect the Duties so clearly prescribed in the Law. This would be a sort of Contradiction, unworthy of an infinitely perfect Being.

³ True; but then there is a wide Difference between the Injuries, which private Persons may do

whether just or not, as has in it some Effect of Right, that is, it implies the Obligation⁴ of Non-resistance. Therefore it is added, when People are thus oppressed, they should cry unto GOD for Help,⁵ as if no Remedy were to be expected from Man. It is then a Right, in the same Sense as it is said that,⁶ *the Pretor renders Justice, even when he pronounces an unjust Sentence.*

IV. Where *Christ* in the New Testament commands to give to *Cæsar* the Things that are *Cæsar's*, he certainly intended, that his Disciples should yield as great, if not a greater Obedience (both active and passive) to the higher Powers, than what the *Jews* were bound to pay to their Kings. Which *St. Paul* (who could best interpret the Words of his Lord) largely describing the Duties of Subjects, says among other Things, *He that resists the Power, resists the Ordinance of God; and they that resist, shall receive unto themselves Damnation.* And a little further, *for he is the Minister of God to thee for Good.* And again, *Wherefore ye must needs be subject, not only for Wrath, but also for Conscience Sake.* He includes in Subjection the Necessity¹ of Non-resistance, not only such as arises from the Apprehension of a worse Evil, but such a one as flows from the Sense of our Duty, whereby we stand obliged not only to Man, but to GOD also: He adds two Reasons for it; *First*, because GOD has approved of this *Ordinance* of commanding and obeying, both formerly in the *Jewish* Law, and now in the *Evangelical*, wherefore the publick Powers are to be esteemed by us, as ordained by GOD himself; for we make those Acts our own, which we support and countenance by our Authority. *Secondly*, because this *Ordinance* tends to our Advantage. But some may say, to bear Injuries is not advantageous; to which others, more truly, than pertinently to the Apostle's Meaning, as I suppose, say, these Injuries are also advantageous to us, because such a Patience shall not lose its Reward. The Apostle seems to me to have regarded the general End proposed in this *Ordinance*, which is the² publick Peace, wherein is comprehended that also of every particular Person. And certainly this Advantage we

VI. Nor by the Law of the Gospel, as proved by Scripture.

Rom. xiii.

one to another in a State, where the Laws are observed, and that which a wicked Prince may do to his Subjects. For, as it has been observed, and as every one plainly sees, the Strength lodged in the Hands of Princes puts them in a Condition of oppressing their Subjects a thousand Ways, which are out of the Power of private Persons. Shall a Citizen, for Example, seize on his Neighbour's Field or Vineyard, with Impunity? Shall he take away his Children, or Servants by Force?

4 Or rather a physical Inability to resist. The *Israelites*, as Mr. LE CLERC observes on the Passage under Consideration, never were of Opinion that no one, even the Body of the People, could not lawfully resist the King. This is evident from the Manner, in which the ten Tribes shook off the Yoke of *Rehoboam*, and the Example of several Tyrants, who were killed in the same Kingdom of *Israel*. Our Author, in a Note on this Place, quotes what *PHILO* makes the *Jews* of *Alexandria* say, when they place their own Conduct in Opposition to that of the Natives of the Country. *When were we suspected of Faction? When did not all the World look on us as a peaceable People? Is not our daily Behaviour irreproachable, and such as tends to promote Concord, and the Good of Society?* In *Flaccum*, pag. 978. Edit. Paris. But it doth not thence follow that the *Jews*, even after the Captivity, were of Opinion, that Resistance is never allowable. The Example of the *Macchabees*, and the whole History of that Nation, manifestly shew the contrary. See *MILTON*, *Defens.* Cap. IV. pag. 115, &c. When they were violently harassed by the *Roman* Governours, they submitted because they were not in a Capacity of resisting; though, to shew their Innocence, and appease their Persecutors, they sometimes valued themselves on their forced Patience, as when *Petronius* went with an Order from *Caligula* to place that impious Prince's Statue in the Temple. See *JOSEPHUS*, *Antiq. Jud.* Lib.

XVIII. Cap. XI. and *PHILO*, *De Legat. ad Caium*, pag. 1025, 1026. But I do not find in either of these Historians the Words quoted by the *English* Author, already mentioned, as an Acknowledgement made by the *Jews* themselves of their own Weakness. Πολεμεῖν μὲν οὐ βολόμενοι, διὰ τὸ μὴ ἂν δύνασθαι; that they would not fight, because they were not able, pag. 133. I only observe that *JOSEPHUS* says, that when *Petronius* was on his March for *Judæa* at the Head of three Legions, and a Body of auxiliary Troops from *Syria*, the *Jews* either could not imagine they were to be employed against them, or were sensible of their own Inability to defend themselves. *De Bell. Jud.* Lib. II. Cap. XVII.

5 But the *Israelites* frequently implored the Divine Assistance, in the Time of the *Judges*, when oppressed by any neighbouring King or People; and will any one say they were then forbidden to resist the Oppressor, when it was in their Power? The Prophet certainly means no more than that GOD, to punish them for demanding a monarchical Form of Government, at any Rate, and in some Manner against his Will, would not change it, by his Providence, when they came to feel the grievous Inconveniencies attending it. And the Prediction was justified by the Event. See Mr. LE CLERC on the Place.

6 DIGEST. *De Justitia & Jure.* Lib. I. Tit. I. Leg. XI.

IV. (1) True; but the Apostle doth not here direct us how we are to behave ourselves toward the Powers, in all Cases, and however they act. So far from that, that he supposes a Magistrate who acts like a true *Minister of GOD*, and employs his Authority for the Good of those whom he governs.

2 *St. CHRYSOSTOM* says very well that the Prince labours in Concert with a Preacher of the Gospel. *GROTIUS*.

commonly receive from the sovereign Powers : For no Body ever wished ill to himself, and the Happiness of the Prince depends on the Happiness of his Subjects, *sint quibus imperes, leave some to reign over*, ³ said one to Sylla. The Hebrews have a Proverb, ⁴ *If there were no sovereign Power, we should swallow up one another alive.* To which agrees that of ⁵ St. Chrysostom, *Take away the Governors of States, Men would be more savage than Brutes, not only biting but devouring one another.*

If the supreme Magistrate sometimes, through Fear, Anger, or some other Passion deviates from the straight Path, that leads to publick Tranquillity; it ought to be considered as a rare Case, and an Evil which, as Tacitus ⁶ observes, is made up by good Offices. It is enough for the Laws to regard that which generally happens, as ⁷ Theophrastus said, and to which we may apply that of ⁸ Cato, *No Law can be convenient for every particular Person, it is enough, if it be beneficial in general, and to the greater Part.* But as to such Cases, which rarely happen, they ought to be submitted to the general Rules. For though the Reason of the Law does not take Place in such or such a particular Case, yet it subsists in its Generality, to which particular Cases ought to make no Exception; because that is much better, than to live without Law; or to allow every Man to be a Law to himself. Seneca speaks pertinently to this Purpose. ⁹ *It is better not to admit of an Excuse, though just, from a few, than that all should be allowed to make what Excuse they please.*

Here we shall cite that remarkable ¹⁰ Saying of Pericles in Thucydides. ¹¹ *I esteem it better, even for private Men, that the State in general flourish, though they themselves do not thrive in it, than that they should flourish in their Affairs, and the Publick suffer. For let a Man's private Affairs be never so prosperous, yet if his Country be lost, he must perish with it. On the contrary, if the State flourish, a Man in bad Circumstances may mend his Condition. Since then the State can relieve private Persons in their Misfortunes, but private Persons cannot do the same Thing in regard to the State; ought not every one to concur in defending it, instead of acting like you, who, being overwhelmed with your domestick Losses, abandon the Care of the publick Safety? Which Livy speaks in short, ¹² *If the Commonwealth flourish, it secures every Man's private Estate, but by betraying the Publick, you will never preserve your own.* And Plato observed, ¹³ *τὸ μὲν γὰρ κοινὸν ζυυδᾶ, &c.* That which is the Bond of States, is the Care of the publick Good, and that which destroys them is the minding only one's private Advantage; therefore it concerns both the State and private Men, to prefer the Interest of the publick to that of particular Persons. And Xenophon ¹⁴, *οὐκ ἐν πολέμῳ, &c.* He that*

³ Furfidius to Sylla. FLORUS. Lib. III. Cap. XXI. num. 25. See PLUTARCH in Sylla. p. 472. and St. AUG. De Civit. Dei. Lib. III. Cap. XXVIII. GROTIUS.

⁴ It occurs in the PIRKE ABOTH, or sentences of the Jewish Doctors; and is attributed to the Rabbi Hananias: Pray, says he, for the Peace of the Kingdom; for, if there was no Fear (of the Magistrate) Men would eat one another alive. Cap. III. p. 42. Edit. P. Fagii. 1541.

⁵ De Statuis. Hom. VI. That Father repeats the same Thought in two or three other Places. If you take away the Courts of Judicature, you at the same Time take away all Order of Life, *ibid.* Tell me not of Persons, who have abused their Authority; but consider the Beauty of the Establishment itself, and you will see the great Wisdom of the first Author of it. *ibid.* If you take away them (the Magistrates) all is ruined. We shall then have no Cities, no Lands, no Market-Places, or any Thing fix'd and certain. All Things will be turned Top-sy-turvy, and the Stronger will devour the Weaker. In Epist. ad Romanos. We have another Passage to the same Purpose on the Epistle to the Ephesians. GROTIUS.

⁶ HIST. Lib. IV. Cap. LXXIV.

⁷ DIGEST. Lib. I. Tit. III. De Legibus, &c. Leg. VI. See also Lib. V. Tit. IV. Si pars hereditatis petatur. Leg. III.

⁸ Satis commoda omnibus &c. sufficiently accommodated to all, &c. LIVY, Lib. XXXIV. Cap. III. num. 5.

⁹ The Philosopher says this in Regard to Laws concerning insolvent Debtors; on which Occasion he asks: Do you suppose our Forefathers not prudent and judicious enough to understand it would be the highest Piece of Injustice to treat a Man, who has thrown away what he borrowed in Gaming and Debauchery, in the same Manner, as one who has lost both another Man's Substance and his own by Fire, Robbery, or any other sad accident? They admitted of no Exception, says he, that Men might know they were obliged to keep their Word. For it were better, &c. De Benefic. Lib. VIII. Cap. XVI.

¹⁰ Lib. II. Cap. LX. Edit. Oxon.

¹¹ Thus likewise St. AMBROSE lays it down for a Maxim, that the Interest of each particular Person is the same with that of the Public. De Offic. Lib. III. (Cap. IV.) The Lawyers hold the same in the Contract of Partnership: For that is always to be done which is to the Advantage of the whole Company, not what is for the private Interest of one of the Partners. DIGEST. Lib. XVII. Tit. II. Pro Socio. Leg. LXV. § 5. See also COD. Lib. VI. Tit. LI. De Caducis tollendis. Leg. unic. § 14. GROTIUS.

¹² Lib. XXVI. Cap. XXXVI. num. 9.

¹³ De Legib. Lib. IX. p. 875. Tom. II. Edit. H. Steph.

¹⁴ De Exped. Cyri. Lib. VI. Cap. I. § 19. Edit. Oxon.

mutinies against his General in War, offends against his own Safety. And Jamblichus, ¹⁵ private Interest is inseparable from the Publick, each particular Advantage is included in the Publick; for as in the natural Body, so in the political, the Preservation of the Parts depends on that of the Whole.

Now, in publick Matters there is nothing more considerable than the Order of Government I have spoken of, which is incompatible with the Right of Resistance left to private Persons. I shall explain this out of an excellent Place in *Dion Cassius*, ἡ μὲν τοι ἡ ἐγὼ, &c. ¹⁶ *I think it neither decent for a Prince to submit to his Subjects, nor can one ever be in Safety, if those who ought to obey pretend to command.* Do but consider what a strange Disorder it would cause in a Family, if Children should be allowed to despise their Parents, and what in Schools, if Scholars should slight their Masters; what Health for Patients that will not be ruled by their Physicians? Or what Security for those in a Ship, if the Sailors will not follow the Orders of the Pilot? For Nature has made it necessary, and useful to Mankind, that some should command, and some should obey.*

To the Testimony of *St. Paul*, we shall add that of *St. Peter*, whose Words are these, *Honour the King; Servants be subject to your Masters, with all Fear, not only to the Good and Gentle, but also to the Froward; for this is thank-worthy if a Man for Conscience toward GOD endure Grief, suffering wrongfully. For what Glory is it, if when ye be buffeted for your Faults, ye shall take it patiently? But if when ye do well, and suffer for it, ye take it patiently, this is ¹⁷ acceptable with GOD.* He immediately confirms this by the Example of *CHRIST*. And *Clement* in his Constitutions, expresses the same Sense in these Words, ὁ δὲ λαός, &c. *Let the Servant love his Master with the Fear of God, though he be wicked and unjust.* Here we may observe two Things. First, that what is said of Submission to Masters, however froward they are, ought ¹⁸ to be applied to Kings. For that which follows, being built upon the same Foundation, respects the Duty of Subjects as well as of Servants; and secondly, that the Submission, to which we are bound, implies an Obligation to bear Injuries with Patience; as it is usually said of Parents, ¹⁹ *Love your Parent if he is just; if not, bear with him.* ²⁰ A young Man of *Eretria*, who had been long a Disciple to *Zeno*, being asked, what he had learnt, answered, ὀργὴν πατρός Φέρεω, *To bear my Father's Anger.* And *Justin* says of *Lyfimachus*, *He suffered the Cruelty of his King as patiently, as if he had been his Father.* And in *Livy*, *As the harsh Temper of our Parents, so also that of our Country, is to be softened by patient Suffering.* So in *Tacitus*, ²¹ *The Humours of Kings must be born.* And in another Place, *Good Emperors are to be desired, but whatsoever they*

¹ Ep. ii. 17, 18, 19, 20.

¹⁵ Our Author has quoted this Passage in *Latin* only. I have not been able to find it either in *JAMBLICHUS's* *Life of Pythagoras*, nor in his *Protrepticon*. Perhaps he has used the Name of that Philosopher for that of some other. However, we have a Thought very like it in *HIEROCLES*. *Wherefore we are not to separate the public from the private Good, but consider them as one and the same. For what is advantageous to our Country, is common to all, and shared by each in particular; for the whole, considered as separate from the Parts, is nothing.* In *STOB.* *Serm.* XXXIX.

¹⁶ This is Part of *Julius Cæsar's* Speech to his mutinous Soldiers at *Plaisance*. *Lib.* XLI. pag. 189. *Ed.* *H. Steph.*

¹⁷ *TERTULLIAN* says that in fearing Men we honour GOD. *De Pœnit.* *GROTIUS.* *Chap.* VII. But the Discourse there turns on a different Subject.

¹⁸ This Consequence can be drawn only by Accommodation; and even then it will not follow that the Subject is obliged to suffer every Thing, since even a Slave has a Right to the Protection of the Laws, when he meets with insupportable Treatment from his Master. See *Mr. NOODT's* Discourse on the Power of Sovereigns, p. 254. second Edition of the *French Translation*. Besides, the Precepts here laid down by the Apostle, were partly grounded on particular Circumstances, as we

shall shew in the 24th Note on the 7th Paragraph. In short, one may say of those general Precepts, which recommend Submission to the sovereign Power, what our Author himself says of those which relate to the Submission of Slaves to their Masters, *Book II. Chap. V. § 29.* See likewise *SCHÆLIUS's* Interpretation of these Passages of *St. Peter*, and *St. Paul*, in his Treatise *De Jure Imperii*, p. 316, &c.

¹⁹ *PUBL. SYRUS*, v. 23.

²⁰ *ÆLIAN*, *Var. Hist.* *Lib.* IX. *Cap.* XXXIII. *JUSTIN.* *Lib.* XV. *Cap.* III. *num.* 10. *LIV.* *Lib.* XXVII. *Cap.* XXXIV. *num.* 13. *TERENCE* makes a young Man say, *it is his Duty to bear with the ill Usage of his Mother.* *Hecyr. Act.* III. *Scen.* I. v. 21. *CICERO* lays it down as a Precept, that Men ought not only to be silent in Regard to the Injuries received from their Parents, but also to suffer them with Patience. *Orat. pro Cluentio.* *St. CHRYSOSTOM* has some beautiful Thoughts on this Maxim on the Epistle to *Timothy*, and in his fifth Book against the *Jews*. To the same Purpose is what *EPICETUS*, and his Commentator *SIMPLICIUS* have said, of every Thing having two Handles. *Cap.* LXV.

²¹ *Annal.* *Lib.* XII. *Cap.* XI. *num.* 3. and *Hist.* *Lib.* IV. *Cap.* VIII. *num.* 3.

are,

are, they must be obeyed. Claudian ²² commends the Persians, who obeyed their Kings, though cruel.

V. And by the
Practice of the
primitive
Christians.

V. Neither did the Practice of the ¹ primitive Christians, the best Interpreter of the Law, deviate from this Law of God. For though the Roman Emperors were sometimes the very worst of Men, and there wanted not those, who under the Pretence of serving the State opposed them, yet the Christians could never be persuaded to join with them. In the Constitutions of Clement we have βασιλεὺς ἡμῶν ἐναντία, *It is not lawful to resist the King's Authority.* And Tertullian says in his Apology, ² Whence are your Cassius's, your Niger's, and your Albinus's? Whence those who besiege Cæsar between the two Lawrels? Whence those who wrestle with him only for an Opportunity of throttling him? Whence those who force the Palace Sword in Hand, Fellows bolder than so many ³ Sigerius's (so the Manuscript in the Hands of those accomplished worthy Gentlemen Mess. du Puy expressly has it) and Parthenius's? If I am not mistaken from among the Romans, that is, from among those who are not Christians. What he says of the Wrestling relates to Commodus's Murder committed by a Wrestler, by the Order of Ælius Lætus, Captain of the Emperor's Lifeguard; but there never was a wickedder Wretch living than that Emperor. Parthenius, whose Fact also Tertullian mentions here with Horror, was he who killed that worst of Emperors Domitian. To these he compares Plautian the ⁴ Captain of the Guard, who would have slain the bloody Emperor Septimius Severus in his own Palace. Pescennius Niger ⁵ in Syria, and Clodius Albinus in Gaul and Britain, took up Arms against this Septimius Severus, as if out of Zeal and Affection to the Commonwealth. But their Enterprize was also disappointed by the Christians, as Tertullian glories in his Treatise to Scapula: ⁶ We are reproached with Treason; but never could Christians be found to act the Albinians, or Nigrians, or Cassians. Those Cassians were they who followed Avidius Cassius, a Man of great Note, who took up Arms in Syria, under a Pretence of restoring the Commonwealth, which the Negligence of M. Antonin ⁷ was like to ruin.

Though ⁸ St. Ambrose was persuaded that Valentinian the second did him an Injury, and not only to himself, but to his Flock, and even to CHRIST, yet he would not take the Advantage of the People's Inclination to resist; but said, ⁹ Whatever

²² In EUTROP. Lib. II. v. 479, 480.

V. (1) This appears from Canon XVIII. of the Council of CHALCEDON, repeated in Canon IV. of the Council in Trullo, and by the IV. Council of Toledo; the II. Capitulary of CHARLES the Bald, in Villâ Colonia; and by the V. Canon of the Council of Soissons. GROTIUS. See Note 24. on § 7. and the Preliminary Discourse § 52.

² Apolog. Cap. XXXV.

³ The Conspirators against him (Domitian) were Parthenius, and Sigerius (for it must be read Σιγνέρος not Σιγνέρος.) both Gentlemen of his Bed-Chamber. XIPHILIN, p. 237. Edit. Steph. MARTIAL, addressing himself to one, who attempted to pass for a Courtier tells him, He talks only of Sigerius's and Parthenius's. Lib. IV. Epigr. LXXIX. The Name of Sigerius is corrupted not only in TERTULLIAN, where we find Stephanis in its Room; but also in SUETONIUS, Vita Domitiani, Cap. XVII. where we find Satorius; and AURELIUS VICTOR who calls that Traitor Casperius, Cap. XII. Num. 8. GROTIUS.

⁴ See HERODIAN, Lib. III. Cap. XI. Edit. Boecler.

⁵ But, as the learned GRONOVIVS observes on this Place, Pescennius Niger, and Clodius Albinus had been declared Emperors by the Soldiers under their Command, at the same Time that Septimius Severus was named by his Troops. So that it might as well be said he took Arms against the two first; who were considered under the Character of Rebels, only because they had the Misfortune to be defeated.

⁶ Ad Scapulam, Cap. II.

⁷ He pretended that that Prince by a natural Excess of Clemency, and too great an Application to Philosophy, neglected the Discovery and Punishment of Offenders, and particularly the Governors of Provinces, who enriched themselves with the Spoils of the People. See Avidius Cassius's Letter to his Son-in-Law, in his Life, written by VULCARIUS GALLICANUS, Cap. XIV.

⁸ In the first Edition of this Work, the Author had inserted a Passage of St. CYPRIAN, before what he here says of St. AMBROSE. It is probable he retrenched it, because it is quoted, § 7. Note 25, where it appears with more Exactness.

⁹ The first of these Passages is inserted in the CANON LAW, Caus. XXIII. Quæst. VIII. An Episcopis vel quibuscumque Clericis sua liceat, &c. Can. XXI. (the second appears in the same Place.) Will you hurry me to Prison? Will you lead me to Execution? I take a Pleasure in submitting. I will not defend myself by raising the People. Epist. XXXIII. GREGORY the Great says something of the same Nature (which is also quoted in the Canon Law, as above, Can. XX.) If I would have had a Hand in the Death of the Lombards, that Nation had now been without King, Dukes or Counts, and dispersed in the utmost Confusion and Disorder. Lib. VII. Epist. I. GROTIUS.

The Authority of St. AMBROSE is so far from being to our Author's Purpose, that it may even serve to prove the contrary of what is here inferred from it, and shew how little we ought to depend on the Opinion of those old Doctors, vulgarly called

Whatever Violence is offered me, I cannot resist; I can grieve, weep, and mourn. Against Arms, Soldiers and Goths, I have no other Arms but Tears, for these are the Defences of a Priest, in any other Manner I neither ought nor can resist. And presently after, I was commanded to appease the Tumult, I answered, it was in my Power not to stir them up, but that it was only in the Power of GOD to quiet them. The same St. Ambrose would not make use of the Forces of Maximus against the same Emperor, though an Arian, and a great Persecutor of the Church. Thus Gre-

Theodoret.
Hist. Eccles.
Lib. V. Cap.
XIV.

ed the *Fathers of the Church*. The Conduct of the Person under Consideration sufficiently made it appear, that he thought Resistance allowable. Even two Passages, here quoted from him, were written on the Occasion of a signal Act of Resistance done by that great Saint. In giving the Fact, I shall borrow the very Words of Mr. BAYLE's Narration, formed on the Circumstances, admitted by Mr. FLECHIER, and Fa. MAIMBOURG. The former, in his *Life of THEODOSIUS*: the latter in his *History of Arianism*. "On the Death of Gratian, the whole western Empire falling to Valentinian, his Brother, he made an Edict, at the Instance of Justina (his Mother) allowing the Arians the public Exercise of their Religion, and declaring all who should oppose the Execution of the said Order, Authors of Sedition, Disturbers of the Church's Peace, Traitors, and worthy of Death. But as all the Churches were in the Power of St. Ambrose, the Arians attempted to take one in Defiance of his Authority. The Emperor going to take Possession of the Cathedral, found St. Ambrose with all his People as it were barricaded in it, who wereresolved to defend both the Church and Pastor, to the last Drop of their Blood. *Hist. de THEOD. Liv. III. num. 25, &c.* "He invested the Church, and summoned St. Ambrose, by Vertue of the late Edict, to surrender it. The Bishop answered that he would never willingly quit it. A Remonstrance was made to the Emperor concerning the Difficulties of that Affair, and he was advised to extricate himself out of them by some Accommodation, because the Court was concerned in the Contest. The Emperor sent a very civil Message to St. Ambrose signifying, that he left him the quiet Possession of his Cathedral, and would be satisfied with a Church in the Suburbs; that it was reasonable that, as the Prince made some Abatement in his Demands for Peace Sake, the Prelate should do the same. But all to no Purpose; the People according to their Pastor's Intentions, cried out with one Voice, that no Accommodation could be made in this Case, but that the Catholics were to be allowed the Churches which belong to them. Whereupon, a Party of Soldiers was sent by the Court, with Orders to make themselves Masters of the Church in the Suburbs; but the People took Arms and opposed them: The whole City was in a terrible Confusion: The Magistrates sent the Mutineers to Prison, and punished them severely; which only exasperated the rebellious Populace. Several Lords of the Court went to St. Ambrose, and desired he would appease the People, and put an End to the Disorder, since the Emperor demanded only one Church in the Suburbs, observing that it was but just that the Emperor should be Master in his own Dominions. The holy Archbishop replied, that the Emperor had no Right over the House of GOD; nor even over the House of one of his Subjects, which he could not seize by Force, without a Violation of Justice: That it was a Crime in a Bishop to surrender a Church, and Sacrilege in a Prince to seize on it: That, as for his Part, he did not raise the Peo-

ple, whom he exhorted to defend themselves only with Prayers and Tears; but when they were once spirited up to Rage and Fury, GOD alone could appease them. The Emperor and Empress, resolving to go in Person, and take Possession of old Basilic, sent a Party of Soldiers to put up the Imperial Canopy.

"St. AMBROSE formally excommunicated all the Soldiers, who had the Insolence to seize the Churches. This Stroke surprized them so that they went over to his Party. The Emperor found himself reduced to the hard Necessity of fearing he should be abandoned by all his Subjects; and said to his chief Officers: I perceive that I am here no more than the Shadow of an Emperor, and that you are disposed to give me up to your Bishop, whenever he commands you. He then dispatched one of his Secretaries to St. Ambrose, with Instructions to ask him: *Whether he was resolved on an obstinate Resistance of his Master's Orders; and pretended to usurp the Empire, like a Tyrant, that Preparations might be made for disputing the Point by Force of Arms.* The Saint answered, *that he retained the Respect due to the Emperor, and revered his Power; but did not envy him it.* He had indeed no Reason to envy him his Power, for his Authority was superior to that of the Emperor, as is evident from that Prince's being at last obliged to leave Things as he found them, and recal the Edict published in Favour of the Arians. This now appears to me a real and formal rebellion. We see on one Side the Emperor's Troops going to take Possession of a House, pursuant to the Edicts and Orders of a Sovereign: On the other a Mob assembled about their Archbishop, and resolved to spend the last Drop of their Blood in Opposition to the Execution of those Edicts. We see an Archbishop excommunicating Soldiers employed in the Execution of the Emperor's Orders, and consequently dispensing Subjects from the Oath of Fidelity, which binds them to their Prince. We see a whole People taking Arms, even when an Emperor waves his Right. And we see all this happen, not under Circumstances, when a King requires his Subjects to do what is forbidden by the Law of GOD: For then it just to disobey; but at a Time, when the Prince makes a Demand of bare Walls, and permits Men to believe what they please, and serve GOD, according to their own Fancies. It is a surprizing Illusion to imagine that a Building, designed for the Service of GOD, is the Inheritance of JESUS CHRIST, over which the secular Power has no Right, &c. *General Criticisms on Mr. MAIMBOURG's History of Calvinism.* Lett. XXX. § 2, 3. p. 275, &c. *Third Edit.* It may be added that the Persons who then obstinately refused to allow the Arians and the Emperor a Church, were not furnished with any particular Privilege, by Vertue of which they could pretend their Sovereign had no Right to take it from them without their Consent. There was neither a fundamental Law of the State, nor a perpetual and irrevocable Concession, which secured them the Possession of it against the Will of their Sovereign.

gory Nazianzen relates, that Julian the Apostate was diverted from bloody Designs (against the Church) by the Tears of the Christians, adding, ¹⁰ *this was the only Remedy against Persecution*. Yet his Army was almost all Christians. Besides, as the same Nazianzen observes, that Cruelty of Julian was not only full of Injustice towards the Christians, but had exposed the State to the utmost Danger: To which we shall add that of ¹¹ St. Augustine, where he expounds those Words of St. Paul to the Romans, *It is necessary for the Good of this Life, that we submit to the Sovereign Powers, and not resist if they should take any Thing from us*.

VI. Inferior Magistrates to make War against the Sovereign unlawful, proved by Reason and Scripture. *Genus speciale* as Seneca calls it, Epist. LVIII. Averroes, V. Metaphys. com. 6.

VI. There are some ¹ Learned Men in this Age, who, suiting themselves to Times, and Places, first (as I think) persuade themselves, and then others, that what we have already said (in Relation to Non-resistance) takes Place only in Regard to private Men, but not in Regard to inferior Magistrates, who they think have Right to resist the Injuries of their Sovereign; nay, and that they fail in their Duty when they do not; which Opinion is not to be admitted. For as in Logic there is a middle Species, which with Respect to the Genus above it is still a Species, but in Respect of the Species below it, a Genus: So those Magistrates, in Respect to their Inferiors, are publick Persons, but in Respect to their Superiors, are but private Persons. ² All the civil Power, that such Magistrates have, is so subject to the Sovereign, that whatever they do against his Will is done without Authority, and consequently ought to be considered only as a private Act. In a Word, according to the Maxim of Philosophers, which may be here applied, all Order necessarily relates to something that is First; and they, who think otherwise, seem to me to introduce such a State of Things as the Ancients fabled to have been in Heaven before there was a sovereign Majesty, when the lesser Gods did not submit to Jupiter. That Order ³ which I have spoken of, and ὑπαλληλισμός, *Subordination*, is not only apprehended by common Sense, as appears by the excellent ⁴ Sayings which we find on that Subject in Authors both *Pagan* and *Christian*; but it is also supported by divine Authority; for St. Peter bids us be subject to the King, otherwise than to Magistrates; to the King as supreme, that is ⁵ without Exception, but only to those Things which GOD directly commands, who approves, and not forbids, our bearing of an Injury. But to Magistrates as deputed by the King, that is deriving their Authority from him. And when St. Paul would have every Soul be subject to the higher Powers, he also included inferior Magistrates. Neither do we find among the *Hebrews*, where there were so many Kings regardless of all Right both divine and human, that any inferior Magistrates, among whom there were many pious and valiant Persons, ever assumed the Liberty to resist their Kings by Force, unless they had a special Commission from GOD,

1 Peter ii. 13.

Rom. xiii. 1.

¹⁰ Orat. I. in Julian. p. 94. Edit. Coln. 1690.

¹¹ *Proposit. LXXIV.* But St. AUGUSTIN adds, to which their Power over temporal Affairs is extended. Our Author has omitted these Words, as seeming to contain a Restriction, which confines the Doctrine of Non-resistance to those Cases, where the Sovereign does not exceed the Bounds of his Power. But the Sequel of the Discourse is not sufficiently clear, for determining what was St. AUGUSTIN'S Opinion at that Time.

VI. (I) The Author, in a Note on this Place refers his Readers to PETER MARTYR, on Judges iii. PARÆUS, on Rom. xiii. JUNII BRUTI *Vindicia, contra Tyrannos*; and DANÆUS, *Lib. VI. Politic. &c.*

² This is true; but it may be likewise said that, supposing it lawful even for private Subjects in certain Cases to resist their Prince, as we have already shewn it is; it will follow that the Magistrates, as Persons of a public Character, who therefore must be better acquainted with State Affairs, and are capable of making an effectual Resistance, are on that Account more particularly authorized to labour for the public Good. For, in short, it is necessary that some-body should begin, and shew others the Way.

³ Thus in a Family, the Father is the first; the Mother and Children hold the next Places; af-

ter them are the ordinary Servants, and then the extraordinary Servants. See St. CHRYSOSTOM, on 1 Cor. xiii. 3. GROTIUS.

⁴ Every Kingdom depends on a more powerful Kingdom. SENECA, *Thyestes. v. 612.* All Things govern and are governed in their Turns. STATIUS, *Lib. III. Sylv. III. v. 49, 50.* St. AUGUSTIN has a remarkable Passage to this Purpose. Consider, says that Father, the Degrees of Subordination in human Affairs. If an Intendant of the Police commands a Thing, is it not to be done? But not, when the Praefect orders the contrary; the same is to be said when a Consul requires one Thing, and the Emperor another. In which Case, you do not despise the Power, but only chuse to obey a superior Power. Nor ought the Inferior to resent this Conduct, which gives the Preference to the Superior. This is quoted in the CANON LAW, *Caus. XI. Quest. III. Can. 97.* We find almost the same in his VI Sermon, *De Verbis Domini.* That Father elsewhere says, speaking of Pilate, that GOD gave him such an Authority, as subjected him to that of the Emperor. In *Joan. Tom. IX. p. 369. Edit. Basil. Erasmi.* GROTIUS.

⁵ Our Author, as the learned GRONOVIVS observes, gives these Words a different Explanation in his Notes on the *New Testament*: as *Sovereign*, that is, as one, who owns no Superior.

who has a sovereign Power over Kings themselves; on the contrary, what the Duty of great Men is to their King, *Samuel* instructs us, who before the Elders and the People gave to *Saul*, though now governing wickedly, the usual Reverence. i Sam. xv. 30.

And so likewise the State of the publick Divine Worship always depended upon the Will of the King, and the ⁶ *Sanhedrim*: For whereas, after the King, the Magistrates, together with the People, promised they would be faithful to GOD; that ought to be understood, ⁷ so far as it should be in the Power of every one of them. Nay, the very Images of their false Gods, which were publicly set up, were never thrown down, as we read, but at the Command of the People, when the Government was Republican, or of the King, when it was monarchical. And if Force was sometimes made use of against the Kings, it is related barely as a Fact that Providence had permitted, and without any Mark of Approbation.

Those of the contrary Opinion often urge that Saying of the Emperor *Trajan*, who delivering a Sword to a Captain of the *Prætorian Band*, said, ⁸ *Use this for me, if I govern well; and against me, if ill.* We must know, that *Trajan* (as appears by *Pliny's Panegyrick*) took particular Care to shew no Marks of Royalty, and ⁹ to act merely as Head of the State, consequently subject to the Judgment of the *Senate* and *People*, whose Decrees the Captain of the Guard was to execute, even against the Prince himself: The like we read of *M. Antoninus*, ¹⁰ who would not touch the publick Treasure without consulting the Senate.

VII. A more difficult Question is, whether the Law of Non-resistance obliges us in the most extreme and inevitable Danger. For some of the Laws of GOD, however general they be, seem to admit of *tacit* Exceptions in Cases of extreme Necessity; for so it was determined by the *Jewish* Doctors concerning the Law of their Sabbath in the Time ¹ of the *Maccabees*; whence arose the famous Saying, ² *The Danger of Life drives away the Sabbath.* And the *Jew* in *Synesius* gives this Reason for the Breach of the Law of the Sabbath, *σαφῶς ὑπὲρ ψυχῆς θέκουσιν, ὥστε* ³ *were in manifest Danger of our Lives*, which Exception is approved of by CHRIST himself; as also in that Law of not eating the *Shew Bread*. And the *Hebrew* Rabbins, following an old Tradition, rightly add the same Exception to their Laws concerning forbidden Meats, and some others of the like Kind. Not that GOD has not a full Right to oblige us to do or not do some Things, even though we should be thereby exposed to certain Death; but that some of his Laws are of such a Nature as cannot be easily believed to have been given in so rigid a Manner, which ought still more to be presumed as to human Laws. VII. What is to be done in case of extreme and inevitable Necessity.
1 Maccab. ix.
10, 43, 44.
Mat. xii. 4.

I do not deny, but that some Acts of Virtue may by a human Law be commanded, though under the evident Hazard of Death. As for a Soldier not to quit ³ his Post; but it is not easily to be imagined, that such was the Intention of the Legislator;

⁶ I have already observed that the Antiquity and Perpetuity of the *Sanhedrim*, supposed by our Author, are at least uncertain.

⁷ That is, the Attachment, which every *Israelite* ought to have for his Religion, obliged neither private Persons, nor inferior Magistrates, to become Iconoclasts by their own Authority, or in any other violent Manner oppose the idolatrous Worship introduced or tolerated by the King; because that would be an Incroachment on his Right. But the present Question does not turn on such Cases.

⁸ This Speech is preserved by XIPHILIN, in his Abridgment of DION CASSIUS, *Vit. Traj.* p. 248. *Ed. H. Steph.* See also ZONARAS, in the Life of the same Emperor. *Annal.* Tom. II. PLINY'S *Paneg.* Cap. LXVII. Num. 8. *Edit. Cellar.* and CASSIODORUS, *Var.* VIII. 13.

⁹ *Pertinax* and *Macrinus* imitated *Trajan* in that Particular, as appears from the fine Speeches put into their Mouth by HERODIAN. GROTIUS.

But why is it not supposed that a good Emperor or modest Sovereign Prince may entertain a just Idea of the Extent of his Power? In Reality, we see but few of that Character; but such may be found; and unless their Conduct belies their Words,

our Regard for their Dignity should oblige us to avoid harbouring Suspicions to their Disadvantage.

¹⁰ XIPHILIN, in that Emperor's Life, p. 281.

VII. (1) See 1 MACCAB. ii. 41. Since that Time the common Opinion of the *Jews* was, that the Law allowed them to defend themselves, but not to attack the Enemy, on the Sabbath Day. JOSEPHUS, *Antiq. Lib. XIV. Cap. VIII.* Our Author alludes to this in MARK iii. 4. as Mr. LE CLERC has very well observed.

² This Sentence occurs in the *Babylonish Talmud.* See our Author on MATT. xii. 11. and BUXTORF, *Synag. Jud.* Cap. XVI.

³ See JOSEPHUS, where he speaks of *Saul's* Guards. We learn from POLYBIUS, that among the Romans, he who quitted his Post was punished with Death. GROTIUS.

The Passage of JOSEPHUS, here meant by our Author, is where *David* having found *Saul's* Guard asleep, calls out to *Abner*, who commanded it, that this was a Crime worthy of Death, because it gave him and his Men a fair Opportunity of entering the Camp, and advancing even to the King's Tent, without being observed. *Antiq. Lib. VI. Cap. XIV.* So that it is evident, the Case was not the same with

Legislator; and it is very probable that Men have not received so extensive a Power over themselves or others, except in Cases where extreme Necessity requires it. For all human Laws are, and ought to be so enacted, as that there should be some Allowance for human Frailty. But this Law (of which we now treat) seems to depend upon the Intention of those who first entered into civil Society, from whom the Power of Sovereigns is originally derived. Suppose then they had been asked, Whether they pretended to impose on all Citizens the hard Necessity of dying, rather than to take up Arms in any Case, to defend themselves against the higher Powers; I do not know, whether they would have answered in the affirmative: It may be presumed, on the contrary, they would have declared that one ought not to bear with every Thing, unless the Resistance would infallibly occasion great Disturbance in the State, or prove the Destruction of many Innocents. For what Charity recommends in such a Case to be done, may, I doubt not, be prescribed by a human Law.

Some may say, that this rigorous Obligation to suffer Death, rather than at any Time to resist an Injury offered by the Civil Powers, is not imposed by any human but the Divine Law. But we must observe, that Men did not at first unite themselves in Civil Society by any special Command from GOD, but of their own free Will, out of a Sense of the Inability of separate Families to repel Violence; whence the Civil Power is derived, which therefore St. *Peter* calls a human Ordinance, tho' elsewhere it is called a Divine Ordinance, because GOD approved of this wholesome Institution of Men. But GOD, in approving a human Law, is thought to approve of it as human, and after a human Manner. *Barclay*, the stoutest Assertor of Regal Power, does thus far allow that the People, or a considerable Part of them, have a Right to defend themselves against their King, when he becomes excessively cruel; tho' otherwise, that Author considers the King as above the whole Body of the People. I can easily apprehend that, the more considerable a Thing is which runs the Risk of perishing, the more Equity requires that the Words of the Law be restrained, to authorise the Care of preserving such a Thing. But I dare not condemn indifferently all private Persons, or a small Part of the People, who finding themselves reduced to the last Extremity, have made use of the only Remedy left them, in such a Manner as they have not neglected in the mean Time to take care, as far as they were able, of the publick Good. For *David*, who (bating some particular Facts) was so famed for living exactly according to Law, did yet entertain about him, first four hundred, and afterwards more, armed Men; and to what End did he so, unless for the Defence of his own Person, in Case he should be attacked? But we must also observe, that *David* did not do this till he was assured by *Jonathan*, and many other infallible Proofs, that *Saul* really sought his Life: And moreover, he neither seized on any City, nor sought Occasions of Fighting, but lurked about, sometimes in by-Places, sometimes among foreign Nations; with this Resolution, to avoid all Occasions of injuring his own Countrymen.

The Example of the *Maccabees* might likewise be alledged here. For 'tis in vain that some pretend to justify their Enterprize, upon the Account that *Antiochus* was only an Usurper. In all History, we do not find that the *Maccabees*, and those of their Party, give *Antiochus* any other Title than that of King: And indeed they could not call him otherwise, since the *Jews* had for a long Time acknowledged the Kings of *Macedonia* for their Sovereigns, to whose Right *Antiochus* had succeeded. It is true the Law forbade a Stranger to be set over them; but that ought to be understood of a voluntary Election, and not of what the People might be forced to do through the Necessity of the Times. As to what others say, that

with that under Consideration. The Passage of *POLYBIUS* is here quoted, as our Author found it in *SUIDAS*, under the Word *Πρόμα*; for the Terms are very different in the Original, *Lib. I. Cap. XVII.* See likewise *JUSTUS LIPSIUS, De Militia Rom. Lib. V. p. 293, 383.* And the Treatise *De Pœnis militarib. Rom. Cap. IV.* written by Mr. *SICHTERMAN*, who in that small Piece has let the World know what might be expected from him, if his Fortune had not forced him out of the

Road of Letters into that of Arms.

4. Some Commentators on this Place say, that *David*, having been anointed King by *Samuel*, was not from that Time to be considered as a private Subject. But it has been judiciously answered by others, that *David* was not to be King during *Saul's* Life; and that he himself, from the Time of his being anointed to the Death of *Saul*, constantly acknowledged him the lawful King of *Israel*.

the *Maccabees* acted by Vertue of the Right which their Nation had to demand Liberty, or the Power of governing themselves, this Reason has no more Weight in it than the other. For the *Jews* having been formerly conquered by *Nebuchadnezzar*, were fallen by the same Right of War, under the Dominion of the *Medes* and *Persians*, Successors of the *Chaldeans*; and the whole Empire of the *Medes* and *Persians* had passed to the *Macedonians*: Hence *Tacitus* calls the *Jews*, See Justin, 1. 36. c. 3.
 6 *The most contemptible People that were conquered, whilst the East was under the Dominion of the Assyrians, Medes, and Persians.* Neither did they obtain any Condition from *Alexander*, or his Successors, but without any Terms submitted to them, as they had before done to *Darius*. And tho' they were sometimes allowed to use publicly their own Rites, and their own Laws, this was only a precarious Right, granted by the Favour of the reigning Princes; and not by Vertue of a fundamental Law of the Government. There is nothing then that could justify the *Maccabees* (in taking up Arms) but extreme and inevitable Danger, which might do it, so long as they kept within the Bounds of Self-Preservation, and like *David*, retired to secret Places for Security, without using their Arms unless first assaulted.

There is still another Caution to be observed here, which is, that even in such Extremity the Person of the Sovereign must be spared. Those who think that *David* spared *Saul*, not to discharge an indispensable Duty, but out of Generosity, founded on the Desire of arising to an extraordinary Degree of Perfection; those, I say, are certainly 7 mistaken: For *David* himself openly declared, that no Man

5 The learned *GRONOVIVS* blames our Author for blindly following *TACITUS*, who pretends, that the *Jews* were under the Dominion of the *Medes*; which is false, unless the Assertion is understood only of *Darius the Mede*, or *Nabonnides*, mentioned by the Prophet *Daniel*. The *Jews* being conquered by *Nebuchadnezzar*, became subject to the *Persians* as soon as *Cyrus* took *Babylon*. I find, however, that both the Emperor *Julian*, and the Patriarch *Cyril*, tho' his Antagonist, were of Opinion, that the *Jews* had been dependent on the *Medes*; and in this they copied the Error of the common Chronology, which made the Empire of the *Medes* succeed that of the *Assyrians*, p. 210. Edit. *Spanheim*.

6 *Hist. Lib. V. Cap. VIII. Num. 3.*

7 I cannot think them so much mistaken. It appears from the Discourse which passed between *David* and *Saul*, near the Cave where the former had the Life of the latter in his Power, that *David* valued himself on acting generously with his mortal Enemy, and that *Saul* was touched with that extraordinary Greatness of Soul. *David* observes to *Saul*, that he was so far from conspiring against him, with which he had been charged, that he refused to take Advantage of an Opportunity of killing him which offered itself. *Wherefore hearest thou Men's Words, saying, Behold David seeketh thy Hurt? Behold this Day thine Eyes have seen how the LORD had delivered thee to Day into mine Hand in the Cave, and some bad me kill thee, but I spared thee, &c.* 1 SAM. xxiv. 9, 10. Whereupon *Saul* acknowledged the Obligation, without insisting on the inviolable Sanctity of his Person. He fairly owns that *David* had waved the Right which his Treatment had given him; and that so noble an Act of Generosity had made him worthy of the Crown which had been promised him, *Thou art more righteous than I; for thou hast rewarded me Good, whereas I have rewarded thee Evil.* — *For if a Man findeth his Enemy will he let him go well away? — And now behold I know well that thou shalt surely be King, &c.* ver. 17, 19, 20. “If *David* had killed *Saul*, (I borrow the very Words of Mr. LE CLERC's Commentary) who had been guilty of so cruel an Abuse of his Autho-

“rity, who had long persecuted him in so furious
 “a Manner, who put to Death all such as lay under a Suspicion of favouring him, and had sacrificed a great Number of innocent Priests to his Rage and Resentment, no one would have been surprized at his Conduct, or charged him with a Crime. But *David*, generous as he was, resolved to act in a very different Manner, to let all the World know his Innocence, and his Dispositions in regard to the King, who took all Occasions to distress him. He likewise shewed, that tho' he had been anointed to succeed *Saul*, he had in no Manner fought for the Royal Dignity, nor done any Thing which might encourage the least Suspicion of his thinking the King's Life too long. He thought himself obliged to prevent all the Calumnies of his Enemies, or those who envied him, and might have accused him of Ambition and Rebellion. He was resolved to ascend the Throne in a Manner that Envy itself should not blame. These were the true Reasons of his Magnanimity; but to avoid making a Show of it, he alledges two others: that *Saul* was his Lord; and that he had been anointed by GOD's Command. But the Man who violates all Sorts of Laws, by his Conduct towards his Servants, is no longer their Master. — No Man commands or obeys but on certain Conditions, which ought to be observed on both Sides; without which human Society is utterly destroyed, and its Laws trampled on. Thus a Prince forfeits the Right which his Undction gave him, when he renders himself intirely unworthy of the Favour of God, by whose Order he was anointed. But *David* would not make use of his Right, for the Reasons already alledged; and because *Saul* was his Father-in-Law. To which we may add, that as he himself had been anointed, in Order to succeed that Prince, it was his Interest that it should be thought unlawful for any one to kill a King.” This seems evident from his Behaviour to the *Amalekite*, who thought to make his Court to him, by bragging of his having dispatched *Saul*, at his own Request, to save him from falling into the Hands of the *Philistines*. For, tho' *David* at that Time
 G g believed

1 Sam. xxvi. 9.
Ex. xxii. 28.

Lib. 2.

Man could be innocent, that stretched forth his Hand against the LORD's Anointed. For he knew it was written in the Law, *Thou shalt not revile the Gods*, that is, the Supreme Judges. *Thou shalt not curse the Rulers of thy People*. In which Law special Mention being made of the supreme Powers; it plainly shews, that some special Duty is required. Wherefore *Optatus Milevitanus*, speaking of this Fact of *David*, says, *GOD's special Command, coming fresh into his Memory, restrained him*. And makes *David* say, *I was willing to overcome mine Enemy, but I chose rather to keep the Commands of GOD*.

⁹ To slander any private Person is not lawful; therefore of a King we must not speak Evil, ¹⁰ tho' it be true. Because, as the Writer of the Problems (fathered upon *Aristotle*) says, *ὁ κακηγορῶν, &c.* ¹¹ *He that speaks Evil of the Magistrate, offends against the whole Body of the People*. But if we must not speak Evil of

believed the Fact, he ordered him to be killed on the Spot, who, on the Supposition of the Truth of the Report, had done *Saul* a Service. See Mr. LE CLERC on 2 SAMUEL i. 14. It may farther be observed, that, as *Saul* had been chosen by GOD in an extraordinary Manner, anointed and consecrated by one of his Prophets, honoured with the Gift of Prophecy, and made a visible Instrument in the Hand of the ALMIGHTY, for gaining great Victories over the Enemies of *Israel*, *David* might have been tender of his Life on those Considerations, which will not conclude in Favour of all other Princes, who arrive at their Dignity by the common Ways. Besides, when he twice spared *Saul's* Life, he was able to do it without endangering his own; so that his Conduct on those Occasion is nothing to the Purpose, in regard to such as have no other Remedy against a Tyrant, than that of repelling him, even with the Hazard of killing him. And after all, the Words of *David*, however they may be understood, are not an Oracle or Divine Precept. There is no Reason for believing that he then spoke by Divine Inspiration, or that GOD put these Words into his Mouth, as a Rule for all Men's Conduct.

8 JOSEPHUS introduces *Joab* speaking thus to *Shimei*, *Shalt not thou die, who hath spoken ill of him whom GOD hath appointed to reign?* Antiq. Lib. VII. Cap. X. GROTIUS.

These are not the Words of *Joab* but of *Abishai*, the Son of *Zeruiah*, and Brother to *Joab*. I do not know why the Author chose rather to quote JOSEPHUS on this Occasion, than the sacred Historian, 2 SAMUEL xix. 21. *Shall not Shimei be put to Death for this, because he hath cursed the LORD's anointed?*

⁹ The same Jewish Historian observes, that when *David* had cut off a Piece of *Saul's* Garment when he surprized him in the Cave, he immediately repented, and said it was not lawful for a Subject to kill his Master. Antiq. Lib. VI. Cap. XIV. And a little after, that when he entered *Saul's* Tent, and found his Guards asleep, *Abishai* would have killed him; but *David* diverted him from that Action, saying, *It was a heinous Crime to kill a King, even tho' he was wicked; and that the Person who should commit it, would be punished by him, who invested him with the Royal Dignity*. GROTIUS.

The two Passages taken from the Jewish Historian, are neither exactly quoted, nor justly translated. In the former our Author has forgot these Words, which immediately follow, *Master, or him whom GOD has intrusted with the Kingdom*. This determines the Maxim to something in particular, which some would make general. See Note 7. In the other, the Words *καταρροσούμενον ὑπὸ τῷ Θεῷ*, are not translated, which signify *ordained, or established by GOD*. The last Words of the same

Passage ἔχειν γὰρ αὐτῷ παρὰ τῷ δούλῳ τὴν ἀρχὴν συνεχρῶν τὴν δίκην, ought to have been rendered thus, *For the King will in Time be punished by him who conferred the Royal Character on him*. This makes a very different, not to say a contrary Sense; and I am tempted to believe that the Author was betrayed into this Blunder, by his great Desire to find wherewithal to support his Opinion.

¹⁰ It is certain that we ought not lightly to defame Princes every Time they are guilty of Faults, or an Abuse of their Power. As I have already observed, the same Reason that obliges us to bear with their unjust Actions, to a certain Point, likewise engages us to spare their Reputation, to avoid giving Occasion of making their Authority contemptible. Those Preachers therefore, who are for bringing their Magistrates to the Scaffold, whenever they imagine them faulty, are certainly so far from being authorized to do so by the Duties of their Ministry, that they are undoubtedly very much to be condemned. But it does not thence follow, that even tho' a Prince becomes a Tyrant, it is a Crime to speak of what is notorious, and call Things by their right Names. Nor can it be proved that this is prohibited by the Law in Question. So that the Argument, or rather the Consequence which our Author undertakes to draw from it, cannot reasonably extend so far, how general soever the Terms may appear, which here, and in an Infinity of other Places, ought to be restrained, as much as the Nature of the Subject requires or allows.

¹¹ The Philosopher, enquiring into the Reasons of the Difference of the Punishments established by Law, says, *Private Persons are not punished for speaking ill one of another; but that Penalties are inflicted on those who take the same Liberty with a Magistrate*. This he calls a wise Institution, because, as he observes, *such a one is judged not only to offend against the Magistrate thus abused, but also against the State, which he represents*. Probl. Sect. XXIX. Num. 14. p. 814. Tom. II. Edit. Paris. The Emperor JULIAN observes that, *The Laws made in Favour of Princes are severe; so that he who commits an Outrage on a Prince, is at the same Time guilty of trampling on the Laws*. In Misopog. p. 342. Edit. Spanheim. GROTIUS.

The last Passage is not exactly translated by our Author. It signifies, as appears from the Terms themselves, and the Sequel of the Discourse, that *The Laws are respected for the Sake of Princes, by whose Authority they are made; He therefore, who commits an Outrage on a Prince, would of Course make less Difficulty of violating the Laws*. Καὶ γὰρ οἱ νόμοι φοβεροὶ διὰ τὰς ἀρχαίας ὥς ὅς τις ἀρχὴν ὑβρίζεν, ἔτι ἐν περιουσίᾳ τὰς νόμους κατεπάτησε. When it is thus understood, it is easy to perceive the Application is not just.

him,

him, much less must we use Violence against him. *David* was struck with Remorse, ¹² for having cut off a Piece of *Saul's* Garment: So much did he regard the Person of a King as sacred! And indeed, the Sovereign Power being necessarily ¹³ exposed to the Hatred of many, he that is invested with it, ought in a particular Manner to be rendered venerable, and secured from every Sort of Insult. The *Romans* even secured the Authority of the Tribunes of the People, declaring their Persons ¹⁴ inviolable. Among the Sayings of the *Essenes*, this was one, ¹⁵ *Kings are to be accounted sacred.* And we find that famous Passage in *Homer*,

Περὶ γὰρ δὲ ποιμένι λαῶν,
Μὴ τι πάθῃ.

¹⁶ *He was afraid lest any sad Accident should happen to* ¹⁷ *the Leader of the People.* It is not without Reason, that *Those Nations*, who live under a monarchical Government, reverence the Name of Kings, as if they were Gods; as ¹⁸ *Quintus Curtius* observes. So *Artaban* the *Persian*, ¹⁹ *Among many excellent Laws we have, this seems to be the best, which commands us to honour and adore our Kings, as the Image of GOD, who preserves all Things.* And in *Plutarch*, of *Agis*, ²⁰ *ὁ δὲ θεὸς ἐνενομοῦσμένον βασιλέως, &c.* It is not permitted by the Laws of GOD or Man, to offer Violence to the Person of a King.

But here is a more difficult Question, Whether what was lawful for *David* and the *Maccabees*, may be lawful for us *Christians*, whose Lord and Master, CHRIST, so often bidding us ²¹ take up our Cross, seems to require from us a greater

¹² It was not because he thought he had violated the Respect due to his Enemy; but, as Mr. LE CLERC observes, tho' *David* did this to convince *Saul* how easily he might have killed him, if he had been so disposed, he felt some inward Uneasiness, (for that is the Sense of the original Expression, *David's Heart smote him, not he repented*) he felt, I say, some inward Uneasiness, lest *Saul*, being whimsical, should put a different Construction upon the Matter.

¹³ QUINTILIAN says, *Such is the Fate of all who are engaged in the Administration of the Commonwealth, that they are exposed to some Hatred and Envy, even when they are doing what is most conducive to the publick Good.* Declam. CCCXLVIII. See *Livia's* Speech to *Augustus* on that Subject, in XIPHILIN's Abridgment of DION. p. 85, 86. Edit. H. Steph. GROTIUS.

¹⁴ ἄσσυτοι. See DIONYSIUS HALICARNASSENSIS, *Antiq. Rom.* Lib. VI. Cap. LXXXIX. p. 395. Edit. Oxon. LIVY, Lib. III. Cap. LV. APPIAN of *Alexandria*, *Bello Civil.* p. 628. Edit. Toll. and what our Author says, B. III. Chap. LXIX. § 8. Note 3.

¹⁵ The Author quotes no one in this Place. All I find to the Purpose in JOSEPHUS is, that according to the *Essenians*, Fidelity is due to all Men, but chiefly to Princes, because they are not raised to that Dignity without the Will or Permission of GOD. De Bello Jud. Lib. II. Cap. XII.

¹⁶ If a Man kills a Sheep, says St. CHRYSOSTOM, he only makes a small Diminution in the Flock; but when the Shepherd is killed, the whole Flock is dispersed. On 1 TIM. i. SENECA delivers himself in the following Manner, *The Subjects are on the Guard in the Night for their Prince's Security: They surround and defend him, and meet those Dangers which threaten his Person. It is not without good Reason that Nations and Cities have agreed thus to love and defend their Kings, and sacrificing their Lives and Fortunes for the Preservation of their Sovereign. Nor is it Folly, or a Neglect of one's own Life, which induces so many thousands to expose themselves to the utmost Dangers for one Per-*

son, and by the Death of great Numbers, redeem the Life of one who is, sometimes, in the Course of Nature near his End. As the whole Body is interested in the Cure of the Soul — so this immense Multitude, acting for the Defence of one Man's Life, is governed by him as their Soul, and is influenced by him in such a Manner, that the Subjects would destroy themselves by their own Strength, were they not supported by his Prudence and Wisdom: They are therefore careful of their own Safety, &c. De Clementia, Lib. I. Cap. III. See what is said on this Subject, B. II. Chap. I. § 9. GROTIUS.

The Philosopher is speaking of a good Prince, as appears from the preceding Words. It is easy to discern how far the Comparison of the Shepherd and his Sheep may be carried. See Mr. LE CLERC, on 2 SAM. v. 2.

¹⁷ *Iliad.* Lib. V. ver. 566, 567.

¹⁸ *Lib. X. Cap. III. Num. 3.*

¹⁹ This Passage has been quoted in Note 6. on Chap. III. § 16.

²⁰ He says that when *Demochares*, one of the *Ephori*, was going to seize *Agis*, King of *Lacedaemonia*, the publick Officers, and others on the Spot, declined the Task, thinking it unlawful to lay Hands on the King's Person. Vita Agid. & Cleom. p. 804. Tom. I. Edit. Wech.

²¹ Our Saviour, at two several Times, commanded his Disciples to carry their Cross, when he gave the twelve Apostles Instructions for their Behaviour in Preaching the Gospel, MATT. x. 38. MARK viii. 34. LUKE ix. 23. and when he was going to *Cesarea Philippi*, followed by great Crowds of People, MATT. xvi. 24. LUKE xiv. 27. By which Words he meant no more than that *Christians* ought to be disposed to bear Persecution, and all Sorts of Afflictions in general, with Patience, when they are not in a Condition to guard themselves against them; for he no where forbids the Use of innocent Means, when in our Power. As a sick Person, therefore, how strongly soever he may be obliged to Patience, is allowed to take what he thinks conducive to his Cure: So a Man, unjustly oppressed, may employ what Force he is Master

1 Ep. ii. 21,
 &c.

1 Ep. iv. 12,
 &c.

greater Measure of Patience? Indeed when the higher Powers threaten us with Death for our Religion, CHRIST grants Leave to flee, especially to those whom the necessary Duties of their Calling tie to no particular Place; but²² he allows nothing beyond Flight. And St. Peter tells us, *That CHRIST in Suffering left us an Example, that we should follow²³ his Steps, who did no Sin, neither was Guile found in his Mouth; who being reviled, reviled not again; when he suffered, he threatened not, but committed himself to him that judgeth righteously.* Nay he bids us *Christians* give Thanks to GOD, and rejoice, when we suffer Persecution for our Religion. And it was this Constancy in Suffering, that chiefly contributed to the Establishment of Christianity, as appears from History.

Wherefore, I think that the primitive Christians, who, living near the Times of the Apostles, and of apostolical Men, understood and²⁴ practised their Precepts, better

Master of, for delivering him from Oppression. Besides, as the learned GRONOVIVS observes on this Place, our Lord's Precept regards all Christians in general, of all Ranks and Stations. Now, as this Obligation to Patience does not tie up the Hands of Princes and Magistrates, or deprive them of the Power of chastising their rebellious and seditious Subjects, so neither does it deprive private Persons of a Right to resist the Rage of a Prince or Magistrate, who behaves himself like a Tyrant to them.

²² The Passage intimated by our Author, is that of MATTHEW X. 23. *When they persecute you in one City, fly to another.* This Advice is directed to the Apostles, and relates to them in particular, as appears from the Words immediately following, *For verily I say unto you, you shall not have gone over the Cities of Israel, till the Son of Man be come.* See Dr. HAMMOND and Mr. LE CLERC on that Text. So that here is no general Maxim, for teaching all that is allowable for *Christians*, when in any Manner oppressed or persecuted; and GRONOVIVS's Answers here are superfluous. Our Author has confuted himself, in his Commentary on the Gospels, published since the Work now before us, where he thus paraphrases the Passage under Consideration. "The Meaning is; when you shall be driven out of one City, let not this make you renounce the Functions of your Ministry: Fly then to some other Place; not to a Desert, to provide for your own Security, but to some other City, to endeavour to produce Fruit by your Instructions. Whence it appears, says he, that this Passage will by no Means afford a Proof for deciding the Question, Whether it is allowable to fly, with the sole View of avoiding *present Dangers*?"

²³ The Patience to which we are obliged by our Saviour's Example, is to be understood in the same Sense with his Exhortation to *carry our Cross*; of which we have already spoken in Note 21. on this Paragraph. Were we obliged to imitate the Conduct of JESUS CHRIST in all Particulars, every Man ought voluntarily to offer himself to Torments, and an ignominious Death; which our Author would not allow. He has himself refuted the Argument drawn from the Example of JESUS CHRIST, for the Support of the Opinion, which he himself thinks too rigid, of those who pretend we ought not to repel an Enemy so far as to take away his Life, Chap. II. § 8. and Chap. III. § 3.

²⁴ I have already observed, and shewn by Examples, (Note 2. on § 52. of the *Preliminary Discourse* to this Work) that the first Christians cannot be considered as the best Expositors of the Holy Scriptures, or Models for our Conduct on all Occasions. We are very well assured that they entertained extravagant Notions on the Point before us,

which put them on extending the Obligation of suffering Martyrdom, far beyond its just Bounds. Our Author, who was sensible of this, retrenched the following Words in the later Editions, which in the first appeared at the End of this Paragraph, "Tho' we should grant, said he, that this is a Counsel, and not an indispensable Precept, it would still be more safe, in the Presence of GOD, to comply with it, since the first Christians, even when they could have fled, or been silent, frequently sought so honourable a Death, in certain Hopes that such as attested their Faith in that Manner, did thereby receive a full Remission of all their Sins; that immediately after their Death they in some Manner enjoyed a Glory like that expected after the Resurrection; and had the Promise of a large Reward in the World to come." See Mr. DODWELL's XII. *Dissertation* on St. Cyprian. To this we may add, that from some Passages of Scripture misinterpreted, they imagined the Day of Judgment very near, as is observed by the learned GRONOVIVS; and while they were full of this Persuasion, we are not to be surprized, that they had no Concern for the good Things of this World, or even for Life itself, the Preservation of which animates Men to repel the Injuries of a Tyrant. They also sometimes gave too literal a Sense to what the Gospel says concerning the good Things of this World, the Concern for which our Saviour would have us neglect, not absolutely, but only when we cannot enjoy them without Prejudice to our Conscience. Thus the Conduct of those first Votaries of Christianity ought not to be proposed as a Model for all Christians in general, who have not the same Ideas, nor are in the same Dispositions: Even tho' they had been inclined to resist their Persecutors, they would not have been in a Condition of attempting it. It is in vain to amuse the World with their great Numbers; they were a scattered Multitude, and very inconsiderable, in Comparison of their Enemies; they were for the most part Persons in mean and low Stations, without Arms, without Forces, without any other Leaders than the Ecclesiasticks, who were not Men of much Distinction; they assembled in private, and consequently could not get together in great Numbers: A single Legion would have been sufficient for defeating all their Projects. But when the Emperors had embraced Christianity, the *Christians* proceeded on very different Principles. See MILTON, *Defensio*, Cap. IV. p. 136, &c. As also the Speech of Dr. BURNET, late Bishop of Salisbury, at Dr. Sacheverel's Trial. In short, it was of the utmost Importance to the Establishment of the Gospel, that the Christians should not lie under the least Suspicion of being seditiously disposed. And that the more, because, as our Author himself observes on Rom. xiii. 1. the *Jews*, from

ter than the Christians of following Ages, are very much injured by those who suppose that they rather wanted Power than Will to defend themselves, in imminent Danger of Death. Indeed *Tertullian* would have been very imprudent, nay, impudent, to have so confidently affirmed a Falshood to the Emperors, who could not be ignorant of it, writing thus, ²⁵ *If we had a Mind to deal with you as declared Enemies, and not only as secret Enemies, could we want Forces and Troops sufficient for such an Enterprize? The Moors, the Marcomanni, the Parthians themselves, or such other Nations, which, however great they be, are yet confined within a certain Extent of Country, and within the Bounds of their own Dominions; Do those Nations, I say, form a more numerous Multitude than we, who are spread over the whole World? We are but of Yesterday, in a Manner, and yet we already fill all Places in your Dominions, your Cities, Islands, Provinces, Castles, Towns; your very Camps, Tribes, Wards, Palace, Senate, Courts of Judicature, publick Places; and in a Word, we only leave you the Temples of your Gods. Disposed as we are to suffer ourselves so willingly to be butchered, what Wars should we not have been in a Condition to undertake, and with what Ardour should we not have engaged in them, however inferior we might have been in Forces, had we not been taught by our Religion, that it is better to be killed than to kill? Also Cyprian follows his Master, and thus declares, ²⁶ Hence it is, that none of us, when apprehended, makes Resistance, or defends himself against your unjust Violence; tho' our People are extremely numerous. The certain Hope of a future Vengeance produces in us this Patience. Thus the Innocent yield to the Guilty. And *Lactantius*, ²⁷ For we confide in the Majesty of GOD, who is able as well to revenge the Contempt of himself, as the Hardships and Injuries done to his Servants. Wherefore we suffer inexpressible Miseries, and do not repine, but refer the avenging of them to the Almighty. *St. Augustin* had precisely in View the Case under Consideration, when he said, ²⁸ A good Man should take Care above all Things not to engage in War, but when he may do it lawfully; for that is not always lawful. And again, ²⁹ When Princes err, they presently make Laws to defend their Errors, to the Prejudice of Truth, by which the Righteous are tried, and crowned (with Martyrdom). And again, ³⁰ So are Sovereigns to be endured by their Subjects, and Masters by their Servants, as that by suffering these temporal Things with Patience and Resignation, they may have just Reason to hope for Rewards that are eternal. Which he further illustrates by the Example of the primitive Christians. ³¹ Neither did the City of CHRIST, (tho' it was then wandering and vagabond upon Earth, and had vast Numbers of People to assist it against its wicked Persecutors) fight for temporal Salvation, but chose rather to make no Resistance, that it might obtain an eternal one. They were bound, imprisoned, beaten, tormented, burnt, torn in Pieces, massacred, and yet they multiplied more and more. To fight for Safety, was, in their Opinion, nothing else than to despise this Life, in order to acquire another that is more excellent.*

from whom the first Disciples of the Gospel came, were prejudiced by a false Notion, founded on a Passage in *Deut.* (xvii. 15.) misinterpreted, which made them look on all Authority exercised by Foreigners as unlawful, so that they did not think themselves obliged in Conscience to obey any Sovereigns but those of their own Nation. If therefore the Christians in those early Times waved their Right on so strong Considerations, no Consequence can be drawn from their Behaviour, that will affect those who have lived since Christianity is established in the World.

²⁵ *Apol.* Cap. XXXVII. Edit. *Herald.*

²⁶ *Ad Demetrian.* p. 192. Edit. *Fell. Brem.* The same Father elsewhere expresses himself in the following Manner; *The Enemy knows that the Soldiers of JESUS CHRIST are sober and vigilant, and stand armed for the Engagement; that they may die, but cannot be conquered; and are therefore invincible, because they fear not Death, nor resist those who attack them; not being allowed, tho' innocent, to kill the guilty; but thinking themselves obliged to*

resign their Life, and their Blood cheerfully, Lib. I. Epist. I. Edit. Erasm. (Ep. LX. Edit. Fell. p. 142.) GROTIUS.

²⁷ *Instit. Div.* Lib. V. Cap. IX. Num. 9. Edit. *Cellar.*

²⁸ *Lib. VI. Quæst. X. in Josuam.* This Passage is quoted in the *Canon Law*, *Caus. XXIII. Quæst. II. Can. II.*

²⁹ *Epist. CLXVI.* This Passage is also quoted in the *Canon Law*, *Cause XI. Quæst. III. Can. 98.*

³⁰ The Author doth not tell us whence he took this Passage. It is probable he quotes it on the Credit of his Memory, as well as the preceding, which is therefore somewhat differently worded than the Original.

³¹ *De Civit. Dei.* Lib. XXII. Cap. VI. *Saint CYRIL* hath some excellent Expressions on the same Subject; in his Explanation of that Passage of *St. JOHN*, where *PETER's* Sword is mentioned, *Chap. XVIII. Ver. II. GROTIUS.*

Martignac.
St. Maurice.

Nor are the Observations of St. Cyril less admirable, upon that Passage in St. John of St. Peter's Sword. The *Thebæan Legion*, as we read in the Acts of their Martyrdom, consisted of 6666 Soldiers, and all Christians. Who, when the Emperor *Maximianus* would have compelled the whole Army to sacrifice to false Gods, at *Oëtodurum*, first removed to *Agaunum*, and when the Emperor had sent one thither, to command them to come and sacrifice, and they had refused to do it; he sent Officers to put every tenth Man to Death, who easily executed his Order, no Man offering to resist.

Mauritius, ³² Commander of that Legion, (from whom the Town of *Agaunum* in Switzerland, was afterwards called St. Maurice) as *Eucherius*, Bishop of *Lyons*, records, thus spake to his Soldiers at that Time. *How did I fear, lest any of you, under the Shew of Self-Defence (as it is easy for armed Men to do) should have endeavoured by Force to prevent their blessed Martyrdom? I was preparing, in order to divert you from that Design, to set before you the Example of JESUS CHRIST, who expressly commanded the Apostle to put the Sword into the Scabbard, which he had drawn in his Master's own Defence; teaching us that all the Force of Arms is not able to shake Christian Constancy. This, I say, is what I intended to represent to you, that none of you, by employing a mortal Arm, should oppose the Glory of an immortal Action; and that, on the contrary, every one might finish with Stedfastness the Work he hath so happily begun.* When, this Execution being over, the Emperor commanded the same Thing to the Survivors, as he had before done to the others, they all unanimously answered, *Indeed, Cæsar, we are your Soldiers, and we took up Arms in Defence of the Roman Empire, never has there been seen amongst us either a Deserter, or Traitor, or Coward: And we should willingly obey the Orders which you give us to Day, if the Christian Religion, in which we have been instructed, did not forbid us to worship Demons, or approach Altars always polluted with innocent Blood. We know you designed either to make Christians commit Sacrilege, or to frighten us, by the Example of those that have been decimated. But you need not search far off for People that do not conceal themselves: We are all Christians, and we declare it to you. Our Bodies are in your Power, but you cannot make yourself Master of our Souls, which are always turned towards CHRIST their Creator.*

Then *Exuperius*, Standard-Bearer to that Legion, thus addressed them. *You see me (brave fellow Soldiers) carry the Standards of secular Wars. But it is not to that Sort of War that I now call you; you have other Battles to fight: There are other Arms you ought to make Use of, to open the Way to the Kingdom of Heaven.* And then he sent this Message to the Emperor, *It is not Despair, the most powerful Resource in Dangers, that has armed us, O Cæsar, against you. We have Arms in our Hands, ³³ but we do not resist, because we rather chuse to die, than overcome, and to fall Innocents, rather than to live Criminals. And again, We throw away our Weapons, your Executioner shall find our Hands without Defence, but our Hearts armed with the Buckler of Christian Faith.*

After

³² The *Swiss* pay a great Veneration to the Memory of that Martyr. See *FRANC. GUILLIMAN, De rebus Helvet*, Lib. I. Cap. XV. and Lib. II. Cap. VIII. The Legion commanded by *Mauritius* is also placed in the Rank of the most illustrious Martyrs, who suffered Death in the tenth Persecution; as appears from an old Relation of the Translation of St. *Justin's* Relicks, to the Monastery of new *Corbie*. *ALBERT KRANTZIUS* speaks of some Martyrs of the *Thebæan Legion*, whose Bodies were removed to *Brunswick*. *Saxonick*. VII. 16. *GROTIUS*.

The whole Relation of the Martyrdom of this Legion is a mere Fable. The Story itself carries several Marks of Falshood; and the small Treatise, in which it appears is not the Work of St. *Eucherius*, Bishop of *Lyons*, whose Name it bears. We need only observe that it mentions *Sigismund*, King of *Burgundy*, as dead several Years before; whereas St. *Eucherius* himself had been long dead, when that Prince reigned. All this is proved at large in a Dissertation, written by the late Mr.

JOHN DU BOURDIEU, formerly Minister at *Montpellier*, and afterwards of the French Church in the *Savoy*, London. This historical and critical Dissertation on the Martyrdom of the *Thebæan Legion*, was first published in *English*, in 1696, and then in *French*, in 1705. I say nothing of what else might be objected against our Author's Note; but for a more full Eviction of the Falseness of the Fact under Consideration, I refer the Reader to the late Mr. *DODWELL's* famous Dissertation, *De paucitate Martyrum*, which is the eleventh of those on St. *CYPRIAN*.

³³ The *Jews* of *Alexandria* formerly expressed themselves in a like Manner to *Flaccus*, *We are, as you see, unarmed; and yet we are by some accused of coming hither as Enemies. We hold our Hands, which Nature has given every Man for his Defence, behind our Backs, where they can be of no Service to us; exposing our Bodies to any who are disposed to kill us.* *GROTIUS*.

After this followed the Slaughter of those Soldiers who suffered Death without Resistance, of which *Eucherius* gives this Account ³⁴ *The Greatness of their Number did not secure them from Sufferings, though innocent; whereas even Criminals come off with Impunity, when numerous.* We have the same Account of it in the old Martyrology. *They were massacred on every Side, without saying a Word. They threw down their Arms, and presented their Throats and naked Breasts to their Persecutors. They took no Advantage of their great Number, nor made Use of the Arms they held in their Hands, to defend the Justice of their Cause at the Point of the Sword; but wholly taken up with this Thought, that they confessed the Name of him, who was led dumb to the Slaughter, and as a Lamb did not open his Mouth, they also like the innocent Flock of CHRIST's Sheep, suffered themselves to be torn in Pieces by furious Wolves.*

And when the Emperor *Valens* wickedly and cruelly ³⁵ persecuted those Christians who according to the Holy Scriptures, and the Traditions of the Fathers professed CHRIST to be *ὁμοούσιον*, of the same Substance, (with GOD his Father) though they were very numerous, they never defended themselves by Arms. Certainly where Patience is recommended to us in the new Testament, there we find ³⁶ CHRIST's own Example proposed to us (as we have just now read it was to the *Thebæan Legion*) for our Imitation; whose Patience reached even unto Death. And he himself declares, that whoever loseth his Life in that Manner truly finds it. Thus having proved, that those who are invested with the sovereign Power, cannot lawfully be resisted; we must now admonish the Reader of some Things, lest he should think those Men transgress this Law, who really do not.

VIII. First therefore, Those Princes who depend on the People, whether they at first were established on that Foot, or their Authority was thus rendered subordinate by a posterior Agreement, ¹ as in *Sparta*, if they offend against the Laws, and the State, may not only be resisted by Force; but if it be necessary, may be punished by Death, as it befel *Pausanias* ² the *Spartan King*. Such was the Condition of the most ancient Kings of divers Countries in *Italy*; so that it is no Wonder, if *Virgil* having related the horrible Cruelties of *Mezentius*, adds,

³ *All Etruria, justly incensed and rising up in Arms against that King, required him to be immediately put to death.*

IX. Secondly, If a King, or any other Prince, has abdicated his Government, or manifestly abandoned ¹ it; after that Time, we may do the same to him, as to any private Man; but Negligence ² in discharging the Functions of Government is not to be taken for a real Abdication.

These Words were not spoken by the Jews of *Alexandria*, but by those of *Judea*, to *Petronius*, Governour of *Syria*, not to *Flaccus*. We find them in *PHILO*, *De Legat. ad Caium*, pag. 1025. Our Author has confounded two different Stories, related in two different Pieces of that Jewish Writer.

³⁴ *The Greatness of their Number did not secure them from Sufferings, though innocent; whereas even Criminals come off with Impunity, when numerous; quum inultum (not multum, according to our Author's Correction) esse soleat, quod multitudo deliquit.*

³⁵ See the Fragments of *JOHN* of *Antioch*, published from a Manuscript, in the Hands of the late Mr. de *PEIRESC*, a Person worthy of immortal Reputation. p. 846. *GROTIUS*.

³⁶ See my ²³ Note on this Paragraph.

VIII. (1) *PLUTARCH* tells us that *Lyfander* being killed (in a Battle) the Spartans were so deeply affected at his Death, that they pronounced Sentence on the King. (*Pausanias*.) who fled to *Tegea*, to avoid the Execution of it. In *Lyfand*. p. 450. *Tom. I. Edit. Wech.* The same Author says, that the *Lacedemonians* detron'd some of their Kings, whose infamous Lives had rendered them unworthy of the Royal Dignity. *Compar. Lyfand. and Syllæ*. p. 476. See likewise what he says of *Agis*, who was condemned to die, though unjustly. *The Molyneccians*, (or *Mossynians*, a People of *Pontus*) cleet their Kings, keep them under close Confinement; and oblige them

to fast a whole Day, when they commit a Fault in the Execution of their Office; says *POMPON. MELA*, *Lib. I. Cap. XIX. Num. 7.* See *ISAAC VOSSIUS*'s Note on that Place. *GROTIUS*.

² This *Pausanias*, the *Spartan General*, was indeed of the Royal Family, but not King. He had been no more than Guardian to his Cousin *Plistarchus*, Son to King *Leonidas*, as the learned *GRONOVIUS* here observes. See *THUCYD. Lib. I. Cap. CXXXII. Edit. Oxon.*

³ *VIRGIL*, *Æn. VIII. v. 494. &c.*

IX. (1) As when *Henry III.* King of *Poland*, being apprised of the Death of his Brother *Charles IX.* King of *France*, left *Cracow* privately, and went for *France*, in 1574. Whereupon, the *Poles* chose another King, the following Year. See also the Debates between the two Houses of Parliament on the Abdication of *James II.* King of *England*, in the Supplement to *SIR RICH. STEEL*'s *Crisis*.

² Provided such Negligence be not very considerable; for if it be carried so far that the King lets the Affairs of the State run entirely into Disorder and Confusion, I make no Doubt that the People have a Right to consider his Conduct as a real Abdication. The Thing speaks for itself; and I find Mr. *VANDER MUELEN* of the same Opinion, in his Commentary on this Place.

X. Or against
a King that
would alienate
his Kingdom;
but only to pre-
vent the Deli-
very of it.
Lib III.
Ch. XVI.
Advers. Mo-
narchomach.

X. *Thirdly*, If a King alienates his Kingdom; or renders it dependent on any other Power ¹, he forfeits the Crown, according to *Barclay*. For my Part, I dare not pronounce peremptorily in that Manner. For, when the Question is concerning a Kingdom, ² either elective or successive, but conferred by a free Consent of the People, such an Act (of Alienation) is in itself void, and whatsoever is in itself void, can have no ³ effect of a Right. Upon this Principle Civilians maintain, that an Ufusufructuary to whom we have compared such Princes, if he yields up ⁴ his Right to any other than the Proprietor himself, does an Act that is of no Force: And this Opinion seems to me best founded. For, as to what is said, ⁵ that the Fruits and Profits revert to the *Landlord*; it must be ⁶ understood after such a Time when the Use and Profits were to terminate. Yet if a King should endeavour actually to deliver up his Kingdom, or to subject it to another, I doubt not, but in such a Case, he may be resisted. For Sovereignty (as I have said) is one Thing, and the Manner of holding it another. The People may hinder any Change in the latter; the Power of making such a Change not being comprehended in the Right of Sovereignty. To which we may fitly apply that of *Seneca*, in a Case not much different ⁷ *Though our Father is to be obeyed in all Things, yet not in those, whereby he ceases to be a Father.*

XI. Or against
a King that be-
haves himself
as an Enemy to
the whole Body
of the People.

XI. *Fourthly*, The same *Barclay* observes, that if a King shall, like an Enemy, ¹ design the utter Destruction of the whole Body of his People, he loses his Kingdom; which I grant. For the Design of Governing, and the Design of destroy-

X. (1) As when he makes the Kingdom feudatary or tributary: *BOECLER* pretends that the Author, here quoted, speaks only of this Case, and not of the former, or of a real, full and intire Alienation. But as *BARCLAY* looks on him as forfeiting the Crown, who does the least, he could not reasonably pass any other Judgment on him who does what is more. The same Commentator finds a difficulty in owning that the Case under Consideration is of such Importance and deserves so heavy a Punishment: He even endeavours to make our Author contradict himself, in Regard to what he has laid down, in the foregoing Chapter, § 21, &c. that a Prince, doth not cease to be a Sovereign, though he is tributary or feudatary to another. But as he who attempts to subject his Kingdom in this Manner, has no Right to do it by his own Authority, and without the Consent of the People, such an Act is sufficient for discharging the People from the Obedience, which they promised him only on Condition, either express or tacit, that he should make no such Attempt. It is unnecessary to say the Good of the State sometimes requires it; for that is not the Question; and in that Case, he must always be authorized by the Consent of the Nation, either expressed, or presumed on convincing Reasons.

² See *Cap. III. § 10 and § 11.*

³ That is, the Act of Alienation, or Subjection performed by the King, neither turns to his Prejudice, nor to the Advantage of the Person, in whose Favour he alienated or subjected the Kingdom; and consequently, he loses nothing of his Right to the Crown, by an Act like this, which is void and of no Effect. See *Book II. Chap. VI. § 3, 9.* But I do not see how this Doctrine agrees with the Permission granted by our Author, to resist such a Prince, when he actually undertakes to give up, or subject his Crown. He thereby only puts in Execution what was already done, as far as in him lay, by a Contract and Engagement with another Power; and if that Engagement did not make him forfeit the Sovereignty, by what Authority shall the People resist him, when he sets about the Execution of it? The Truth is, every Prince, who having no Right so to do, undertakes to alienate or subject his Kingdom, without the Consent of the People, doth thereby violate a fundamental Law of the State;

and thus really forfeits the Sovereignty; as *BARCLAY* teaches, who is in other Respects a zealous Defender of the Sovereign's Rights. Here too Mr. *VANDER MUELEN* is of the same Opinion with me; and considers such an Action in a King, as a manifest Abdication of the Crown. See some Instances of this Sort in *HUBER's Treatise De Jure Civit. Lib. I. Sect. IX. Cap. VI. § 36, 37.*

⁴ *INSTITUT. Lib. II. Tit. IV. De Ufusufructu. § 3.*

⁵ *DIGEST. Lib. XXIII. Tit. III. De Jure Dotium. Leg. LXVI.*

⁶ But some maintain the contrary, and in my Opinion on better Grounds; as appears from Mr. *NOODT's Treatise De Ufusufructu. Lib. II. Cap. X.* where he distinguishes between the old and new Law on this Subject; and explains the Law in Question, as well as the Paragraph quoted from the *INSTITUTES* in the foregoing Note. So that, even though an Ufusufructuary might in all Respects be compared to the Sovereign of an elective or successive Kingdom, this would rather make against our Author than for him. Let Men of Judgment determine whether Mr. *VAN DE WATER*, has urged such Reasons as are sufficient for supporting the opposite Opinion, in his *Observationes Juris, Lib. III. Cap. XI.* which appeared in 1713, soon after Mr. *NOODT's Works*, among which the *Treatise De Ufusufructu*, was first published.

⁷ That Author proposes an Enquiry whether this ought to be done. *Controv. Lib. II. Cap. IX. p. 158. Edit. Elziv. 1672.*

XI. (1) On this Principle *Gracchus* ingeniously maintained, that a Tribune of the People ceases, to be such, and is entirely divested of his Power. His Discourse on that Subject is worth reading; and may be seen in *PLUT. Vit. Tib. & C. Gracchi. p. 831, 832. Tom. I. Edit. Wech. JOHN MAJOR, (or MAIR) in his Treatise on Book IV. of PETER LOMBARD's Sentences, says that a People cannot divest themselves of the Power of deposing the Prince, when he endeavours their Destruction. A Principle which ought to be softened, and explained, as we shall here explain it. GROTIUS.*

See Mr. *NOODT's Discourse, Du Pouvoir des Souverains, p. 237, 238.* and the Note in the second Edition published in 1714.

ing are inconsistent together. Wherefore he that declares himself an Enemy to the whole Nation, is presumed by that very Act to renounce the Government. But such an Excess of Fury.² can hardly, in my Opinion, enter the Thoughts of a King, that is in his right Senses, and that governs only one Nation. But if he govern several, it may so happen, that in Favour to one, he should endeavour³ to destroy another, in order to people the Lands of the former with Colonies sent from the latter.

XII. *Fifthly*, If a Kingdom be forfeited, either¹ for Felony against him of whom it is a Fief, or by vertue² of a Clause in the Act whereby the Sovereignty had been conferred, and which declares that if the King does such or such a Thing, his Subjects shall from that Time be absolved from all Allegiance to him, then also a King becomes a private Person.

XII. *And against a King, who breaks the Condition, upon which he was admitted.*

XIII. *Sixthly*, If a King should have but one Part of the sovereign Power, and the Senate or People¹ the other, if such a King shall invade that Part which is not his own, he may justly be resisted, because he is not Sovereign in that Respect. Which I believe may take Place, though in the Division² of the Sovereignty, the Power of making War fell to the King, for that is to be understood of a foreign War: Since whoever has a Share of the Sovereignty must have at the same Time a Right to defend it. And when the Case is so, the King may, by the Right of War, lose even his Part of the Sovereignty.

XIII. *And against a King, who having but one Part of the Sovereign Power invades the other.*

XIV. *Seventhly*, If in the conferring of the Crown, it be expressly stipulated,¹ that in some certain Cases the King may be resisted; even though that Clause does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty² is reserved to the People, and exempted from the Power of the King. Now every one in alienating his Rights in Favour of another may do it under what Restriction he pleases.

XIV. *And against him, who grants such a Licence in certain Cases.*

XV. We have treated of him, who has now, or has had a Right to govern; it now remains, that we say something of him that usurps the Government; not after he has either by long Possession, or Agreement obtained¹ a Right to it, but so long as² the Cause of his unjust Possession continues. The Acts of Sovereignty exercised by such an Usurper may have an obligatory Force, not by vertue of his Right, (for he has none) but because it is very probable that the lawful Sovereign, whether it be the People themselves, or a King, or a Senate, chuses rather that the Usurper should be obeyed during that Time, than that the Exercise of the Laws and Justice

XV. *An Usurper, how far to be obeyed.*

² A Prince may be in the Case here specified, though he doth not, like *Caligula*, wish the whole People had but one Head, that he might dispatch them at one Stroke; or though he expresses no formal and direct Design of destroying his Subjects. It is sufficient that his Actions have a manifest Tendency that Way. Nor is there any Obligation of waiting till there is no Remedy for the Evil. See *Note I.* on PUFEND. B. VII. Chap. VIII. § 6.

³ *Philip II.* King of Spain was charged with such a Design, in Regard to the Low Countries. See somewhat of the like Nature, attributed to *Philip*, King of Macedonia, in *Liv. Lib. XI. Cap. III.*

XII. (1) See the foregoing Chap. § 23:

² See also Chap. III. § 16.

XIII. (1) We have an Instance of this Kind in the Republic of *Genoa* in *PETER BIZAR. Lib. XVIII.* and in *Bohemia*, under *Wenceslaus*, in *DUBRAY'S Hist. Lib. X.* See *AZOR, Institut. Moral. Lib. X. Cap. VIII.* and *LAMBERT of Schaffnaburg*, in Relation to the Emperor *Henry IV.* *GROTIUS.*

² The learned *GROTIUS* observes that our Author in this Place gives a tacit Answer to the Heads of the Charge brought against *BARNEVELD*; and refers the Reader to his Defence, entitled, *Apologeticus eorum, qui Hollandiæ Westfrisiæque, &c. ex legibus præfuerunt ante mutationem quæ evenit anno 1618. Cap. X.* But the Case is not exactly the

same; as will appear on comparing what our Author says in that Piece with what he says here.

XIV. (1) See some Examples of this Kind in *Mr. DE THOU'S History, Lib. CXXXI.* on the Year 1604. p. 1037, 1038. *Edit. Francof. and Lib. CXXXIII.* on the Year 1605. p. 1074; both relate to *Hungary*. As also in *MEYER'S Annal Belgic.* on the Year 1339, in regard to *Brabant and Flanders*; and on the Year 1468, in Relation to the Treaty between *Lewis XI. King of France, and Charles, Duke of Burgundy.* See also what *CHYTRÆUS* says of *Poland, Saxonie. Lib. XXIV.* and what *BONFINIUS* relates of *Hungary, Decad. IV. Lib. IX. GROTIUS.*

The Instances here alledged are not to the Author's Purpose; as will appear on examining each apart.

² Why is it not plainly and directly said that this Reservation disengages the Subject from their Obedience, whenever the Case happens; so that if the Prince is obstinately bent on doing what is prohibited by such a Clause, which has the Force of a fundamental Law, the People ought to consider him no longer as their Sovereign? It is not conceivable that the Restriction can naturally have any other End, or Effect.

XV. (1) See *B. II. Chap. IV. § 14.*

² Compare all this with what *PUFENDORF* says on the same Subject, *B. VII. Chap. VIII. § 9, 10.* and in his academical Dissertation *De Interregnis. § 16.*

should be interrupted, and the State thereby exposed to all the Disorders of Anarchy. Cicero condemns Sylla's Laws, as cruel upon the Children of the Outlaws, making them incapable of Honours; yet he thought they ought to be observed, affirming (as Quintilian³ tells us) that this was so necessary, considering the Circumstances of the State at that Time, ⁴ that if they were abrogated it could not subsist. Florus also says of the Acts of the same Sylla: *Lepidus endeavoured to repeal the Acts of that great Man, and not without Reason, if he could have done it, without great Hurt to the Commonwealth.* And again, *It was necessary for the State, then sick and wounded, to rest at any Rate, lest her Wounds should be ripped open in going about to cure it.*

But in those Things, which are not so necessary for the public Good, and which contribute towards establishing the Usurper in his unjust Possession, if by disobeying we run no great Hazard, we must not obey. But the Question is, whether it be lawful to depose such an Usurper, or even to kill him:

XVI. An Usurper may be killed during the War, if no Contract be made with him.

XVI. And First, If he has seized on the Government in Consequence of an unjust War, and which had not all the Qualities required by the Law of Nations, and if no Treaty has been made afterwards, ¹ or any Oath of Fidelity taken to him; in a word, if he has no other Title to Possession, than mere Force, the Right of War seems to continue intire, and ² consequently what may lawfully be done against an Enemy, may be lawfully attempted against him, whom any private Man may kill. *Against Traitors and publick Enemies every private Man* (says ³ Tertullian) *is a Soldier.* So against Deserters, ⁴ any Man is allowed by the Roman Law to take Revenge, in the Name of the Publick, for the common Safety.

XVII. By virtue of an antecedent Law.

XVII. I think, with ¹ Plutarch, the same may be said of him, who has usurped the sovereign Authority in a State where there was already a Law, empowering any Person to kill him, who should do such or such a Thing, visible and manifestly designed: as for Example, if a private Man should go with a Guard about

³ QUINTIL. *Instit. Orat.* Lib. XI. Cap. I. pag. 981. Edit. Burn.

⁴ Because the Children of the Outlaws would have put the whole State in Confusion. And the Persons, on whom Sylla had bestowed the Estates of those Outlaws, would not easily have restored them, as FLORUS observes, in the Quotation here alledged, which stands thus at large. *For Lepidus, full of Insolence, and fond of Innovations, attempted to annul the Acts of that great Man; and not without good Reason, if it had been practicable without great Prejudice to the Commonwealth.* For when Sylla, the Dictator, by the Right of War, had outlawed his Enemies, who survived that Revolution, Lepidus, by recalling them, only called them to renew the War; and since the Estates of the proscribed Citizens, though unjustly seized, and alienated by Sylla, had been taken from them by some sort of Right; a Re-demand of such Estates would certainly have involved the State in fresh Troubles. It was advisable therefore on any Terms to allow the sick and wounded Commonwealth some Repose, lest its Wounds should be opened again by the very Means taken for its Cure. Lib. III. Cap. XXIII. Num. 2, 3, 4.

XVI. (1) See B. II. Chap. XIII. § 15. and B. III. Chap. XIX. § 2, &c. of this Work.

² The learned GRONOVIVS in this Place applies what a Roman Senator said in Regard to the Decemvirs: *As if the Roman People had any War, which more deserved their Attention than that which Men, - - - - - who, though but private Persons, assumed Marks of Magistracy, and acted in the Character of Sovereigns.* Liv. Lib. III. Cap. XXXIX. Num. 8.

³ Apolog. Cap. II.

⁴ The Roman Law speaks thus: *We allow Persons in every Province full Power and Right to distress Deserters. If they shall dare to resist, we command that their Punishment be expeditious, wherever they*

they are found. Let all Men know they are hereby invested with a Right to act in the Name of the Public against public Robbers and those who desert from the Army; and that this Right is to be employed for the Peace of the Commonwealth. COD. Lib. III. Tit. XXVII. *Quando liceat unicuique sine Judice se vindicare, &c.* Leg. II.

§ XVII. (1) I shall set down PLUTARCH's Way of Reasoning, on which our Author grounds the Opinion here attributed to him. The Philosopher undertakes to prove that it cannot be said all Things are directed by Fate, or are so many Effects and Consequences of Fate, καὶ εἰμαρμένην, though every Thing is included in Fate. He then makes Use of this Comparison. Every Thing comprehended in the Law, is not therefore legal, or according to Law; thus Treason, Desertion, Adultery, and many other Acts of the like Nature, are comprehended in the Law; and yet no Man will venture to affirm any of them to be lawful. Nor would I say that an Action of extraordinary Bravery, killing a Tyrant, or other great Achievement, is according to Law. For only what the Law enjoins deserves that Appellation. If therefore the Law enjoins the Actions already specified, how shall a Man be cleared of Disobedience, and offending against the Law, who engages in none of the said Actions? Or if he is thereby disobedient, and offends against the Law, would it not be just to punish a Person? But if this is absurd, that only, which is prescribed by the Law, is to be termed, legal, and according to Law; and thus only what necessarily follows from, or is conformable to the divine Regulations and Determinations, can be said to be done by Fate, or according to Fate - - - Fate doth indeed comprehend all Things - - - but they will not fall out by Necessity; but every Thing will come to pass according to its Nature. De Fato, p. 570. Ed. Wech. Tom. II. This Comparison is somewhat far fetched, and grounded on a Quibble, which is unworthy of a Philosopher.

him,

him, should assault a Fort, or kill a Citizen uncondemned, or illegally condemned, or presume to create a Magistrate without being elected by legal Votes. Many such Laws were extant in the States of Greece, with whom it was reputed lawful to kill such Tyrants. Such was ² Solon's Law at Athens, after the Return from the Piræus, against such as should abolish popular Government, or after its being abolished, should exercise any publick Office. And such was the ³ Valerian Law at Rome, if any one bore an Office without the Order of the People; and the Consular Law, after the Decemviral Government, ⁴ that no Man should create a Magistrate without an Appeal; and he that did it might lawfully be killed.

XVIII. Nor will it be less lawful to kill an Usurper if there be an express Order for it from the lawful Sovereign, whether King, People, or Senate. The Guardians of the Heir to the Crown have the same Right; and it was by Vertue of that Right, that Jeboiada drove Athalia from the Throne, which belonged to his Pupil Joash.

XVIII. By his Commission who has a Right to the Crown. 2Chron. xxiii.

XIX. Unless in one of these Cases, I do not see how it can be lawful for any private Man, either to dethrone or kill an Usurper. Because it may be, he that has the true Right, had rather leave the Usurper in quiet Possession, than engage his Country in dangerous Troubles and bloody Wars, which generally follow the expelling, or killing such Men, especially if they have a strong Faction at home, or powerful Friends abroad. It is at least uncertain, whether the King, or Senate, or People, to whom the sovereign Authority lawfully belongs, would be willing that Matters should be brought to that dangerous Extremity; and whilst their Mind on that Head is not known, all Force would be unjust. Favonius said ¹ χαίρον εἶναι μοναρχίας ἀνὸς πῶλεμον ἐμφύλιον, A Civil War is worse than the Necessity of submitting to an unlawful Government. And Cicero, ² Any Peace is preferable to a Civil War. And T. Quintius Flaminius, ³ that it was ⁴ better to leave Nabis Tyrant

XIX. Why an Usurper is not to be killed, but in these Cases.

² I find it mentioned by the Orator ANDOCIDES, who, addressing himself to Epichares, tells him, that a Man who should kill him, would be deemed innocent, even according to the Law of Solon, viz. If any one abolishes the Athenian Democracy, or exercises any publick Office after such Abolition, let him be reckoned an Enemy to the Athenians, and be killed with Impunity to the Person who dispatches him. Orat. I. p. 219, 220. Edit. Hanov.

³ DIONYSIUS of Halicarnassus reports this Law in the following Terms, He (Valerius) made most excellent Laws, of great Advantage to the Publick; in one of which he expressly ordered, that no Man should act in a publick Office, except he received it from the Hands of the People, under Pain of Death; and declared the Person who should kill such an Intruder innocent. Antiq. Rom. Lib. V. Cap. XIX. p. 281. Edit. Oxon. Livy expresses himself thus, on the same Occasion, He made Laws for appealing to the People against the Magistrates, and punishing the Man with Confiscation of his Estate, and Death, who should attempt to seize the Sovereignty. Lib. II. Cap. VIII. Num. 2. Edit. Cleric. See his Note on that Place. Our Author quotes the two following Passages from PLUTARCH, in a Note, who expresses himself in Terms somewhat different, For if any one attempts to become a Tyrant, Solon ordered him to be seized and punished; but Publicola allows such a one to be dispatched without that Formality. Vit. Poplic. p. 110. He made a Law which allowed any one to kill the Man, without any Trial, who should aspire at the Tyranny; and ordered, that the Person who dispatched him, should be deem'd innocent, on bringing Proofs of the Crime, p. 103. Where it may be observed, that PLUTARCH is mistaken concerning the Law of Solon, as is evident from the Passage of ANDOCIDES, quoted in the foregoing Note.

⁴ Our Author here uses the Words of LIVY, tho' he doth not quote them. This Law was

made by Valerius, Grandson to Publicola, in Conjunction with his Collegue in the Consulship, M. Horatius, Lib. III. Cap. LV. Num. 4, 5.

XIX. (1) PLUTARCH, Vit. M. Bruti, p. 989. Edit. Wech.

² Philippic. II. Cap. XV. p. 445. Edit. Grav.

³ Livy, Lib. XXXIV. Cap. XLIX. Num. 1, &c.

⁴ PLUTARCH expresses this in the following Manner, Titus alledged in Defence of his Conduct, that he had put an End to the War, because he perceived the Tyrant could not be destroyed, without doing great Damage to the rest of the Spartans. Vit. T. 2. Flamin. p. 376. It will not be amiss to give the Reader in this Place, the Saying of a Lacedæmonian, who in reading an Epigram, the Sense of which was, These Men fell before the Gates of Selinus, in attempting to extinguish Tyranny; said, They deserved to die; for they ought to have waited till the Tyranny consumed itself intirely. Ὁ δὲ ἀναλίσκας τὸ ἐπίγραμμα τῷτο,

Σθεννύλας πῶλε τὴς δε τυράννιδας χαλκιδῶ Ἀρης
ἔειλε· Σελινῶν δ' ἄμφι πύλας ἔθανον.

Δικαίως, ἔειπε τεθνήσκοντες τοὶ ἄνδρες· ἔδει γὰρ ἀφ' ἑμῶν ὅταν αὐτὸν καὶ καταῆμεν. Vit. Lycurg. p. 52. GROTIUS.

This last Passage is ill translated by the Latin Interpreter, who renders it, Permittendum enim fuerat, ut totum conflagraret Oppidum; that is, They ought to have let the whole Town be burnt. Nor has our Author succeeded much better in expressing the Sense of it, tho' he perceived the Quibble in which the Point consists. The Lacedæmonian meant, as PALMIERIUS of Gretefmenil observes, in his Exercitationes in optimos ferè Auct. Græc. p. 186. "These Men deserved their Fate; for they ought not to have extinguished the Tyranny, but
" rather

rant of *Lacedemon*, in Possession of the Government, than to ruin that City by endeavouring to restore its Liberty. To this Purpose was the Advice of ⁵ *Aristophanes*; not to nourish a Lion in the City, but if he were nourished, to bear with him.

It is certainly a Matter of the utmost Consequence, to determine ⁶ whether we ought to continue quiet, or endeavour at any Rate to recover Liberty; as *Tacitus* speaks. And *Cicero* calls it, ⁷ *A difficult Question in Politicks, whether when our Country is oppress'd with Tyranny, we may endeavour to rescue it, tho' with the extreme Hazard of the State.* Therefore private Persons must not set up for Judges in such an Affair, that concerns the whole Body of the People. So that there's great Injustice in this Expression,

⁸ *Detrahimus dominos urbi servire paratæ.*

We take up Arms ⁹ to free the City from Tyrants, to whose Yoke it is ready to submit. As there is also in that Answer of *Sylla*, who being asked, ¹⁰ why he came into his Country so armed; replied, to deliver it from Tyrants.

¹¹ *Plato*, and after him *Cicero* ¹², lay down a more reasonable Maxim, Do not meddle, say they, in what concerns the Government, but so far as you can promise yourself the Approbation of your fellow Citizens; offer no Violence either to your Father or your Country. To the same Sense is that of *Sallust*: ¹³ For tho' you could govern your Country, or Parents, by Force, and correct Offences, yet it is an odious Enterprize, especially when all Changes of Government are generally attended with Slaughter, Banishments, and other Miseries of War. Not much different is that of *Stallius* in *Plutarch*, in the Life of *Brutus*, ¹⁴ It is not fit for a prudent and wise Man to expose himself to Dangers and Troubles for Knaves and Fools. To which we may refer that of *St. Ambrose*, ¹⁵ This also will gain you Reputation, to rescue the Poor out of the Hands of the Oppressor, to deliver the Condemned from Death, as far as you can do it without occasioning Troubles and Disorders, lest otherwise you should seem to have done it more out of Ostentation than Compassion, and so cause greater Wounds than those you propose to cure. *Thomas Aquinas* said, that one becomes sometimes guilty of Sedition, by attempting to destroy even a tyrannical Government.

Secund. Secund.
Quæst. 42.
Art. 11.

4. The Fact of *Ehud*, against *Eglon* King of *Moab*, should not move us to the contrary Opinion; for the Scriptures positively tell us, that GOD raised up *Ehud* to deliver *Israel*, that is, by giving ¹⁶ him a special Commission for that Purpose. Neither is it certain, ¹⁷ that this King of *Moab* had not by Agreement any Right of Sovereignty; for GOD did execute his Judgments even against other law-

Judges iii. 15.
Neh. ix. 27.

“rather have let it burn and consume itself entirely, instead of preserving it.” So that the Criticism falls on the Word *extinguish*, which seems to signify, that the Persons mentioned in the Epigram had maintained the Tyranny; whereas the Poet's Meaning was, that they had destroyed it. And consequently, the *Lacedemonian's* Remark, rightly understood, is misapplied in this Place, being so far from making any Thing to our Author's Purpose, that it is directly against him.

⁵ *Ranæ*, v. 1478, &c. Edit. Kuster.

⁶ *TACITUS*, *Hist. Lib. IV. Cap. LXVII. Num. 5.*

⁷ *Epist. ad Attic. Lib. IX. Ep. IV.*

⁸ *LUCAN*, *Lib. I. v. 351.* They are the Words of *Julius Caesar*.

⁹ Thus *Antiochus the Great*, undertaking a War against the Romans, did it under Pretence of giving the Grecians their Liberty, who had not Need of it. *PLUTARCH*, *Vit. Cat. Maj. p. 342.* *GROTIUS*.

¹⁰ The Embassadors finding him on the Road, asked him why he attacked his Country in a hostile Manner? To which he replied, that he appeared in Arms in Order to free it from Tyrants. *APPIAN*, *Bell. Civ. Lib. I. p. 648.* Edit. Toll. (384 H. Steph.)

¹¹ Our Author here quotes that Philosopher's seventh Epistle to *Perdiccas*. I have given the Passage at Length, in my Remarks on *PURFENDORF*, *B. VII. Chap. VIII. § 5. Note 1.* But it is more probable, that *CICERO* had the following Words of the Dialogue, entitled *Crito*, in View, *In the Conduct of War, in the Tribunals of Justice, and on all other Occasions, the Orders of the State, and our Country are to be obeyed; or we are to advise what is just in its own Nature. But it is not allowable to commit Violence either on a Father or a Mother, and much less on our Country.* *Tom. I. p. 51.* Edit. Steph.

¹² *Lib. I. Epist. ad Famil. IX. p. 50.* Edit. *Maj. Græv.*

¹³ *Bell. Jugurth. Cap. III. Edit Waff.*

¹⁴ *Vit. M. Brut. p. 989. Tom. I.* Edit. *Wech.*

¹⁵ *De Offic. Lib. II. Cap. XXI.*

¹⁶ There is nothing in *Judges iii. 15.* that authorises this Explication. It is only said that GOD raised up *Ehud* to deliver the *Israelites*. See Mr. *LE CLERC*'s Comment on Verse 20th of that Chapter.

¹⁷ Nor do we find any Thing that gives Room to suspect it.

ful Kings, by such Instruments as he himself pleased, as by *Jehu* against *Jeho-* 2 Kings ix.
ram.

XX. But especially in a controverted Right, no private Person ought to deter-
mine; for then he ought to side with Possessor. Thus CHRIST commanded
us to pay Tribute to *Cæsar*, because the Money had his Image or Superscription;
that is, because he was then in Possession of the Government; for the Power of
Coining Money is a certain Sign of Possession.

XX. In a con-
troverted
Right no pri-
vate Man to be
Judge.
Matt. xxii. 20.
P. Bezari. Hist.
Genuenf. l. 18.

C H A P. V.

Who may lawfully make War.

I. AS in other Things, so also in moral Actions, there are wont to be three Effi-
cient Causes, *Principals*, *Assistants*, and *Instruments*. The principal Effi-
cient Cause in a War, is generally the Person interested. In a private War a
private Person; in a publick, the Civil Power, especially the Supreme. Whether
a War may be justly undertaken in Behalf of another, not making War, shall be
treated of in ¹ another Place. In the mean Time this is most certain, that every
Man has a natural Right to revenge himself; and therefore were Hands given
us.

I. The Efficient
Causes of War
are those who
engage in it,
either upon
their own Ac-
count, as Prin-
cipals:

II. 1. But it is not only lawful for us, as far as we are able, to be beneficial to
another, but also commendable. They who write of Offices, justly say, that there
is nothing so useful to one Man, as another Man. Now there are several particular
Ties, which engage Men mutually to assist each other. Kinsmen assemble to help
one another: Neighbours and Fellow-Citizens call for ¹ the Aid one of the other;
whence comes that Saying, *Porro Quirites* and *Quiritari*. *Aristotle* ² said it behoved
every one to take up Arms, either to defend himself upon an Injury offered him, or for
his Kinsmen, or Benefactors, or Allies. And *Solon* ³ declared that a happy State,
wherein every Man looked upon the Wrongs done to another, as done to himself.

II. Or upon the
Account of o-
thers as Assis-
tants:

2. But tho' there were no other Obligations, it is enough that we are allied by
common Humanity. For every Man ought to interest himself in what regards
other Men. It was well said of *Menander* ⁴,

Dig. l. 18.
Tit. 7. De Ser-
vis exportand.
Leg. 7. De fur-
tis, l. 7. & Cod.
l. 10. tit. 1. De
jure fisci.

Injuriarum, si improbis, &c.

If every one would heartily engage in the Defence of those that are insulted; if Men
would look on Injuries done to others, as done to themselves, and would strenuously assist
one another; the Wicked would not become daily more bold and enterprising, but finding
themselves watched on every Side, and suffering the just Punishment of their Crimes,
few or none would run the Hazard of it. And this of *Democritus*, ⁵ It is every
Man's Duty to the utmost of his Power, to assist the Injured, and by no Means to
neglect it; for this is just and good: Which *Lactantius* thus expresses, ⁶ GOD,
who has denied Wisdom to all other Animals, has furnished them with such natural
Arms, as may secure them from Insults and Dangers. But as he made Man naked
and weak; chusing rather to adorn him with Wisdom, than endow him with Force;

Cic. de Off. l. 11
ex Panæcio.
Bartol. ad Dig.
l. 1. tit. 1. De
Just. & Fur.
n. 7, 8.

Jaf. ib. n. 29.
Cas. ad Leg. 1.
§ 4. ib. Bartol.
ad Dig. l. 49.

Tit. 15. De
Capt. & c. Leg.
24. n. 9.
Innoc. ad C. fi-
cut De Jure
jur. & in C. olim
De restit. Spol.
n. 16. Panorm.
n. 18. Sylv. in
verbo Bellum,
Q. 8.

I. (1) See B. II. Chap. XXV.

II. (1) Hence, as our Author here observes,
come those Expressions among the antient Romans,
Porro, Quirites; & *Quiritari*, for complaining, and
calling for Assistance. See GRONOVIVS on this
Place.

2 Rhetoric. Ad Alexand. Cap. III. p. 615: Edit.
Parif. Tom. II.

3 Being asked what State he thought best regulated,
that, says he, where, &c. PLUT. in Solon, p. 88.
Tom. I. Edit. Wech. The following Advice of
PLAUTUS may be applied here,

Stop the Course of Injustice before it reaches you.

*Prætorquete injuriæ prius collum, quam ad vos per-
veniat.*

Rudent. Act. III. Scen. II. v. 12.

GROTIUS.

4 In STOBÆUM, Tit. XLIII. See Mr. LE
CLERC's Note on that Fragment, p. 3, 4.

5 In STOB. Scrm. XLVI. p. 310.

6 Lib. VI. Cap. X. Numb. 3. Edit. Cellar.

he has given him, amongst other Things, a Sentiment of Affection, which prompts him to defend those of his own Species, to love them, to cherish them, to give to them, and receive from them Assistance against all Dangers whatsoever.

III. Or are Instruments, as Servants and Subjects:

Coû. de Agric. 1. 11. & 1. 9. de Adulter. Sen. 1. Con. 4. Arist. Eth. Nicom. v. 10. p. 67. Ed. Paris.

III. By Instruments, we mean not Arms, nor such like Things; but certain Persons who act by their own Will, but yet so as that their Will depends on another, that sets it in Motion: Such is a Son to his Father, being part of himself naturally; or a Servant, as a Part of his Master by Law. For as a Part is not only a Part of the Whole, in the same Relation as a Whole is the whole of a Part, but that very Thing which it is, because of the Whole on which it depends: ¹ So the Thing possessed makes in some Manner part of the Possessor. ² Democritus said, *Servants are to be used as Members of our Body, some to one Purpose, and some to another.* As a Servant is in a Family, the same is a Subject in a State, and is therefore the Instrument of the Sovereign.

IV. By the Law of Nature none are excused from War. Thomas, Sec. Sec. 40. Art. 2. Sylvest. de Bell. p. 3.

IV. Nor can we doubt, but all Subjects may naturally be employed in War, tho' some special Laws may exempt some; as formerly ¹ Slaves among the Romans, and now every where the ² Clergy; which Law notwithstanding, as all others of that Nature, must be understood with the Exception of Cases of ³ extreme Necessity. Let this suffice to be spoken of Assistants and Subjects in general. For what Questions particularly relate to them, shall be handled ⁴ in their proper Places.

III. (1) These Ideas of the old Philosophy afford but little Satisfaction. It is sufficient that, when a Son or a Slave are considered as mere Instruments, they act, or are supposed to act, by the Orders of a Father or a Mother, so that without such Directions, they would not have determined themselves to Action. See what I have said on the Abridgment of PUFENDORF's Treatise *Of the Duties of a Man and a Citizen*, B. I. Chap. I. § 27: Note 1, 2. third and fourth Edition.

² In STOB. *Serm.* LXII. p. 385.

IV. (1) See PUFENDORF, B. VIII. Chap. II: The Author, in a Note on this Place, refers us to SERVIUS, on *Æneid.* IX. ver. 547; where we have this formal Law: Slaves are excluded from all military Service; if they engage in it, they are punished with Death. DIGEST. *Lib.* XLIX. *Tit.* XVI. *De Re Militari*, Leg. XI. See LIPSIUS, *De Militiâ Romanâ*, *Lib.* I. *Dial.* II. p. 22. &c. *Edit. Wesal. and Analect.* p. 444. As also the Notes of Father ABRAM, a Jesuit, on CICERO's *Orat. in Pisonem*, *Cap.* X. & *pro Rege Dejotaro*, *Cap.* VIII.

² The Levites also were excused from bearing Arms, as JOSEPHUS observes, *Antiq. Jud.* *Lib.* III. *Cap.* XI. As to what concerns Ecclesiasticks, see NICETAS CHONIATES, *Lib.* VI. *The Capitularies of Charles the Bald*, in *Sparnac.* XXXVII. and

the *Canon Law*, *Distinct. L.* *Can.* V. and *Caus.* XXIII. *Quæst.* VIII. Those are the Regulations made by the Canons, but we may see in the History of ANNA COMNENES, *Lib.* X. *Cap.* VIII. how much more strictly they have been observed by the Greeks than by the Latins. [Compare them with what is said in *Votum pro Pace Ecclesiasticâ*, *Art.* XVI.] GROTIUS.

See Chap. II. § 10. *Num.* 8. and Mr. BOHMER's *Jus Ecclesiasticum Protestantium*, *Lib.* III. *Tit.* I. § 62, &c. and *Tit.* XX. § 71, &c. as also Mr. THOMASIIUS's Notes on LANCELOT's *Inst. Juris Canon.* p. 154, and 350. I find nothing in NICETAS CHONIATES, quoted by our Author, concerning the Exemption granted to Ecclesiasticks; that Historian only says, in the Life of MANUEL COMNENES, *Lib.* VII. *Cap.* III. that that Emperor ordered the Monks should possess no Lands, that they might be free from such Distractions as attend the Care of temporal Affairs, and devote themselves entirely to spiritual Exercises.

³ Thus, after the Battle of Cannæ, the Romans, being in great Want of Soldiers, bought 8000 young and able bodied Slaves, and lifted them in the Service. LIVY, *Lib.* XXII. *Cap.* LVII. *Num.* 11, 12.

⁴ See our Author, B. II. Chap. XXV. XXVI.

H. G R O T I U S,

O F T H E

Rights of W A R and P E A C E.

B O O K II.

C H A P. I.

*Of the Causes of War; and first, of the Defence of Persons
and Goods.*

I. 1. **L**ET us now proceed to the Causes of War, I mean such as are properly said to *justify* it; ¹ for there are some *Motives of Advantage*, sometimes different from *just Occasions*, that determine us to take up Arms. *Polybius* ² accurately distinguishes these two Sorts of Causes, the one from the other, and both from the ³ *Beginning of the War*, or that which gave Occasion to the first Acts of Hostility, as was the Stag ⁴ wounded by *Ascanius*, whence arose the War between *Turnus* and *Æneas*. But tho' there be a manifest Difference between those three Things, yet the Terms made Use of to

1. What Causes of War may be termed justifiable.

I. (1) See *Chap. XXII.* of this Book, and *PUFENDORF, B. VIII. Chap. VI. § 3, 4.*

2 In the third Book of his History, where he calls the Motives of Advantage, which induce a Nation to engage in a War, *Αἰτίαι, Causes*, and the Reasons urged for justifying such a Step, *Προφάσεις, Pretexts*, both which, as he observes, precede the *Ἀρχή*, the *Beginning* of the War, that is, the actual Execution of the Design formed, or the first Acts of Hostility, *Cap. VI.* He then applies this to the War between the *Grecians* and *Persians*, and that made on the *Romans* by *Antiochus*. In the former two Causes were alledged, *viz.* the experienced Weakness of the Barbarians, on the memorable Retreat of the ten thousand, who passed through all *Asia*, while none dared venture to attack them; and King *Agésilas's* Expedition in *Asia*, which confirmed *Philip* of *Macedonia* in that

Opinion of the *Persians*, and put him on making Preparations for attacking them. But his *Pretext* was, that he designed to revenge the Injuries the *Grecians* had received from the *Persians*; and the War did not actually *begin* 'till his Son *Alexander* marched into *Asia*. The Causes given for the latter War, was the Resentment of the *Etolians*, who in Revenge for the Marks of Contempt given them by the *Romans*, engaged *Antiochus* to espouse their Interests. This was followed by a Pretext of freeing the *Grecians* from the Yoke of the *Romans*, against whom they animated all the Cities of *Greece*, and the War begun when *Antiochus* landed at *Demetrias* with a Fleet. All this may be read in the Original, *Cap. VI. VII.*

3 This is what *VIRGIL* calls *Exordia pugnae*, *Æneid. VII. 40.* GROTIVS.

4 *Æn. VII. 481, &c.*

express them are commonly confounded. Thus *Livy*, in the Speech which he puts in the Mouth of the *Rhodians*, calls *Beginnings* what we call *justifying Reasons*.⁵ You Romans,⁶ (say the Deputies) profess to believe that the Success of your Wars are happy, because they are just; and you glory not so much in the Victory that determines them, as in the⁷ BEGINNINGS, or because you do not undertake them without Reason. In which Sense *Ælian* styles them ἀρχὰς πολέμων; and *Diodorus Siculus*, treating of the War of the *Lacedemonians* with the *Ælians*, calls them ἀρχαίαι and ἀρχαί.

2. And these *justifying Reasons* are indeed our proper Subject here, where it will be no Ways impertinent to mention that of *Coriolanus* in *Dionysius*,⁸ Let it be your principal Care, that the Cause of your War be just and honest. And *Demosthenes*,⁹ As in the Building of Houses, Ships, &c. the Foundations ought to be firm and solid: So all our Actions and Enterprizes whatever, should be founded on the substantial Basis of Truth and Justice. Thus too *Dion Cassius*,¹⁰ We ought chiefly to look to the Justice of our Cause; for with that we have Room to conceive good Hopes of the Success of our Arms, and without it we can depend on nothing, even tho' at first Things should succeed to our Wishes. So also says *Tully*,¹¹ Those Wars are unjust that are undertaken without Cause. And in another Place¹² he blames *Crassus*, because¹³ he had passed the *Euphrates*, When there was not the least Grounds for a War.

3. What has been said touching the Justice of the Cause, ought to be observed in publick Wars, as well as in private. And *Seneca* with Reason complains of the Difference that is put in that respect,¹⁴ We punish, says he, Murders committed between private Persons: But do we act in like Manner with regard to Wars; and the Slaughter of whole Nations? It is a glorious Crime, Avarice and Cruelty reign there without Restraint. — Barbarities are authorised by the Decrees of the

⁵ Lib. XLV. Cap. XXII. Num. 5.

⁶ Certainly no Nation was so long remarkable for a careful Enquiry into the Justice of the Wars they undertook. *POLYBIUS*, as quoted by *SUIDAS* observes, that The Romans were particularly cautious never to attack their Neighbours, nor appear the Aggressors; but always let the World see they took Arms in their own Defence. Under the Word ἑμῶν. This *DION CASSIUS* shews in his beautiful Comparison of the Romans with *Philip of Macedon* and *Antiochus*. Excerpt. Peiresc. (p. 314, &c.) The same Historian elsewhere says, that The Antients (that is, the Romans) had nothing so much at Heart, as that the Wars in which they engaged were just. Excerpt. Legationi. And to come to no Resolution without mature Deliberation. Excerpt. Peiresc. (p. 341.) *GROTIUS*.

The Passage quoted from *SUIDAS* appears in the Place specified; but the Lexicographer doth not attribute it to *POLYBIUS*. The Comparison between the Romans and the two Princes here mentioned, as also that last produced in the Note before us, belong to *DIODORUS* of Sicily. The Reader may see the Places of the *Excerpta Peiresciana*, which I have marked exactly. I do not find in the *Excerpta Legationum*, the Passage here quoted by our Author; which induces me to believe, he has on this Occasion also taken one Writer for another. In Regard to the Thing itself, or the glorious Conduct of the Romans, see my 7th Note on § 27. of the Preliminary Discourse.

⁷ In the same Sense *ELIAN* uses the Words πολέμων αἱ ἀρχαί. Var. Hist. Lib. XII. Cap. LIII. *DIODORUS* of Sicily, treating of the War between the *Lacedemonians* and *Elæans*, calls them ἀρχαίαι καὶ ἀρχαί, Lib. XIV. (Cap. XVIII. p. 404. Edit. H. Steph.) and *PROCOPIUS*, ἀιζωμένα, Justifications. Gothic. Lib. III. Cap. XXXIII. See the Beginning of Chap. XXII. of this Book. The Emperor *JULIAN* makes Use of

the Word ἀρχαίαι. Orat. II. De Laudib. Constantii, (p. 95. Edit. Spanheim). *GROTIUS*.

⁸ Antiq. Rom. Lib. VIII. Cap. VIII. p. 468. Edit. Oxon. (486 Sylburg).

⁹ Olynthiac II. p. 7. Edit. Basil. 1572. The Orator there speaks of the military Expeditions of *Philip of Macedon*.

¹⁰ Lib. XLI. p. 189. Edit. H. Steph.

¹¹ Illa Bella injusta sunt, quæ sunt sine causa suscepta. Thus our Author quotes the Passage, and in his Margin refers us to the third Book of *CICERO*'s Treatise De Republica. But I do not find those Words in the Fragments of that illustrious Roman's lost Works; I see only a Thought which bears some Resemblance to it, preserved by *St. AUGUSTIN*, and taken from the same third Book, De Repub. A well regulated State enters into no War, but for making good its Engagements, or for its own Security. De Civit. Dei, Lib. XXII. Cap. VI.

¹² De finib. Bon. & Mal. Lib. III. Cap. XXII.

¹³ *APPIAN* of Alexandria says, that The Tribunes of the People (οἱ δῆμοαρχοί) opposed *Crassus*'s Motion for making War on the Parthians, from whom no Offence had been received. (De Bello Civil. Lib. II. p. 723. Edit. Toll. 438 Steph.) And *PLUTARCH* relates, that several expressed their Dislike of attacking Men who not only had given no Provocation, but were even in Alliance (with the Romans). Vit. M. Crass. p. 552. Tom. I. Edit. Wech. *GROTIUS*.

The Words last quoted are likewise in *APPIAN*, De Bell. Parth. p. 220. Edit. Toll. (135 H. Steph.) The other Passages of the same Author are to be explained by what he says in his History of the Parthian War; for *Ætius* was the only Man who dared oppose *Crassus*'s unjust and rash Designs, in which he was not supported by the other Tribunes, as *PLUTARCH* also observes.

¹⁴ Epist. XCV. p. 464. Edit. major Elzevir. 1672.

Senate, and Orders of the People; and what is prohibited in private ¹⁵ *Persons is enjoined by the State.* 'Tis true, those Wars that are commenced by publick Authority have certain Effects of Right, as the Sentences of Judges: Of which hereafter: But are therefore not less criminal, if begun without a *just Foundation*. Thus was *Alexander*, for unjustly invading the *Persians*, and other Nations, deservedly reproached by the *Scythians* as a Highwayman, in *Curtius* ¹⁶, and by *Seneca* ¹⁷ and *Lucan* ¹⁸ branded with the opprobrious Names of *Thief* and *Robber*; by the *Indian Magi* he was taxed ¹⁹ with *criminal Ambition*, and by a *Pirate* was told he was the ²⁰ *same* himself. So *Justin*, speaking of his Father *Philip*, said, ²¹ that two Kings of *Thrace* were dethroned by the *Fraud* and *Villany* of a *Thief*. To which may be referred that Passage of *St. Austin*, ²² *What are Kingdoms without Equity, but so many great Robberies?* So that of *Lactantius*, ²³ *That Conquerors being dazzled with a vain Glory, miscall their Vices by the Name of Virtue.*

4. There is no other reasonable Cause of making War, but an *Injury* received: So says *St. Austin*, ²⁴ *The Iniquity of one Side*, that is, the *Injury* received, *furnishes a just Occasion of War.* *Iniquitas* in this Place is taken for *Injuria*; as if we should use the *Greek Word* *ἀδίκημα* instead of *ἀδίκημα*. So the *Roman Herald*, ²⁵ *I declare, and call you to witness, says he, that that People has acted unjustly, and does not make us due and proper Satisfaction.*

II. 1. Now, as many Sources as there are of judicial Actions, so many Causes may there be of War. For where the Methods of Justice cease, War begins. Now in Law there are Actions for Injuries not yet done, or for those already committed. For the First, When Securities are demanded against a Person that has threatened an Injury, or for the indemnifying of ¹ a Loss that is apprehended; and other Things included in ² the Decrees of the superior Judge, which prohibited any Violence. For the Second, that Reparation may be made, or Punishment inflicted; two Sources of Obligation, which ³ *Plato*, and before him *Homer* ⁴, have judiciously

II. Justifiable Causes of War are, when for Defence; for the Recovery of one's Property, or one's Debt; or for the Punishment of an Offence committed.

¹⁵ The same Philosopher elsewhere says, that Some Enterprizes are esteemed glorious, which were looked on as Crimes, while the Execution of them could be hinder'd. *De Irâ. Lib. II. Cap. VIII.* See *SENECA* and *St. CYPRIAN*, as quoted *B. III. Chap. IV. § 5. GROTIUS.*

¹⁶ *Lib. VII. Cap. VIII. Num. 19.*

¹⁷ He (*Alexander*) was from his Infancy a Robber and Plunderer of Nations, &c. *De Benef. Lib. I. Cap. XIII.* *JUSTIN MARTYR* says, *The Power of those Princes, who prefer their own private Opinions to Truth, is just as great as that of Highwaymen in a Desert.* *Apol. II.* And *PHILO* the Jew calls such as are ambitious of Power, so many great Robbers, who disguise their Crimes under the specious and venerable Names of Sovereignty and Government. (*De Decal. p. 763. Edit. Paris.*) *GROTIUS.*

¹⁸ *Felix Prædo; a fortunate Highwayman, Lib. X. Ver. 21.*

¹⁹ You are a Man, like others, with this Difference only, that busying yourself with Things which do not concern you, and animated by a criminal Ambition, you have left your own Kingdom, and traversed so much Ground, to torment yourself, and others. *ARIAN. De Expedit. Alex. Lib. VII. Cap. I. Edit. Gronov.*

²⁰ *NONIUS MARCELLUS* has preserved us this Expression in a Passage, which he quotes from the third Book of *CICERO's* Treatise, *De Repub.* A Pirate being asked by *Alexander*, on what wicked Motive he infested the Sea; replied, on the same which puts you on infesting the whole World. In *Voce Myoporo, p. 534. Edit. Mercer.* See also *St. AUGUSTIN, De Civit. Dei, Lib. IV. Cap. IV.*

²¹ *Lib. VIII. Cap. III. Num. 15.*

²² *De Civit. Dei. Lib. IV. Cap. IV.*

²³ *Instit. Divin. Lib. I. Cap. XVIII. Num. 8, 9. Edit. Cellar.*

²⁴ *De Civit. Dei, Lib. IV.* The Words, as quoted by our Author, are, *Iniquitas partis adversæ justa bella ingerit.* They do not stand thus in the Book of *St. AUGUSTIN* here specified. But that Father, in Book XIX, says *Iniquitas enim partis adversæ justa bella ingerit gerenda Sapienti.* *Cap. VII.* The Mistake proceeds from our Author's copying *ALBERIC GENTILIS, De Jure Belli, Lib. I. Cap. VI. p. 49, &c.* confounding this Passage with another, quoted by that Lawyer from *B. IV. Chap. XV.* where the Word *Iniquitas* is used in the same Sense, and on the same Subject.

³⁵ *LIVY, Lib. I. Cap. XXXII. Num. 10.*

II. (1) *Damni infecti.* A Roman Law Expression, as are those which follow in this Division; where they are not, however, always used precisely in the Sense of the antient Lawyers, but accommodated to the general Notions of natural Law. See *DIGEST. Lib. XXXIX. Tit. II. De damno infecto, & de suggrundis & protectionibus, &c.*

² *Interdicta ne vis fiat;* or as the Roman Lawyers speak, *Prohibitoria, quibus [Prætor] vetat aliquid fieri; veluti vim, sine vitio possidenti, vel mortuum inferenti, quo ei jus erat inferendi.* That is, *Prohibitories, by which [the Pretor] forbids the doing of any Thing, as offering Violence to a just Possessor, or to a Man that brings a dead Body into a Place where he had a Right to bring it.* *Instit. Lib. IV. Cap. XV. De Interdictis, §. 1.*

³ The Author here quotes *Lib. IX. De Legib.* and undoubtedly had that Passage in View, where the Philosopher says, *Two Things are to be considered, the Injury, and the Damage; the latter is to be repaired by Laws, as far as is practicable. In Regard to the former, whether great or small, the Law is to direct, and oblige him never willingly to do such a Thing again.* *Pag. 862. Tom. II. Edit. H. Steph.*

⁴ *Penelope's Suitors made Ulysses an Offer of paying*

judiciously distinguished. As for Reparation, it belongs to what is or was properly *our own*, from whence ⁵ *real* and some ⁶ *personal* Actions do arise, or to what is properly *our due*, either by *Contract*, by *Default*, or by *Law*. To which also we may refer those Things which are said to be due by a ⁷ *Sort of Contract*, or a ⁸ *Sort of Default*: From which Heads all other *personal* Actions are derived. The *Punishment of the Injury* produces *Indictments* and ⁹ *publick Judgments*.

Baldus ad Leg.
2. Cod. de serv.
& aqua. n. 71.
Willb. Matt.
de Bello justo,
& licito.

2. Most Men assign *three* just Causes of War, *Defence*, the *Recovery* of what's *our own*, and *Punishment*: Which *three* you have in *Camillus's* Declaration against the *Gauls*. ¹⁰ *Omnia quæ defendi repetique & ulcisci fas est: Whatever may be defended, recovered, or revenged*; in which Account, if the Word *Recovered* be not taken in a greater Latitude than usually it is, it will not include the suing for that which is our *Due*; which suing was not omitted by *Plato*, when he said, ¹¹ *That War is not only undertaken when one is insulted, or plundered; but also when imposed upon, or treated in any fraudulent Manner*. To which agrees that of *Seneca*, ¹² *It is a very equitable Saying, and founded on the Law of Nations, Pay what you owe*. And it was a Part in the Form used by the *Roman Herald*, ¹³ *That they neither gave, paid, nor did, what they ought to have given, paid, and done*: And as *Salust* has it in his History, ¹⁴ *I demand my own by the Law of Nations*. *Saint Austin*, ¹⁵ when he said, that *Those Wars which are to revenge our Injuries, are generally*

paying handsomely for what they had eat and drank in his House, and giving him what Quantity of Gold and Silver he desired. To which *Ulysses* replied, that, *tho' they should restore him all his Father's Fortune and Effects, which were in their Hands, and even make a large Addition to them, he would not stop his Hand, 'till he had made them pay for all their Extravagancies*. *Odyss. Lib. XXII. v. 62, &c.* *CASSIODORE* observes, that *When we have waved our Right of punishing, we ought at least to suffer no Damage. Ut qui vindictam remisimus, damna minimè sentiamus*, *Lib. V. Epist. XXXV*. See below, *Chap. XVII. XX. GROTIUS*.

In the Passage here quoted from *HOMER*, *MADAM Dacier* explains those Words in the first Line, *παλῶντα πάλιν ἀποδοῖτε*, as if meant of the Patrimony of the Suitors themselves. But I leave the judicious to determine whether the Word *ἀποδοῖτε*, which signifies *to restore*, does not better agree with our Author's Explication, which is likewise that given by the Interpreters. Besides, the Sequel of the Discourse does not require, we should in this Place leave the natural Sense of the Terms.

⁵ *Vindicationes*, or *Actiones in rem*. See Note 4. on *PUFENDORF*, *B. IV. Chap. IX. § 8*.

⁶ Such are, as the learned *GRONOVIVS* observes, First, *Condictio causâ datâ*, or *ob causam datâ*, *causâ non sequentâ*. A personal Action for redemanding a Thing, which was given on a Condition which is not fulfilled. See *DIGEST. Lib. XII. Tit. IV. De Condictione causâ datâ, &c.* Secondly, *Condictio ob turpem vel injustam causam*, *ibid. Tit. V.* which is when any one redemands what was given for an unjust or dishonest Thing done by the Person who received it. Thirdly, *Condictio indebiti*, *ibid. Tit. VI.* A personal Action of what is *not due*; when a Man redemands what he has paid, thinking he owed it, tho' he really did not. Fourthly, *Condictio furtiva*. A personal and civil Action on the Account of Theft. *Lib. XIII. Tit. I.*

⁷ See *PUFENDORF*, *B. IV. Chap. XIII. § 5. Note 11. Second Edit.*

⁸ The *Roman* Lawyers by that Term understood certain Trespasses, in Consequence of which the Person is obliged to Indemnification, tho' it was not committed with a bad Intention, or even was committed by another, without the least Con-

currence of the Defendant. Thus a Judge was obliged to pay the full Value of the Loss of a Cause, to the Person whom he had condemned wrongfully, tho' he passed a wrong Sentence only through Ignorance or Inadvertency. When any Thing was thrown out of a Window, the Person to whom the Chamber belonged, or who lodged in it without paying Rent, was answerable for the Damage, tho' done without his Knowledge, by one of his Servants, or any other Person. A Master of a Ship, one who keeps a Publick House, or a Stable, were responsible for whatever was stolen from, or spoiled in, the Vessel, House, or Stable, tho' they themselves had no Share in the Theft or Damage. This was termed *Quasi Maleficium*, or *Quasi Delictum*; because there was a Sort of Fiction in such Cases, by Vertue of which a Person was judged culpable, tho' not really so. See *Instit. Lib. IV. Cap. V. De obligationibus, quæ quasi ex delicto nascuntur*.

⁹ This Term, in the *Roman* Law, signifies those Causes which concern certain Crimes, wherein the Publick is more particularly and directly interested; for which Reason every Citizen was allowed to appear in the Character of Accuser on such Occasions. Of this Sort were *Treason*, *Adultery*, *Murder*, *Parricide*, *Forgery*, publick or private *Violence*, *Peculation*, the Crime of those who monopolize and raise the Price of Goods, &c. *Instit. Lib. IV. Cap. XVIII. & ult. De publicis Judiciis*.

¹⁰ These Words of *Camillus* are not part of a Declaration of War, but of a Speech to his Soldiers, *He exhorted them, says the Historian, to retrieve the Glory of their Country by the Sword, not by Gold; fixing their Eyes on the Temples of their Gods, on their Wives, their Children, on their native Land disfigured with the Calamities of War, and every Thing that might be lawfully defended, redemanded, and punished, &c.* *LIVY, Lib. V. Cap. XLIX. Num. 3.*

¹¹ *Alcibiad. p. 109. Tom. II. Edit. H. Steph.*

¹² *De Benef. Lib. III. Cap. XIV.*

¹³ *LIVY, Lib. I. Cap. XXXII. Num. 11.*

¹⁴ This is spoken by a Tribune of the People. *Orat. Marci Licinii, Cap. X. Fragm. Lib. III. p. 50. Edit. Walf.*

¹⁵ The whole Sentence runs thus, *The usual Definition of just Wars, is, that they are undertaken for revenging Injuries; when any Nation or State, on which*

generally termed ¹⁶ *Just*: He took the Word *Revenge* in a general Sense, which implies all Removal, Cessation, Abolition, and Reparation of Injuries, which appears by the Sequel, where there is not so much an Enumeration of the Parts, as an Illustration by Examples. So, says he, *That Nation or City may be invaded, that shall neglect to punish the bad Actions of those that depend on it; or to restore what's unjustly taken from another.*

3. Conformable to this Principle of natural Equity did the *Indian King* (as *Diodorus* ¹⁷ informs us) accuse *Semiramis*, that *she had commenced War against him, without having received any Manner of Injury.* Thus the *Romans* argued ¹⁸ with the *Senones*, that they ought not to make War on a People that had given them no *Provocation.* *Aristotle* observes, ¹⁹ that *Men usually make War on those who first have done some Injury.* So *Curtius* ²⁰ speaking of the *Abian Scythians*, *They were reputed the most just of the Barbarians; they never took up Arms, but in their own Defence:* ²¹ *The first Cause therefore of a just War, is an Injury, which tho' not done, yet threatens our Persons or our Estates.*

III. We have before observed, that if a Man is assaulted in such a Manner, that his Life shall appear in inevitable Danger, he may not only make War upon, but very justly destroy the *Aggressor*; and from this Instance, ¹ which every one must allow us, it appears that such a *private War* may be *just and lawful.* It is to be observed, that this *Right of Self-Defence*, arises directly and immediately from the Care of our own Preservation, which *Nature* recommends to every one, and not from the Injustice or Crime of the *Aggressor*; for if the Person be no Ways to blame, as for Instance, a *Soldier who* ² *carries Arms with a good Intention;* or a Man that should *mistake me for another;* or one *distracted* ³, or *delirious*, (which may possibly happen) I don't therefore lose that *Right* that I have of *Self-Defence*: For it is sufficient that I am not obliged to suffer the Wrong that he threatens to do me, no more than if it was a Man's *Beast* that came to set upon me.

IV. 1. It is a Matter of Dispute, whether an innocent Person, ¹ who happens to be in our Way, and hinders that *Defence* or *Escape* that is absolutely necessary for the *Preservation* of our Lives, may be run through, or crushed in Pieces. There are some, even among *Divines*, who think it *lawful.* And certainly, if we have regard to *Nature* only, the Engagement we lye under to maintain Society, is of less Moment than the *Preservation* of *ourselves*: But the Law of *Charity*, especially the *Evangelical*, which has put our Neighbour upon ² a Level with our Selves, does not permit it.

2. It

which War is to be made, either has neglected the Punishment of its own Delinquents, or the Restitution of what was taken away unjustly, Lib. VI. Quæst. X. on *Joshua*. This Passage is quoted in the Canon Law, Caus. XXIII. Quæst. II. *Quod Bellum sit justum, &c.* Can. 2.

16 *SERVIVS* has observed, that when the *Romans* designed to make War, the Chief of the *Heralds* appeared on the Frontiers of the Enemy, and, after some previous Solemnities, declared with a loud Voice, that he proclaimed War for certain Reasons; either because they had injured the Allies, (of the Roman People) refused to restore the Cattle they had seized, or give up the Offenders. On *Æneid*. Lib. IX. v. 53. *GROTIUS*.

17 That Prince being informed, that the Queen was marching toward him, sent an Embassy with this Accusation. Lib. II. p. 74. Edit. H. Steph. Cap. XVIII.

18 *LIVY*, Lib. V. Cap. XXXV. Num. 5.

19 *Analytic. post.* Lib. II. Cap. XI. p. 171. Ed. *Parif.*

20 Lib. VII. Cap. VI. Num. 11.

21 *PLUTARCH* says, that *Hercules*, by defending himself, conquered all whom he engaged. In *Vit. Nicæ*, (p. 539. Tom. I. Edit. *Wech.*) And *JOSEPHUS*, *That such as begin the Attack unjustly, on Persons not aware of the Design, force the injured*

to take up Arms in their own Defence. *Antiq. Jud. Lib. XVII. (Cap. XI. p. 604. Edit. Lips.) GROTIUS.*

III. (1) In Chap. II. § 3. of the foregoing Book. See *PUFENDORF*, B. II. Chap. V.

2 *Bonâ fide militet.* The Author means those who serve their Sovereign in a War which they sincerely think just, tho' it is not really so. See Chap. XXVI. of this Book. *PUFENDORF*, B. II. Chap. V. § 5. misunderstands our Author, as if he had in View the Case of a Soldier, who takes his Comrade for one of the contrary Party; which Case is specified in the Words immediately following, *aut alium me putet quàm sim.* The learned *GRONOVIVS* also gives the Words in Question a wrong Explanation, and supposes them spoken of every Soldier, lifted in Form.

3 We may here add the Example of such as walk in their Sleep. See my first Note on *PUFENDORF*, B. I. Chap. V. § 11.

IV. (1) See *PUFENDORF*, B. II. Chap. VI. § 4.

2 The Laws of Charity, however understood, require us to love our Neighbour as ourselves, not more than ourselves, which we should do in the Case before us, and others of the like Nature. See our Author, B. I. Ch. III. § 3. All other Things being equal, the Care of our own Preservation is certainly

III. *War in Defence of Life, lawful.* Sylvest. verbo *Bellum*, p. 1. n. 3. & p. 2.

Bartol. ad Leg. 3. Dig. de just. & jure. Bald. in l. 1. Cod. unde vi. Bann. 2. 2. Q. 10. Art 10. Dub. ult. Soto, l. 4. Disp. 5. Art. 10. Val. 2. 2. Disp. 5. Q. 10. p. 7.

IV. *But only against the Aggressor.* Card. Q. 33. l. 1. Pet. Navar. l. 2. c. 3. n. 147 Cajetan. 2. 2. Art. 67. Qu. 2.

Second. second.
Qu. 64. Art. 1.

2. It was well observed of *Thomas Aquinas*, if apprehended rightly, that in our own Defence we do not *purposely* kill another; not but that it may be sometimes lawful, if all other Means prove ineffectual, to do that *purposely* by which the Aggressor may die; but we take this Course, as the only Means left to preserve *our selves*, and not as the *principal* End proposed, just as in the Judgment of Criminals condemned to Death: For he that is actually attacked, ought even then to chuse rather to do any Thing else, that may stop the Fury of the Aggressor, or disable him, than to secure himself by killing him.

V. In a present
and certain
Danger, but
not in such a
one as is only
Matter of
Opinion.

V. 1. But here 'tis necessary that the ¹ Danger be *present*, and as it were, contained in a *Point*. I grant, if a Man takes Arms, and his Intentions are visibly to destroy another, the other may very lawfully prevent his Intentions; for as well in *moral* as in *natural* Things, there is no Point but what admits of some Latitude: But they are highly mistaken, and deceive others, who admit that any Sort of Fear gives a Right to take away the Life of another. 'Tis very justly observed by *Cicero*, ² that one frequently commits Injustice, by attempting to hurt another, in Order to avoid the Evil which he apprehends from him. So *Clearchus* in *Xenophon*, ³ καὶ γὰρ εἶδα, &c. I have known many People moved either by some false Report, or by Suspicion, who for Fear of others, and to be before-hand with them, have done most horrible Injuries to those, who never would have offered, nor ever designed to offer them any Hurt in the World. So *Cato*, in his Oration for the *Rhodians*, ⁴ Shall we ourselves be first guilty of that which we alledge they intended to do? It was excellently said by *Aulus Gellius*, ⁵ That a Gladiator's Condition is such, that he must either kill or be killed; but human Life is not under such unhappy Circumstances, that we are necessitated to do an Injury to prevent the receiving one. And as *Tully* in another Place no less admirably expresses it, ⁶ Whoever maintained, or to whom can it be allowed without exposing the Life of every one to the greatest Dangers, that a Man may lawfully destroy another, through a Pretence of Fear, lest the other should one Day kill him? To which this Passage of *Euripides* may be applied; ⁷

Ἐπὶ γὰρ σ' ἐμελλεν, &c.

Your Husband, say you, would have killed you: You should have staid till he actually attempted it. So *Thucydides*, ⁸ What is to come is yet uncertain; nor should any one be so far transported with the Apprehensions of what may happen, as to engage in a declared Enmity, accompanied with present Acts of Hostility. The same Author, where he eloquently describes the Evils that Faction had brought upon the States of Greece, ⁹ blames those People, because It was thought commendable in a Man to

certainly allowed to take Place of the Care of another Man's. The Observation of *THOMAS AQUINAS*, which our Author alledges, and approves of afterward, ought with much more Reason to be applied in this Case.

V. (1) See a good Use of this Distinction in *AGATHIAS*, *Lib. IV. Cap. I. II.* in relation to the Murder of *Gubazes*. *Phrynichus*, General of the Athenians, said he ought not to be blamed, if, finding his Life in Danger, he did all in his Power to avoid being destroyed by his Enemies. *THUCYDIDES*, *Lib. VIII. (Cap. L. Edit. Oxon.)* *GROTIUS*.

That General's Case was not one of those mentioned by our Author; as appears from consulting the Historian, in the Place here quoted. In regard to this whole Paragraph, consult *PUFENDORF*, *B. II. Chap. V. § 6, 7, 8.* where he not only explains the Matter more at large, but likewise carefully distinguishes, what may be done in the State of Nature from what is allowed in Civil Society; a Distinction of great Importance, which our Author doth not seem to have much considered.

2 *De Offic. Lib. I. Cap. VII.*

3 *De Expedit. Cyri, Lib. II. Cap. V. § 2. Edit. Oxon.*

4 *AULUS GELLIUS, Noct. Att. Lib. VII. Cap. III. p. 382. Edit. Jac. Gronov.*

5 *Idem. ibid. p. 383.*

6 *Orat. pro Tullio, apud QUINTILIAN. Instit. Orat. Lib. V. Cap. XIII. p. 315, 316. Edit. Obrecht.*

7 Your Husband. It ought to have been rendered *My Husband*; for it is *Merope*, Sister-in-Law to *Polyphontes*, who speaks thus to that Prince, guilty of her Husband's Murder. Our Author, however, has committed the same Mistake, in his *Excerpta ex Trag. & Com. Græcis*, published since this Work, p. 390. The two Verses may be seen in *AULUS GELLIUS*, as more than once quoted; and Mr. *BARNES* places them among the Fragments of a lost Tragedy, entitled *Cresiphontes*.

8 The Historian's Words are these, *What may happen in regard to the War (which the Corinthians apprehending, exhort us to begin the Attack) is as yet uncertain, &c. Lib. I. Cap. XLII. p. 26. Edit. Oxon.* Where our Author, as is evident, makes a general Maxim of what was said on Occasion of the Fear of a particular War.

9 *Lib. III. § 82. p. 195.*

injure another first, for Fear of being injured himself. A very shameful Thing, as ¹⁰ Livia calls it in *Dion Cassius*. Livy says ¹¹, that By taking Precautions against what we apprehend from another, we give Occasion first to apprehend something from us ¹², and we do to others the Injury we would repel, as if there were a Necessity either of doing or receiving Wrong. One may apply to such as act in that Manner, that of *Vibius Crispus*, so much celebrated by *Quintilian*, ¹³ Who gave you an Authority thus to fear?

2. Tho' we were certainly informed, that a Person has conspired against us, or designs to lay an Ambush for us, or is preparing to poison us, to bring a false Accusation against us, to suborn false Witnesses, and to corrupt the Judges: Yet whilst we have nothing to fear for the present, on the Part of that Person, I maintain that we cannot lawfully kill him; if either such a Danger can be possibly avoided any other Way, or even if it does not then sufficiently appear that it may not be avoided. For Time gives us frequent Opportunities of Remedy, and there may many Things happen, as the Proverb has it, ¹⁴ betwixt the Cup and the Lip. There are however both Divines and Lawyers, who are a little more indulgent in this Affair: But the other Opinion, which is certainly the safer and better, has also its Partisans.

VI. But what shall we then say of the Danger of 'losing a Limb, or a Member? When a Member, especially if one of the principal, is of the highest Consequence, and almost equal to Life itself; and 'tis besides doubtful whether we can survive the Loss; I am of Opinion, if there be no Possibility of avoiding the Misfortune, the Aggressor may be lawfully killed.

VII. That the same may be done on Account of 'Chastity, can scarce be here any Matter of Dispute; when not only the ² Opinion of the World, but even the ³ Law of GOD, has made it equivalent to Life itself. So Paulus the Lawyer,

¹⁰ In a Discourse, where she gives Augustus Advice for his Conduct, *Lib. LV. p. 640. Edit. H. Steph.*

¹¹ *Lib. III. Cap. LXV. Num. 11.*

¹² Thus Caesar, having made himself Master of the Commonwealth, declared he was forced to take that Step by the Fear he entertained of his Enemies. We have a beautiful Passage on this Occasion, in *APPIAN* of *Alexandria*, *Bell. Civil. Lib. II. GROTIUS.*

I do not know where this fine Passage occurs. I do not find it in any Part of the Book quoted by our Author, where the Historian speaks of Caesar's Transactions 'till his Death. I imagine our Author had his Eye on what Caesar said in a Letter to the Senate, before he engaged in the Civil War. He there promised to quit the Command of his Army, if Pompey would do the same; and added, that it would be unjust to force him to that Act while Pompey appeared in Arms; because thus he (Caesar) was in Danger of being delivered into the Hands of his Enemies. This may be seen in *DION CASSIUS*, at the Beginning of *Book XLI.* *APPIAN* takes no Notice of this Fear, with which Caesar disguised his Ambition; on the contrary, he makes him say, with a threatening Air, that if Pompey pretended to continue at the Head of his Forces, he would do the same, and march to Rome immediately, to revenge the Injuries done to his Country, and those he himself had received. *p. 448. Edit. H. Steph.* So that it is not improbable our Author, trusting his Memory in quoting, has confounded these two Historians. See also an Expression of Caesar, after the Battle of *Pharsalia*, as related by *ASINIUS POLLIO*, on whose Authority *SUETONIUS*, (in *Jul. Cæs. Cap. XXX.*) and *PLUTARCH*, (*Vit. Cæs. p. 730.*) have inserted it in their Writings.

¹³ This Question was put to one who appeared armed in the Forum, and pretended he did it out

of Fear. *Instit. Orat. Lib. VIII. Cap. V. p. 723. Edit. Burman.*

¹⁴ *Inter os & offam.* This old Proverb is set down by *A. GELLIUS*, on which he quotes the Words of one of *CATO's* Speeches, *Sæpe audiivi, inter os & offam multa intervenire posse.* *Noct. Attic. Lib. XIII. Cap. XVII.* See also *ERASMUS*, in his Adages.

VI. (1) Compare this Paragraph with *PUFENDORF, B. II. Chap. V. § 10.*

VII. (1) See the Place last quoted from *PUFENDORF, § 11.* and what I have said in Note 1, on the Abridgment of *The Duties of a Man and a Citizen. B. I. Chap. V. § 22.* in the third and fourth Edition.

2 *SENECA* places Liberty, Chastity, and a sound Understanding, after Life, without which three valuable Things a Man may indeed live, but so as that Death would be preferable. *De Benefic. Lib. I. Cap. XI.* *St. AUGUSTIN* observes, that *The Law allows the Killing of a Ravisher, either before or after the Action, in the same Manner as it permits a Man to kill a Highwayman, who attempts our Life.* *De Lib. Arbitr. Lib. I. (Cap. V.) GROTIUS.*

3 It hath been doubted, whether our Author could find any Passage in Scripture, from which he might infer what he advances here without quoting any Text. It appears from his Notes on the Old Testament, that he had the following Law in View, *If a Man find a betrothed Damsel in the Field, and force her, and lie with her, then the Man only who lay with her shall die; but unto the Damsel thou shalt do nothing; there is in the Damsel no Sin worthy of Death; for as when a Man riseth against his Neighbour and slayeth him, even so is this Matter.* *Deut. xxii. 25, 26.* It must, however, be acknowledged, that it cannot be directly concluded from those Words, that Chastity and Life are of the same Value. For the Legisla-

Bann. q. 64. Art. 7. Dub. 4. Bald. in Leg. 17. Cod. De Liberali Causa, & in l. 1. Cod. unde vi, Less. 1. 2. c. 9. Dub. 8. Soto, l. 5. qu. 1. art. 8.

VI. For the Preservation of a Limb or a Member. Card. in Clem. 1. 5. tit. 4. De Homicid. &c. leg. si furiosus, &c. Covarr. lib. part 4. § 1. n. 2. Sylvest. in Verbo Homicidium, 3. q. 4.

VII. Especially in Defence of Chastity. Sylvest. in Verbo Homicidium, c. 3. q. 4.

Pro Milon. c. 4.
Declamat.
Tribunus Ma-
rianus.
Vit. Mar. p.
413. Ed. Wccb.

yer, ⁴ that to defend ones *Chastity*, tho' with the *Death* of him who would violate it, is but an Act of *Justice*. We have an Example of this in *Cicero*, *Quintilian*, and *Plutarch*, in the Person of one of *Marius's* Tribunes, who was killed by a Soldier. Among Women ⁵ who have vindicated their Chastity, *Heliodorus* records that Act of *Heraclea*, which he calls *ἀμύνης νόμον*, &c. ⁶ *A just Defence of her injured Honour*.

VIII. Self-De-
fence may some-
times be omit-
ted.
Soto ubi supra,
Sylvest. de
verbo Bellum,
p. 2. n. 2.

VIII. Tho' some agree with me in what I observed before, ¹ that tho' I may lawfully kill him who attempts to take away my Life, 'tis more commendable to die one's self than to kill another: Yet they will only grant it upon this Condition, that we ² except Persons that are useful to many others. But it seems to me not very safe to maintain, that all those whose Lives are of *Advantage* to others, are under such an Obligation as that, so contrary ³ to Patience; and therefore I think this ought to be *limited* to those only whose particular *Office* and *Duty* it is to defend others, such as those who are engaged to guard Travellers; or the Governors of the State, to whom we may apply that of *Lucan*, ⁴ *Since the Life and Safety of so many Nations depend on your Preservation, and so large a World has established you for their Head; it would be Cruelty in you to be willing to die*.

IX. Self-De-
fence against a
Person, very
useful to the
Publick. A
Crime from the
Law of Cha-
rity.
Soto ubi supra.

IX. 1. It may happen, on the contrary, that because the *Aggressor's* Life may be serviceable to many, it would be *criminal* to take it from him; and this not only by the *Divine* Law, both of the *Old* and *New Testament*, of which we have spoke before, when we shewed that the *King's* Person is *sacred* and *inviolable*, but also by the very Law of *Nature*. For *natural Right*, considered as a *Law*, ¹ does not only respect what we call *expletive* Justice, but comprehends the Acts of other Virtues, as of *Temperance*, *Fortitude*, and *Prudence*; so that in certain Circumstances they are not only *honest*, but of an *indispensible* Obligation. Besides that, as to what we were now speaking of, ² *Charity* does also oblige us.

Lib. I. Contr.
illust. 18.

2. Neither am I ever the less of this Opinion, on Account of what *Vasquez* asserts, that *A Prince who attacks the Life of an innocent Person, is ipso facto no more a Prince*. A Proposition not only absurd, but even very dangerous too. For as the *Right of Property*, so the *Right of Sovereignty* is not lost ³ by an *evil Action*, unless

tor means only, that in the Case before us, a *Damself* is no more culpable than a *Man* who is killed by *Highwaymen*; for she is supposed to have had no more Power to defend herself against the *Brutality* of the *Ravisher*, than a *Person* murdered had against the *Ruffians*. *Mr. LE CLERC* gives this Explication in his *Paraphrase*.

⁴ He expresses himself in the following Manner, *He who kills a Robber attempting his Life, or a Ravisher, is not to be punished. For the one defends his Life, and the other his Chastity, by an Action in which the publick Good is concerned, (publico facinore): Recept. Sent. Lib. V. Tit. XXIII. Ad Leg. Cornel. de Sicariis, &c. § 3.*

⁵ We read also, that *Mars*, who had killed a Son of *Neptune*, for attempting the Chastity of his Daughter, was cleared in the *Areopagus*, by the Judgment of twelve Gods. *APOLLODORÉ Bibliotheca, Lib. III. (Cap. XIII. § 2. Edit. Gall.)* Add to this a remarkable Story in *GREGORY of Tours, Lib. IX. GROTIVS.*

6. Book I.

VIII: (1) The Author has no where said this, at least formally and directly. It may indeed be barely inferred from what he insinuates in *Chap. II. of the first Book, § 9. and Chap. III. § 3.*

2 That is, they are of Opinion that in such a Case a *Man* is not allowed to let himself be killed; and, according to their Way of Reasoning, *Patience* is so far from being commendable, that it is really vicious, on Account of the Injury done to those to whom his Life was useful.

3 But if the Obligation to *Patience* doth not extend thus far, as our Author acknowledges, why should not a *Man* be bound to preserve a Life that

is useful to several others, and what should oblige him to sacrifice their Interest, as well as his own, to that of a Villain? In Reality, the Care of defending one's Life is a Thing to which we are obliged, not a bare Permission. See my 5th Note on *PUFENDORF, B. II. Chap. V. § 2. Second Edition*; and what that Author says in § 14. of the same Chapter.

⁴ *Pharsal. (Lib. V. ver. 685, &c.)* Thus *Craterus* remonstrates to *Alexander the Great*, that, while he exposed himself to such evident Dangers, he forgot that he drew after him the Ruin of so many Souls. *QUINTUS CURTIUS, Lib. IX. (Cap. VI. Num. 8). GROTIVS.*

IX. (1) See *B. I. Chap. I. § 9.*

2 I should think that *Charity*, that is, the Interest of others, and of a great Number, should not indispensibly be allowed the Preference to *Self-Preservation*, so strongly recommended, and in some Manner prescribed by Nature, unless such Interest is in itself very considerable, and certain. Now, on a careful Enquiry into the Cases which may happen in the Question before us, I am confident it will appear, that the Advantage which may accrue to another, from a *Man's* submitting to be killed, is very far from being considerable and certain enough to oblige us to sacrifice our own Life to it. Besides, in such Sort of Cases, where a *Man* is in Danger of being killed, he is so affrighted, that he is not capable of enquiring whether it is advantageous to the Publick, or not, to permit himself to be killed, rather than kill the Aggressor.

3 All that the Nature of *Sovereignty*, well understood, requires, is, that it should not be forfeited for all Manner of Faults, or for every Abuse of Power:

unless it be decreed by some particular Law; but what *Law* was there ever enacted, that *Kings* should be *dethroned* for an Injury done to a *private* Person? Surely there is no such Law yet in Being; nor I believe ever will, for what a Confusion would it make? But what *Vasquez* lays down as the Foundation for this, and other Conclusions of the like Nature, is, that *All Governments regard the Good of the People, and not that of the Prince*; which, were it *universally* true, would be nothing to the Purpose. For a Thing is not destroyed, ⁴ as soon as the Advantage of it ceases in some Respect. What he further urges, that every Man does only for his own Sake with well to the *Commonwealth*, and that therefore he ought to prefer his own Good to that of the *Publick*, is likewise a weak Argument. 'Tis true every Man for his own Sake wishes well to the *Commonwealth*, but not for his own Sake only, it is also ⁵ for the Sake of others.

3. The most judicious Philosophers have with Reason rejected the Opinion ⁶ of those who think that Friendship is only founded on Indigence; for it is evident we are prompted to it by natural Inclination: And to prefer the Advantage of many Persons to my own single Interest, is what *Charity* often advises, sometimes commands. So *Seneca*, ⁷ 'Tis no Wonder that Kings and Princes, and in general all the Governors of the State, whatever Title they bear, ⁸ should be loved by every one, and even more than private Persons, to whom we are nearly related; for if 'tis agreed by all wise Men, that the publick Good should rather be consulted than any private Interest whatever; it follows, that nothing should be dearer to us than the Person of him on whom the Welfare of All depends. *St. Ambrose* says, ⁹ that Every one finds more Pleasure in saving his Country, than in extricating himself out of Difficulties. So the same *Seneca*; ¹⁰ *Callistratus* and *Rutilius*, the former an Athenian and the latter a Roman, refused to be recalled from Exile, because it was better that two Persons should suffer unjustly, than that their Return should expose the State to any Danger.

X. 1. There are some of Opinion, that if a Man is in Danger of receiving a Box on the Ear, or any Injury of the like Nature, he has a Right of revenging so small a Crime, even by the Death of him that attempts it. ¹ If Regard be here only had to *expletive* Justice, I don't deny it; for tho' there be no Manner of Proportion betwixt Death, and so slight an Injury; yet, whoever shall attempt to wrong me, gives me from that Time an unlimited ² Right, that is, a certain Moral

X. That it is not lawful for Christians to murder a Man for a Box on the Ear, or such other slight Injury, or to avoid running away. Soto, ubi supra.

Power. But there are some Acts of Injustice directly contrary to the End for which Sovereignty is established; and consequently, whenever the Sovereign wilfully and deliberately proceeds to such Excesses, he forfeits his Right, at least in Regard to the Persons injured. Of this Sort is the Case of a Prince, who, without just Cause, attempts the Life of one whom he ought to protect and defend against all such as shall attack him in the same Manner. See my first Note on Book I. Chap. IV. § 2.

4. True: But when this Advantage fails considerably, and such a Prejudice arises as is evidently contrary to the End for which a Thing was established, who can doubt but that then the Thing itself is destroyed.

5. It is certain that a Regard is to be had for the Interest of others, and especially for that of a considerable Number; and that we are sometimes obliged to sacrifice our own Interest to it. But the Question is, Whether we have sufficient Grounds for believing that a Prince, who is guilty of the Extravagance under Consideration, is useful to Society? I therefore still adhere to what I have said in my first Note on PUFENDORF, B. II. Chap. V. § 5. of the second Edition.

6. See *SENECA*, *De Benefic.* Lib. I. Cap. I. and Lib. IV. Cap. XVI. where he confutes this pernicious Opinion. *GROTIUS*.

It would have been more proper to refer the Reader to that Philosopher's ninth Epistle, where

he treats of the Subject more directly, and more at large. See also *CICERO*, *De Amicitia*, Cap. IX. and XIV.

7. *De Clementia*, Lib. I. Cap. IV.

8. According to *PLUTARCH*, The principal Act of Virtue is to preserve him, who preserves every Thing else. *Vit. Pelopid.* (p. 278. Tom. I. Edit. Wech.) *CASSIODORUS*, (or rather *PETER* of Blois) says, that If the Hand, by the Assistance of the Eyes, perceives a Sword ready to fall on any other Part of the Body, it receives the Sword, without regarding its own Danger, and shews more Concern for another Limb than for itself: — Consequently, those who save their Master's Life, at the Expence of their own, do well, if in this Case they consider the Safety of their own Souls, more than the Deliverance of another Man's Body. For as Conscience tells them they ought to be faithful to their Master, it seems reasonable that they should prefer his Life to their own. From all which he concludes, that A Man may safely expose his Body to Death, out of a Principle of Charity, especially for the Preservation of a great Number. *GROTIUS*.

9. *De Offic.* Lib. III. Cap. III.

10. *De Benef.* Lib. VI. Cap. XXXVII.

X. (1) On this Question see PUFENDORF, B. II. Chap. V. § 12. and Mr. VANDER MUELEN, on this Paragraph of our Author.

2. *APOLLODORUS* tells us, that *Linus*, the Brother of *Orpheus*, coming to Thebes, and being made free of that City, was killed by *Hercules*, whom he had

Navarr. c. 15.
n. 3. Sylvest. in
Verbo Homi-
cidium, l. q. 5.
Lud. Lopez, c.
62.
Ubi supra.

ral Power against him *in infinitum*; upon a Supposition, that I am not otherwise capable of diverting such an Injury from my own Person. Neither does Charity of itself lay us under an indispensable Obligation of sparing the Offender in that Case; but the Gospel does expressly forbid this, for CHRIST commanded his Apostles rather to receive a Blow than to hurt their Adversary. How much more then does he forbid the Killing of a Man to avoid the Blow? By this Example we are admonished to beware of what Covarruvias advances on this Topick, that *The Ideas of natural Right being within the Extent of human Knowledge, it cannot be said, that any Thing is permitted by natural Reason, which is not at the same Time permitted before GOD, who is Nature itself.* ³ For GOD, who is so the Author of Nature, that he can, whenever he pleases, act above Nature, has a Right also of prescribing Laws to us, even in those Things which are in their own Nature free and indifferent. How much more then can he command us to do that which is naturally honest, tho' not obligatory?

Navarr. c. 15.
Henr. del Reg.
c. 11. Viñor.
de jure belli,
p. 5.

2. It is therefore very surprising, that when GOD has so manifestly declared his Will in the Gospel, we should find Divines, nay Christian Divines, who maintain, that 'tis not only lawful to kill a Man, in Order to avoid a Blow, but even after it is received, if he that gave it endeavours to escape: For then, say they, one ought to recover one's Honour: Which to me seems as well contrary to Reason as to Piety. For Honour being the Opinion of some Excellency or Merit, he that can put up such an Affront, expresses a particular Excellency of Temper; and therefore, rather adds to his Honour than detracts from it. But if some Persons, through a false Notion of Honour, call this Virtue of Patience by a wrong Name, and so turn it into Ridicule, it is not material: For those false Judgments do not alter the Nature of the Thing, nor diminish its Value; nor did the primitive Christians only think so, but even the Philosophers, who said, that *It argued a Meanness of Soul in Man, not to be able to bear an Affront.* As we have elsewhere observed.

Soto, art. 8. ubi
sup. q. 5. Doct.
in Leg. 3. Dig.
de Just. & Ju-
re, & in Leg. 1.
Cod. Unde vi.
Vasquez ubi
sup. c. 18. n. 13.
14.
Sylvest. in Ver-
bo Bellum.
p. 2. n. 4.
In Addit. ad
Alex. Conf.
119.

3. From hence it appears too, that we ought not to approve what many Ca-
suits assert, that even by the Divine Law, a Man in his own Defence may kill
another; (indeed if we consider the Law of Nature only, 'tis beyond all Manner
of Dispute) nay, tho' at the same Time he may escape from him without any
Danger: Because, say they, to turn one's Back is mean and reproachful, and be-
low a Gentleman: Whereas in Reality 'tis no Ways a Disgrace, but only a vain
Imagination, which ought to be despised by all that have a Regard to Virtue and
Wisdom; in which Matter I am not a little pleased, that amongst Lawyers I have
the excellent Charles Du Moulin of my Sentiments. Now what has been said of
a Box on the Ear, and making one's Escape, may be equally applied to all other
Cases where Man's true Honour is not injured. But what if a Man shall report
any Thing of us, by which that Reputation we have with good Men, may pos-
sibly suffer? There are those who assert, that a Man may lawfully kill such Per-
sons too; but this is not only extreme false, but highly repugnant to the Laws of
Nature; for such an Action is no proper Means of preserving one's Character.

Pet. Navarr. l.
11. c. 3. n. 376.

XI. Murder
in Defence of
our Goods per-
mitted by the
Law of Na-
ture.

XI. We now proceed to those Injuries that affect our Estates or Possessions¹; and here, if we have Regard to *expletive* Justice, I must own, that for the Pre-
servation of our Goods 'tis lawful, if there's a Necessity for it, to kill him that
would seize upon them. For the Inequality betwixt the Goods of one Man and
the Life of another is made up, by the Difference betwixt the favourable Cause
of the innocent Person, and the odious Cause of the Robber, as was before ob-
served: From whence it follows, that if we have Regard only to this Right, I
may shoot that Man who is making off with my Effects, if there's no other Me-
thod of my recovering them. So Demosthenes in his Oration against Aristocra-

had struck; and that Hercules being tried for Mur-
der, pleaded the Law of Rhadamanthus, which ac-
quitted such as defend themselves against an unjust
Aggressor. Biblioth. Lib. II. (Cap. IV. § 9. Edit.
Paris Galei.) GROTIUS.

³ ZIEGLER observes, that that Spanish Lawyer
doth not maintain what our Author charges him
with, and that he reasons on a Supposition that

there was no positive Divine Law in this Case,
which deprives us of the Right which each Man
hath by Nature.

XI. (1) See PUFENDORF, B. I. Chap. V. § 16.
and what I have said on the Abridgment of *The
Duties of a Man and a Citizen.* B. I. Chap. V.
§ 23. third and fourth Edition.

tes: ² Is it not, says he, highly unjust, and contrary not only to written Laws, but also to that which is common to all Mankind, that I shall not be suffered to use Force against him that robs me, and so commits an Act of Hostility against me? Nor does Charity, by Way of Precept, (if we consider it abstractedly from all Human and Divine Laws) disallow of this; unless in those Things that are in themselves too inconsiderable to be regarded; which Exception some Authors do very justly subjoin.

XII. 1. But let us see in what Sense the ¹ *Mosaick Law* ² is to be understood, to which agrees that ³ old Law of *Solon*, which *Demosthenes* urges against *Timocrates*, from whence ⁴ the Law of the *Twelve Tables* was taken, and ⁵ *Plato's* Maxim, in his ninth *de Leg.* all which consent in this, that they make a Distinction betwixt a Night and a Day Thief. But it is not agreed upon what Reason that Difference is founded. There is some who think it only regards this, that by Night it cannot be discovered, whether the Person who comes in upon you be a Thief or an *Assassin*, and therefore he ought to be treated as the latter; and others think that it turns upon this, that as the Thief cannot be known in the Obscurity of the Night, one sees no other Way of recovering one's Effects; but to me it seems, that those Legislators had neither the one nor the other of these Reasons in View. They rather intended to shew, that ⁶ the Life of no Man was to be taken away merely on the Account of one's Goods, which would certainly happen; if, for Instance, I should shoot a Thief ⁷ who is running away, to recover by his Death what he had stolen from me: But that if I am any Ways in Danger of my own Life, 'tis lawful then to secure myself, tho' it be at the other's Peril. Neither is it any Objection to me, that I brought myself into this Extremity, by endeavouring either to keep or recover my own, or to apprehend the Thief; for in all this there's nothing can be laid to my Charge, who am only concerned in a lawful Act. Neither do I any Injustice to any Man, since I only make use of my own Right.

2. The Difference therefore betwixt a Night and a Day Thief, consists in this, that in the Night it is not an easy Matter to have Witnesses; and therefore, if the Thief should be found dead, we readily give Credit to a Person who declares that he slew him in his own Defence, since he was armed with some dangerous Instrument. For this the *Hebrew Law* supposes, where it treats of a Thief taken,

² *Orat. adversus Aristocrat.* p. 436. Edit. Basil. 1572.

XII. (1) This is examined both in the Text, and Notes on PUFENDORF, B. II. Chap. V. § 17, 18.

² See B. I. Chap. III. § 2.

³ This is quoted in the Place last referred to.

⁴ [See the same Place]. To these may be added a Law of the *Wifigoths*, Lib. VII. Tit. II. Cap. XVI. and the Capitulary of *Charlemagne*, Lib. V. Cap. CXCI. One of the Laws of the *Lombards* allows a Man to kill a Person who enters his Court-Yard in the Night, except he submits to be bound. GROTIUS.

⁵ If a Thief enters a House by Night, with an Intent to steal, and he be taken and killed, let the Slayer be reckoned innocent. De Legib. Lib. IX. p. 874. Tom. II. Edit. H. Steph.

⁶ This is not the Spirit of those Laws. On the contrary, they evidently suppose, that the Defence of a Man's Goods, when there is no other Way for preserving them, authorizes him to kill the Thief, as fully as the Defence of Life. As to the Thought itself, that we ought not to kill any one precisely and directly for the Preservation of our Goods, it can be allowed only in this Sense; that he who finds a Thief in his House, ought not directly and principally to propose killing him, but only making Use of that Right which every Man hath to preserve his own Property, on default of all other Means. Now this will hold good in Relation to an Aggressor, who attempts our Life, as has been observed, § 4. Our Author is not entirely

consistent with himself on this Subject. He will not allow a Man to kill a flying Thief, for the Recovery of his Goods, because that would be doing it directly and precisely, for the Preservation of his Property; and yet in the following Period, he says one may kill him, either with a View of taking from him what he has stolen, or securing the Thief himself. In which Case the Thief is supposed to fly, and consequently, that the Life of the Person robbed is not in Danger. Besides, PUFENDORF has very well observed, that, if it is not allowable to kill any one precisely and directly for the Preservation of the Goods which he attempts to steal, or actually carries off, neither will it be allowable to defend or endeavour the Recovery of our Goods, so far as to put ourselves under a Necessity of Killing the Thief, who, rather than quit his Prize, attacks our Life, which he had at first no Design to attempt.

⁷ *Si fugientem telo prosternerem, &c.* Thus the Words stand in all the Editions of the Original: But I am pretty well assured there is a Word omitted, and that we ought to read, *si fugientem inermem telo prosternerem, &c.* as the Sequel of the Discourse evidently requires. For we must suppose the Thief unarmed, in Order to make this Case different from the following, where the Thief likewise endeavours to escape, and it is in this that our Author grounds the Difference between a Night Thief and a Day Thief. As to the Substance of the Question, our Author's Opinion still remains exposed to the Objection offered in the Close of the foregoing Note.

XII. How far permitted by the Law of Moses.

Soto ubi supra.

Matthesianus

Notabil. 135.

Jas & Gom. in

Inst. de Act.

princ. Covar.

ubi sup. § 1. n.

ib. decimo, Less.

Dub. 11. n. 68.

Covar ubi sup.

August. cit. in

C si perfodiens.

De Homicid.

Lessius, D. c. 9.

Dub. 11. n. 66.

במהדר in the Act of *Piercing*, or as some better translate it, with a *stabbing Instrument*; in which Sense also the most learned Rabbies have expounded that Word in *Jer. ii. 34.* I am inclined the more in Favour of this Opinion by the Law of the *Twelve Tables*, which forbids the Killing of a Thief in the Day-time, unless he *defends himself with some Weapon.*⁸ It is therefore by this presumed, that a Night Thief defended himself with some Weapon. Under the Name of *Arms* or *Weapon*, an Iron, a Club, or a Stone are included; as *Cajus*⁹ observes on this Law. On the contrary, 'tis the Opinion of *Ulpian*, that what is said of Killing a nocturnal Thief with Impunity,¹⁰ is to be understood of killing him, when we could not secure our Goods and spare him, without running the Hazard of our own Lives.

3. This therefore is that Presumption which is allowed in favour of him who has killed a Thief by Night; but if Witnesses should chance to be present, by whom Proof could be made, that the Person who thus slew the other, was far from being in Danger of his own Life, then should we presume no longer in his Favour, but account him guilty of Murder. It is, besides this, provided by the Law of the *Twelve Tables*, that whoever shall surprize a Thief, either by Day or Night,

⁸ This Consequence is not just. All that can be inferred, is that the Laws of the Twelve Tables supposed it hardly possible to recover one's Goods in the Night, but by killing the Thief, because commonly speaking, we do not know the Thief, and consequently, if we permit him to proceed, or escape, we have no Means left for recovering what he takes; and if the Thief is known, we have abundant Reason to believe he will make off, and evade Prosecution: Whereas in the Day Time, when the Thief quits his Booty, as soon as he perceives himself discovered, it is commonly easy to know him, or apprehend him, with the Assistance of the Neighbourhood. But, as it is possible that a Day Thief, in Hopes of escaping with his Prize, may run all Hazards, and defend himself by Force of Arms, in that Case the Law allows the Proprietor to kill him, because he has then as much Reason to fear the Recovery of his Goods, as if the Attempt was made in the Night; especially when the Thief is not known.

⁹ DIGEST. *Lib. XLVII. Tit. II. De Furtis*, Leg. LIV. § 2.

¹⁰ DIGEST. *Lib. XLVIII. Tit. VIII. Ad Leg. Cornel. de Sicariis*, &c. Leg. IX. Mr. NOODT, in his *Probalia Juris*, *Lib. I. Cap. IX.* and his Treatise, *Ad Legem Aquilianam*, *Cap. V.* has given very plausible Reasons for proving that TRIBONIAN has misplaced this Law, and that it ought to appear under the Title of the *Aquilian Law*, which relates to the Reparation of Damages done by one who had killed another Man's Slave, caught in the Act of Stealing, and not the Punishment of Murder. His Opinion is grounded on the following Considerations. First, The *Cornelian Law* punished only such Murders as were committed maliciously and deliberately (*dolo*); and in Particular, with Regard to that in Question, it was entirely conformable to the Laws of the Twelve Tables, which allowed of Killing a Night Thief, without any Distinction of Cases; as appears from CICERO's Oration in Defence of *Milo*, *Cap. III.* ULPIAN, *Collat. Legum Mosaicæ & Romanæ. Tit. VII. § 2.* PAUL, *ibid. ex Lib. V. Sententiarum. Ad Leg. Cornel. de Sicariis*, &c. *Tit. XXIII. § 9.* To which may be added a Passage of St. AUGUSTIN, quoted in the *Decretals*, *Lib. V. Tit. XII. De Homicidio volunt. vel casuali*, *Cap. III.* ULPIAN, indeed, in the Place already specified, and in another of his Fragments. DIGEST. *Lib. IX. Tit. II. Ad Leg. Aquilianam*, Leg. V. seems to say, that the Man who kills a Night Thief, whom he might

have apprehended, incurs the Penalty of the *Cornelian Law*. But it is probable, that that antient Lawyer inadvertently wrote *Lege Corneliâ*, instead of *Lege Aquiliâ*, as the learned and judicious Professor thinks, whose Opinion I am giving. Perhaps, the Transcribers having made this Mistake in one of the two Fragments, it was copied in the other, with a View of correcting the Text; or perhaps the Transcribers have actually committed the same Fault in both Places; for all this is possible, and there may have been other Causes, of which we are ignorant. Secondly, The Law under Consideration, is taken from Book XXXVII. on the *Edict* of the Pretor. Now it appears from several other Passages in the same Book, quoted elsewhere, that it doth not treat of Murder, or any other publick Cause, but of some private Causes only. Thirdly, ULPIAN's Fragment, preserved in the *Collatio Leg. Mosaicæ & Romanæ*, speaks only of the *Aquilian Law*, both before and after these Words, *Ergo etiam Lege Corneliâ tenebitur*, nor doth it appear to what Purpose they are inserted. So that it is highly probable here is a false Reading; and, consequently, that in the ninth Law, *Ad Legem Cornelianam*, &c. which belongs to the same Lawyer, *impunè ferre*, signifies no more than to be exempt from paying Costs and Damages. We find *innoxium esse* in the same Sense, *Tit. de Lege Aquiliâ*, Leg. XLV. § 4. I add that the Adverb *impunè* is used to express the same Thing, by MARCELLUS, the Lawyer, when he says, that if a Man who has promised another a Slave, takes him in the Fact, he may kill him with Impunity, (*impunè*) and the Person to whom he stands engaged, shall be allowed no Action for Damages, (*utilis Actio*). DIGEST. *Lib. XLV. Tit. I. De verborum obligat.* Leg. XCVI. But, whatever becomes of this Question, Mr. NOODT's Reasons seem to me well grounded, even after the Perusal of Mr. VAN DE WATER's Objections against them, in his *Observationes Juris Romani*, *Lib. I. Cap. XVIII.* The famous Mr. SCHULTING, Mr. NOODT's Collegue and Relation, owns that ULPIAN's two Fragments treat of the *Aquilian Law*; but he has some Difficulty in allowing the *Cornelian Law* to be erased from this Place, where it is said it is improperly mentioned. In Order to this, he restrains the Generality of the Terms employed by the old Lawyer; and, after all, he acknowledges the Explication of the Passage very difficult, supposing no Mistake in it. See what he says on that Subject, in his excellent Notes on the *Jurisprudentia ante Justinianæa*, p. 760.

shall signify it by an *Outcry*, (as we learn from *Cajus* ¹¹) in Order that the Magistrates or Neighbours may come in to his Assistance, or be Witnesses of the Fact: But because, as *Ulpian* ¹² observes, on the above-mentioned Passage of *Demosthenes*, this cannot be so easily effected in the Night as in the Day, therefore we give more Credit to the Person who asserts his Danger then.

4 Much like this is the *Jewish* Law in Case of a Rape, which if committed in the Field, the Woman's bare Word was Evidence sufficient; but ¹³ if in the City the Case was otherwise, it being presumed that she ought to have called for Assistance, and might have had it. To this we may add, that tho' all other Circumstances were equal, yet one cannot so well discover what happens in the Night, nor know so well the Nature and Greatness of the Danger, and consequently, is more frightened than one would be at what happens in the Day-time. The Law therefore, as well of the *Jews* as of the *Romans*, prescribes the same Thing to the People that Charity enjoins, I mean, not to kill any Person merely upon account of Theft, but only when one runs the Hazard of his Life, by endeavouring to preserve his Effects. And as *Moses Maimonides* observes, *No private Person is permitted to kill another, except in defence of that which, if once lost, is irreparable, as Life and Chastity.*

Deut. xxii. 23, &c.

XIII. 1. What shall we then say of the Gospel in this Affair? Does it allow the same that the Law of *Moses* did? Or does it, as it is in other Things more perfect than the *Mosaic* Law, require something more of us in this Respect also? In my Opinion it is not to be questioned but that it does. For if *CHRIST* has commanded, rather to part with a Cloak or a Garment than contend about it; and ¹ *St. Paul*, rather to suffer Wrong than to go to Law about it; tho' this be a Dispute where no Blood is shed: How much more should even Things of greater Moment be given up, rather than a Man's Life should be taken from him, who is the Image of *GOD*, and descended from the common Father of all Mankind? Wherefore, if there's any Possibility of preserving our Goods, without running the Hazard of committing Murder, we may certainly do so; but if not, we should rather be the Losers, unless it be of such Things on which not only our own Life, but even that of our Family depends, and which, by the Methods of Justice, can never be recovered, because perhaps the Thief is not known, and we are in some Hopes that the Affair may be concluded without any such Bloodshed.

XIII. Whether permitted at all, and how far, by the Gospel.

2. I know that almost all the modern *Lawyers* and *Divines* maintain, that in Order to save one's Goods it is permitted to kill him that would rob us, and that they even extend this Permission beyond the Limits prescribed by the *Jewish* and

Soto ubi sup. Lessius, Dub. 11. n. 74. Sylv. in Verb. Bel-lum, 2. n. 3.

11 DIGEST. Lib. IX. Tit. II. Ad Leg. Aquil. Leg. IV. § 1. From what has been said in the foregoing Note, it appears that this Condition cannot be enjoined by the Law of the Twelve Tables, which absolutely permitted a Man to kill a Night Thief. Mr. NODD likewise offers some very plausible Reasons, in his *Observ.* Lib. I. Cap. XV. for proving that this doth not relate to the Punishment of Murder, ordered by the *Cornelian Law*; but to the Reparation of Damages, which belongs to the *Aquilian Law*; and that even in that Point, the Lawyers had softened the Rigour of the Law, by insinuating, that it ought to be reckoned sufficient, that a Man, who finds another Man's Slave attempting to rob him in the Night, cries out before he kills him; whereas before it was very difficult to prove a Man obliged so do to by the Necessity of defending his own Life, and consequently avoid making his Master a Recompence, if there was any Means left of securing one's self from the Danger without Killing the Slave. Others, as JAMES GODFREY, (*ad LL. XII. Tab. p. 58.*) and Mr. SCHULTING, (*Jurip. Antejust. p. 508, 759.*) chose rather to consider the Words, *ut tamen id ipsum cum clamore testificetur*; as an Addition made by *TRIBONIAN*. But which Opinion soever is followed, our Author's Thought is still equally ill grounded.

12 Page 265. Edit. Basil. 1572.

13 PHILO the Jew, explaining this Law, judiciously observes, that the Difference of Places is specified only, as the most common Example of Cases in which a young Woman is forced; not that a Regard is always to be had to this single Circumstance, in condemning or clearing her. For, says he, it may happen that a Man may hinder a young Woman from crying out, before he ravishes her, tho' the Fact is committed in the Middle of a City; and a young Woman may consent to be debauched in the Fields. *De specialib. Legib.* (p. 788. Edit. Paris.) GROTIUS.

XIII. (1) All that can be inferred from our Saviour's Words, and those of the Apostle, is, that when the Thing in Question is of but small Consequence, we ought not to kill the Thief, who attempts to take it, or is carrying it off. But when a Man finds a Thief in his House, he doth not immediately know he has taken a Thing of small Value; he hath very good Reason to presume the contrary; for Persons of that Character do not usually leave the best Goods; and even tho' at first he had a Design on one certain Thing only, it is well known that Opportunity makes the Thief.

Roman

Roman Laws; for they say, if the ² Thief runs away after he has taken any Thing, the Proprietor may pursue and kill him. But I do not doubt but the Opinion I declare for was that of the *primitive* Christians; and St. *Austin* was fully persuaded of it, when he said, ³ *How can Men be guiltless in the Sight of GOD, who even for Things that a Christian ought to despise, shall embrue their Hands in human Blood?* Indeed in this, as in other Cases, ⁴ Christianity is fallen from its primitive Purity, and the Interpretation of the Gospel is by Degrees accommodated to the Customs of the present Age. In former Times the Clergy at least were obliged to follow the antient Maxim; but ⁵ at Length they also were exempted from all Censure on this Account.

Panorm. c. 11.
De Homic. Less.
ubi supra.

XIV. Whether
the Civil Law
permitting
Murder in one's
own Defence,
gives a Right
to the Fact, or
only dispenses
with the Pu-
nishment of it.
Explained by a
Distinction.

XIV. 'Tis a Question with some Persons, Whether the Civil Law, which is vested with a Power of Life and Death, if in any Case it shall allow that a Thief may be killed by a private Person, does not so far excuse the Fact, as to exempt it altogether from being a Crime. Which in my Opinion is scarce to be admitted of. For first, the Law has no Power over the Life of any Subject upon every Offence, but for Crimes only of so heinous a Nature as to deserve Death. Now, I think the Opinion of *Scotus* very probable, who affirms that it is not lawful to condemn any to Death, but ¹ for those Crimes that were punished ² with Death by the Law of *Moses*, or for those that appear equal to these, upon impartial Examination. Nor does it appear, that the Knowledge of the Divine Will, which alone can quiet the Consequence, can, in an Affair of so high a Consequence as this is, be otherwise had, than from this Law only, which certainly has no were sentenced a Thief to Death. Besides, the Law neither does nor ought to give a Power to any Man, to kill him privately who has deserved Death, unless in Crimes of the most flagrant Nature; for else it would be needless to have Courts of Justice. Therefore, when the Law acquits that Man who has killed a Thief, it may be understood to take off the Punishment, but not to give him ³ a real Right to the Act itself.

XV. When a
Duel, or single
Combat, may
be lawful.

XV. From what has been said it appears, that in two Cases we may justify a single Combat: The first is, when the Aggressor ¹ permits the other Person to defend himself, being otherwise determined to kill him if he does not fight. The other, when a King or Magistrate shall doom two Malefactors, both equally guilty of Death, to combat together. In this last Case, each of the Criminals may lawfully use the Means offered him, for endeavouring to save his Life: But he who gave the Commandment, does not so equitably discharge his Duty; since it were better, if he thought it sufficient for one only to suffer, that a Lot ² should determine the Choice.

XVI. Of De-
fence in a pub-
lick War.

XVI. What we have hitherto said, concerning the Right of defending our Persons and Estates, principally regards private Wars; but we may likewise apply it

² See § 12. Note 6.

³ *De Lib. Arbitr.* Lib. I. Cap. V. But he is not there speaking of Goods; his Discourse runs only on the Defence of Life or Honour, as appears from the preceding Words.

⁴ St. JEROM, in his Life of *Malchus*, observes that *Since the Church began to have Christian Magistrates, it became more considerable for Riches and Power, but less so for Virtue.* See the *Decretals*, Lib. V. Tit. XII. *De Homicidio Volunt.* Cap. X. and Distinct. L. *Ecclesiastici criminosi*, &c. Can. XXXVI. GROTIUS.

This Passage of JEROM, which appears at the Beginning of the Letter here quoted, runs thus in the Original: *Et postquam ad Christianos Principes venit [Ecclesia] Potentiâ quidem & Divitiis major, sed virtutibus minor facta est.* That is, *After the Church came into the Hands of Christian Princes, &c.* p. 255. Tom. I. Edit. Basil.

⁵ Our Author speaks here of the Liberty with which Ecclesiasticks have been indulged in the later Ages, of making War, and commanding Armies; whereas, according to the antient Discipline, they could not even kill a Man in their own Defence,

without incurring the Penalties specified in the Canons. See CONRADUS RITTERSUS, *Dissert. Juris Civil. & Canon.* Lib. VI. Cap. VI. and Lib. VII. Cap. XIII. as also the Authors above quoted, B. I. Cap. V. § 4. Note 2.

XIV. (1) See PUFENDORF, B. VIII. Chap. III. § 26.

² See GREGORY of Tours, Lib. X. Cap. X. JOHN of Salisbury, *Policratic.* Lib. I. Cap. IV. PETER of Blois, Epist. CXXIX. concerning such Laws as punished Peasants with Death for Hunting. GROTIUS.

³ It gives a real Right, in all Cases, where the Action is allowed by the Law of Nature, and the Rules of Charity well understood.

XV. (1) Some of our Author's Commentators on this Place fight with their own Shadow, undertaking to refute him at large, as if he meant to speak of *Duels*, properly so called; whereas it is evident, he treats only of what we term *Encounters*, or Cases in which a Man is unexpectedly attacked, without any Appointment.

² See my *Discourse on the Nature of Lots*, § 20.

¹ to publick Wars, with some Difference. For first, in a private War, the Right of Defence is as it were, only momentary, and ceases as soon as one can apply to a Judge: Whereas a publick War, arising only between those that acknowledge no common Judge, or when ² the Exercise of Justice is interrupted; the Right of Defence has here some Continuance, and is perpetually maintained, by fresh Injuries and Damages received. Besides, in a private War we have only a Regard to our own Defence, but the supreme Powers have not only a Right of Self-Defence, but of ³ revenging and punishing Injuries. Whence it is, that they may lawfully prevent an Insult which seems to threaten them, even at some considerable Distance; not *directly*, (for the Injustice of that we have shewed already) but *indirectly*, by punishing a Crime that is only *begun*: Of which we shall have Occasion to treat ⁴ in another Place.

XVII. But I can by no Means approve of what some Authors have advanced, that by the Law of Nations it is permitted to take up Arms to reduce the growing ¹ Power of a Prince or State, which if too much augmented, may possibly injure us. I grant, that in deliberating whether a War ought to be undertaken or not, that Consideration may enter, not as a justifying Reason, but as a Motive of Interest. So that where we have any other just Cause for making War, it may for this Reason too be thought prudently undertaken. And this is all that the Authors before cited do in Effect say; but to pretend to have a Right to injure another, merely from a Possibility that he may injure me, is repugnant to all the Justice in the World: For such is the Condition of the present Life, that we can never be in perfect Security. It is not in the Way of Force, but in the Protection of Providence, and in innocent Precautions, that we are to seek for Relief against uncertain Fear.

XVIII. 1. Neither can I admit another Maxim of those Authors, namely, that even those who have given just Cause to take up Arms against them, may lawfully defend themselves; because, say they, there are few who are content only to proportion their Revenge to the Injuries they receive. But such a Suspicion of what is uncertain, gives no Man a Right to oppose Force to a just Attack, no more than a Criminal can plead a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate, on a Pretence that his Punishment may be greater than his Crimes deserve.

2. But he who has offended another, ¹ ought first to offer him such a Satisfaction, as by the Judgment of any honest Man shall be thought sufficient; and if that be refused, he may in Conscience defend himself. Thus *Hezekiah* being threatened with a War by the King of *Assyria*, for not observing the League that his Ancestors had made, acknowledged his Fault, and left it to that King to nominate what Recompence he should make him; which done, and being afterwards invaded with a powerful Army, he then trusted to the Justice of his Cause, defended himself, and, by the Assistance of the most high GOD, became Successful. So *Pontius*, the *Samnite*, having made a full Restitution to the *Romans*, for what had been unjustly taken from them, and delivered up him who was the Author of the War, said, ² *Do not imagine that our Embassy has been fruitless: We*

XVII. War only to weaken a neighbouring Power, not lawful. Alberic. Gentil. l. 1. c. 14.

Bald. in Leg. 3. De Rerum divis.

XVIII. Nor in him who himself gave the just Occasion for a War.

Alberic. Gentil. l. 1. c. 13. Cast. l. 5. de Justitia.

2 Kings xviii. 7, 14, and xix.

XVI. (1) AMMIAN MARCELLINUS says, *It is an universal and perpetual Law, that no Custom can deprive us of the Right of Defending ourselves by all Means in our Power, when attacked by foreign Arms.* Lib. XXIII. (Cap. I.) The Emperor *Alexander Severus* spoke thus to his Soldiers on the Subject, *An unjust Aggressor has no good or plausible Excuse for his Conduct; but he, who repels such an Aggressor, receives Confidence from the Goodness of his Conscience, and hopes for Success, because he is doing no Injury, but is only acting in his own Defence.* HERODIAN, Lib. VI. (Cap. III. Num. 8, 9. Edit. Boecler). GROTIUS.

Nihil remittente vi moris. ADRIAN DE VALOIS, in his Edition of this Author, reads *nihil remittente vi moris*, from an antient MS. but the common Reading, which our Author follows, seems preferable. The Passage is very well explained by JAMES GODFREY, in the last Page of *Tome V.* of his Commentary on the THEODOSIAN Code, where he

refers this *vi moris* to the superstitious Custom of engaging in no military Expedition, without first consulting the Auspices. It is surprizing, that the last Editor of that Code hath said nothing on this Subject, nor even referred the Reader to that Lawyer's Remark.

2 *Ubi cessant Judicia.* Our Author means in the Time of a Civil War.

3 See B. II. Chap. XX. § 8.

4 In the Place quoted § 39.

XVII. (1) See B. II. Chap. XXII. § 5. and PUFENDORF, B. II. Chap. V. § 6. and B. VIII. Chap. VI. § 5. BOECLER observes, that ALBERIC GENTILIS, whom our Author has here in View, as appears by the marginal Quotation, is at the Bottom of the same Opinion with him.

XVIII. (1) See PUFENDORF, B. I. Chap. V. § 19. and B. V. Chap. XII. § 1.

2 LIVY, Lib. IX. Cap. I. Num. 3, 4, 7, 8.

have thereby expiated the Violation of the Treaty, and prevented whatever we had Reason to apprehend from the Wrath of Heaven. I am persuaded that the Gods, who were pleased that we should be reduced to the Necessity of restoring what was required of us by virtue of our Engagements, were not pleased that the Romans should so haughtily reject the Satisfaction we offered them. — What more, ye Romans, do I owe you? What ought I to do to repair the Infraction of the Alliance, and to appease the Gods, who were the Witnesses and Guarantees of it? To whose Judgment should I submit, in Regard to a Punishment capable of satisfying your Resentment, and expiating the Crime of my Infidelity? There is no Nation, nor private Person, that I refuse on this Head. So when the Thebans³ had offered to the Lacedemonians all that they could in Justice require, and they were yet for pushing Matters further, Aristides said, that the good Cause⁴ passed then from the Party of the latter to that of the former.

³ The Author here changes the Persons, and attributes to the Thebans, what the Greek Orator says of the Lacedemonians. Besides, ARISTIDES doth not even say that the Lacedemonians had offered the Thebans a reasonable Satisfaction; but only that the People last mentioned, had gained it by the Victory at *Leuctra*; for he is speaking of the Succours which the Lacedemonians demanded of the Athenians, when the Thebans, after that Victory, seemed resolved to compleat the Destruction of the vanquished. See *Orat. Leuctrica*, p. 98. Tom. II. Edit. Paul Steph. And XENOPHON, *Hist. Græc. Lib. VI. Cap. V. § 33, &c. Edit. Oxon.*

⁴ See what ZONARAS says (Tom. III.) of the Prince of *Chalepus* (*Aleppo*) who had offered *Argyropolis*, the Roman Emperor, to remain quiet, and pay the Arrears of the Tribute due to him. MARTIN CROMER, in his *History of Poland*, Lib. XVII. relates something like this of those engaged in the *Crusade*. (p. 393. Edit. Basl. 1555.) PHILIP DE COMMINES, in the seventh Book of his *Memoires* concerning the *Swiss*, who offered to make *Charles the Bald* Satisfaction for a Waggon-Load of Sheep-Skins, which had been taken from some Merchants. GROTIUS.

Our Author has made a Mistake in the last Instance. The Waggon was not seized by the *Swiss*,

but taken by the Count *de Romont* from one of that Nation, as he passed over that Nobleman's Lands, as COMMINES relates the Matter, B. V. p. 368. Edit. Genev. 1615. When that Writer adds, *Considering the Offers which had been made him*: These Words relate to what he had said in the Beginning of the Book, p. 363, viz. that the *Swiss* perceiving the Duke of Burgundy so near them, who was then returned from his Conquest of the Duchy of *Lorraine*, dispatched two Embassies to him, with Instructions to offer him, among other Things, the *Restitution of whatever they had taken from the Lord of Romont*, who, as being the Duke's Vassal, desired he would come in Person to his Assistance. Thus the Seizure of the Waggon loaded with Sheep-Skins, gave Occasion to the War between the *Swiss* and the Count *de Romont*, and consequently, to that made on the same People by the Duke of Burgundy, partly under the aforesaid Pretence. Besides, our Author had read this Story not in the Original, but in the compendious Latin Version made by SLEIDAN, p. 66, 67. Edit. Wech. as appears from his quoting B. VII. instead of B. V. as it is in the French. However, the Translator did not lead him into the Mistake which I have pointed out.

CH A P. II.

Of Things which belong in common to all Men.

I. The Division of what is our own.

I. IT follows now, that in treating of those Causes that justify a War, we speak of Injuries already done; and first of those that regard what is properly ours. There are some Things which are ours by virtue of a Right common to all Men; and others which are so by a particular Right. The Right common to all Men respects either certain corporeal Things, or certain Actions (which one requires of another). Corporeal Things are either without a Proprietor, or else belong to some particular Persons. The former are either not susceptible of Property, or else they are. For the better understanding of which, let us examine into the Original of Property, which our Lawyers do generally call *Dominion* or *Demesne*.

II. The Beginning and Improvement of Property.

II. 1. Almighty GOD at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World: *All Things*,

I. (1) See PUFENDORF, B. IV. Chap. IV. with the Notes in the second Edition, where this Sub-

ject is treated more at large, and with greater Exactness.

as ¹ *Justin* has it, *were at first common, and all the World had, as it were, but one* Gen. i. 29. — ix. 2, 3. *Patrimony*. From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that Time supply the Place of Property; for no Man could justly take from another, what he had thus first taken to himself; which is well illustrated by that Simile of *Cicero*, ² *Tho' the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own*. And this State of Things must have continued till now, had Men persisted in their primitive Simplicity, or lived together in perfect Friendship. A Confirmation of the first of these is the Account we have of some People of *America*, who by the ³ extraordinary Simplicity of their Manners, have without the least Inconvenience observed the same Method of Living for many Ages; and the latter appears by the Example of the ⁴ *Essenes*, of the primitive Christians at *Jerusalem*, and many who now live in religious Societies. That the first Men ⁵ were created in a State of Simplicity, evidently appears from their Nakedness. They were rather ignorant of the Nature of Vice, than versed in the Knowledge of what was virtuous, as *Justin* ⁶ testifies of the *Scythians*. *The first Men*, says *Tacitus* ⁷, *being free* ⁸ *from vicious Inclinations, lived in Innocence, without committing any Crime or dishonest*

II. (1) *Lib. XLIII. Cap. I. Num. 3.* The Words immediately preceding those here quoted, are, *We are told that Saturn, King of that People, (the Aborigines) was so just, that during his Reign, no Man was a Slave to another, nor possessed any Thing as his private Property*. Where we see the Historian is speaking of the Reign of *Saturn*. Thus some Remains of this ancient Custom of having all Things in common, were preserved in the *Bacchanalian* [*Saturnalian*] Feasts, as our Author here observes. And the Historian here already quoted, says the same in the Words immediately following, *In Memory of whose Example, it is ordered, that, during the Saturnalia, every Man's Right being reduced to an Equality, Slaves shall eat promiscuously with their Masters*. *Num. 4.*

² *De finib. Bon. & Mal. Lib. III. Cap. XX.* *SENECA* also observes, that in the Amphitheatre, the Places reserved for the Roman Knights, were common to the whole Equestrian Order; but that which I occupy becomes my own. *De Benefic. Lib. VII. Cap. XII. GROTIUS.*

³ *HORACE*, speaking of the *Scythians* and the *Getæ*, represents their Way of living in the following Manner, that they lived in the Fields, and drew their moveable Huts with Waggon, whenever they changed Place, that they did not divide their Lands by Acres; that the Corn and Fruits which their Grounds produced, were free and common to all; that they sowed no more than would suffice for one Year, and cheerfully succeeded one another in their annual Labour. *Lib. III. Od. XXIV. ver. 9, &c. GROTIUS.*

Neither this, nor some others produced by our Author, are Examples of a perfect Community. But his End is sufficiently answered, if Things were common to a certain Point, and were not so in that Manner in those Times, and among People, where less Simplicity was observed.

⁴ And of the *Pythagoreans*, who sprung from them. See *PORPHYRY*, (*de Vit. Pythag.* *Num. 20. Edit. Kuster.*) *DIODES LAERTIUS*, (*Lib. VIII. § 10*) *AULUS GELLIUS*, *Noct. Attic. Lib. I. Cap. IX. GROTIUS.*

Our Author, in one of his Letters, (*Part I. Epist. DLII.*) has laid down the Reasons with which he endeavours to support his Conjecture, that the *Pythagoreans* took the *Essenians* for their Model. But, whether this is true or false, it is nothing to the Purpose. It would be better to observe that this Example, with others of the same Kind, are alledged with a Design of shewing that

such as thus possessed all Things in common, could not have lived in that Manner, had they not been disinterested, and full of Sentiments of mutual Friendship. So likewise, had Mankind continued in their primitive Innocence, as well as in their first Simplicity, Men would have been under no Obligation of establishing the Property of Goods. This, in my Opinion, is all our Author means; and the Commentators, who employ their Criticisms on this Part of his Work, only cavil at him, as they do on several other Occasions, for want of entering into his Design.

⁵ *Adam* was a Type of Mankind. See *ORIGEN contra Cels.* To this Purpose are the following Words of *TERTULLIAN*, *What is reasonable ought to be considered as natural, and engrafted in the Soul from the Beginning of our Existence, by a reasonable Creator: For how should that not be reasonable which GOD has produced by his bare Command; and much more what he has produced by his own Breathing on us? We are therefore to consider what is unreasonable, that is, Sin, as something posterior, and an Effect of the Solicitations of the Serpent; so that this Sin, having since taken Root in the Soul, has grown up in it, and is become as it were natural to it, because the Transgression was committed at the very Beginning of Nature.* *De Animâ. (Cap. XVI.) GROTIUS.*

Mr. BARBEYRAC declares he doth not see what this obscure Passage is to the Purpose, which, says he, *I have translated as well as I could*. We are obliged to say the same with Regard to our *English* Version of this Quotation from *TERTULLIAN*, and several others from the same Writer, whose Style the Learned very well know, is neither clear nor natural. But our Annotator is of Opinion that all to be inferred from the Passage before us is, that Man was innocent when he came out of the Hands of the Creator, which is no great Difficulty.

⁶ *Lib. II. Cap. II. Num. 15.*

⁷ *Annal. Lib. III. Cap. XXVI. Num. 1.*

⁸ *SENECA* maintains that the first Men lived in Innocence, because they were ignorant. *Epist. XC.* Having afterwards said they were endowed neither with Justice, Prudence, Temperance, nor Fortitude, he adds, that their simple and uncultivated Life afforded something that bore a Resemblance to those Virtues. *JOSEPHUS*, the Jewish Historian, represents our first Parents, in the State of Innocence, as not ruffled or disturbed with Cares. (*Antiq. Jud. Lib. I. Cap. II.*) *GROTIUS.*

Action;

*Action; and therefore there was no Need to keep them to their Duty through the Fear of Punishment. So Macrobius, ⁹ There was so much Simplicity amongst Mankind in the first Ages, that they were ignorant of Vice, and unacquainted with Deceit. This Simplicity is what was by a ¹⁰ wise Jew called ἀφθαρσία, Integrity, and by St. Paul, ¹¹ ἀπλότης, which he opposes to τῇ πανουργίᾳ, Subtily and Artifice. The Worship of GOD was their only Care, of which the ¹² Tree of Life was a Symbol; according to the Explication of the antient Jewish Doctors, confirmed by a Passage in the *Apocalypse*. And they lived at their Ease on what the ¹³ Earth, untill'd, did naturally afford them.*

Prov. iii. 18.

— xii. 2.

Eccl. vii. 29.

2. But Men did not long continue in this pure and innocent State of Life, but applied themselves to various Arts, whereof the Symbol was the ¹⁴ Tree of Knowledge of Good and Evil, that is, of the Knowledge of Things which one may use either well or ill: Which *Philo* calls φρόνησιν μέσην, ¹⁵ a middle Prudence. This *Solomon* had in View when he said, that GOD made Man upright, but that they had sought out many Inventions, ἐρεπον εἰς πανουργίαν, they became subtle, ¹⁶ as *Philo* on that Passage expresses himself. So *Dion Prusænsis*, in his sixth Oration, ἀλλὰ τὴν πανουργίαν, &c. ¹⁷ The Cunning of those who came after the first Men, and their Sagacity in inventing Things ¹⁸ for the Use of Life, was not very advantageous; because Men made use of their Wit and Ingenuity to procure themselves Pleasure, rather than to distinguish themselves by Acts of Valour and Justice. The

⁹ In *form. Scipion. Cap. X.*

¹⁰ *Wisdom of SOLOMON, Chap. ii. 23.* Saint PAUL uses this Word in *Ephes. vi. 24.* and employs another of like Signification, ἀδιαφθορία, *Tit. ii. 7.* GROTIUS.

Our Author gives a different Explication to these Terms, in his *Notes on the Old and New Testament*. By ἀφθαρσία, Incorruption, or Incorruptibility, he understands in the Book of *Wisdom*, attributed to SOLOMON, the State of Immortality, in which Man was created; and this Explanation agrees best with what follows; for it is said immediately after, that Death entered into the World by the Envy of the Devil, ver. 24. According to the same Commentator ἀφθαρσία, and ἀδιαφθορία, signify such a Probity or Integrity as is Proof against all Temptations; not that wavering Simplicity which was founded rather on an Ignorance of Vice than a Knowledge of Virtue.

¹¹ *2 Cor. xi. 3.* But our Author, in his *Notes* on the New Testament, doth not fix the same Idea to the Word Simplicity; for he understands by that Term, such a Purity of Doctrine and Morals as is worthy of a Christian.

¹² PHILO, in his *Treatise Of the Creation of the World*, observes, that the Tree of Life represents Piety, the most excellent of Virtues; which the Rabbins call the superior Virtue; and ARETHAS on the *Apocalypse*, ἐνθεὸς σοφία, Divine Wisdom. See *Ecclesiasticus xl. 17.* concerning the terrestrial Paradise, and *Chap. xxiv. 25, &c.* of the same, concerning the four Rivers in it. GROTIUS.

¹³ See a beautiful Passage of DICÆARCHUS on this Subject, quoted by VARRO, *De Re Rusticâ*, Lib. I. (Cap. II. p. 9. Edit. 3. H. Steph. 1581.) which may be compared with what PORPHYRY says after the same Author, in his *Treatise of Abstinence from Animal Food*. (Lib. IV. p. 342, &c. Edit. Ludg. 1620.) GROTIUS.

In the *Collection of antient Grecian Geographers*, published by Mr. HUDSON, Tom. II. before the Fragment of DICÆARCHUS, we have some Words of St. JEROM, in which the Passage of that Author is quoted so as more expressly to contain the Fact here mentioned. DICÆARCHUS, says that Father, in his Books of the Antiquities and Descriptions of Greece, relates, that under Saturn, that is, in the Golden Age, when the Ground freely yielded plen-

ty of all Things, no one eat the Flesh of Animals; but all Men lived on the spontaneous Productions of the Earth. Adv. Jovin. Tom. II. p. 78. Edit. Basil. 1537.

¹⁴ JOSEPHUS says, The Fruit of that Tree bestowed Understanding and Penetration. (*Antiq. Jud. Lib. I. Cap. I.*) Telemachus, as a Proof that he was not then a Child, declares, that he knows every Thing, both good and bad. HOMER, (*Odys. XX. ver. 309, 310.*) ZENO defined Prudence, the Knowledge of Good and Evil, and of Things indifferent. DIOGENES LAERTIUS, (*Lib. VII. § 92. Edit. Amst.*) And PLUTARCH, in his *Treatise against the Stoicks*, reasons thus, Where would be the Damage if there was no Evil in the World? and consequently, no Prudence? which is the Knowledge of Good and Evil; and another Virtue was substituted in its Room, which should consist in the Knowledge of Good only? De communib. Notitiis. (Tom. II. p. 1067. Edit. Wech.) GROTIUS.

¹⁵ Treating the History contained in the first Chapter of *Genesis* in an allegorical Manner, he says, that, by the Knowledge of Good and Evil, we are to understand a middle Prudence, by which Men distinguish between Things contrary in their own Nature. De Mundi Opific. p. 35. Edit. Paris. I observe that in the same Treatise, he bestows the Appellation of a middle Man, or middle and earthy Mind, on him who is neither virtuous nor vicious; and opposes his Character to that of a perfect Man, adding, that the latter doth not stand in need of Admonitions and Instructions like the former, for engaging him to embrace Virtue and avoid Vice, p. 57. Hence it appears what the Jewish Philosopher means by his middle Prudence, an Epithet of which the Reason could not otherwise be comprehended.

¹⁶ PHILO's Words are, But as they had now degenerated into Craftiness, and neglected the Practice of Sanctity and true Prudence, — GOD banished them from Paradise, p. 35. where he speaks of the Sin of our first Parents; which is nothing to the present Purpose.

¹⁷ Orat. VI.

¹⁸ This is explained at large by SENECA, *Epist. XC.* and in the Passages of DICÆARCHUS produced by the Authors already quoted. (Note 13.) GROTIUS.

most antient Arts were those of Agriculture, and Feeding Cattle; they were exercised by the first Brothers, so that there was between them some Sort of Division of Goods. The Diversity of Inclinations immediately produced Jealousy, and afterwards Murder. At last good Men being likewise insensibly corrupted by Intercourse with the bad, a Kind of *gigantick* Life ¹⁹ prevailed, that is, they used all Manner of Violence, like those whom the *Greeks* termed *χερδίναι*, ²⁰ *People that would attempt any Thing*. To this savage Sort of Life succeeded after the Deluge, ²¹ an Attachment to Pleasures ²², to which the Use of Wine newly invented did contribute; and from thence proceeded also abominable Lusts.

3. But that which tended most to disunite Men, was a more noble Vice, I mean *Ambition*, ²³ whereof the Tower of *Babel* is a Proof. They went afterwards Gen. x. xi. some one Way, and some another, and thus divided the Lands amongst them. But even after this, there remained among Neighbours a Community, not of Cattle but of Pastures; because the Extent of Grounds was as yet so great in Proportion Gen. xiii. to the small Number of Men, that it was sufficient to answer the Occasions of many, without their incommoding one another. *It was not then permitted*, says *Virgil*, ²⁴ *to distinguish Possessions, and to set Bounds to the Fields*. But the Number of Men, as well as of Cattle, being very much increased, it was thought proper at last to assign a Portion of Lands to each Family; whereas before they were only divided by Nations. And as the Wells of Water, a Thing very necessary in Gen. xxi. a dry Country, were insufficient to supply a Multitude, ²⁵ every one appropriated to himself those he could seize on. This is what we learn from the Sacred History, and is agreeable to what both Poets and Philosophers have spoken of that early State of Things, when all was common, and of the Divisions that followed. The Testimonies of these Authors I have had Occasion to produce in another Mar. liber. c. 5. Place.

4. From hence we learn, upon what Account Men departed from the antient Community, first of *moveable*, and then of *immoveable* Things: Namely, because Men being no longer contented with what the Earth produced of itself ²⁶ for their Nourishment; being no longer willing to dwell in Caves, to go naked, or covered only with the Barks of Trees, or the Skins of wild Beasts, wanted to live in a more commodious and more agreeable Manner; to which End Labour and Industry was necessary, which some employed for one Thing, and others for another. And there was no Possibility then of using Things in common; first, by Reason of the Distance of Places where each was settled; and afterwards because of the Defect of Equity and Love, whereby a just Equality would not have been observed, either in their Labour, or in the Consumption of their Fruits and Revenues.

5. Thus also we see what was the Original of Property, which was derived not from a mere internal Act of the Mind, since one could not possibly guess what others designed to appropriate to themselves, that he might abstain from it; and besides, several might have had a Mind to the same Thing, at the same Time; but it resulted from a ²⁷ certain Compact and Agreement, either expressly,

¹⁹ SENECA, speaking of the Deluge which was to happen according to the Notions of the *Stoicks*, says, that *all Mankind will perish* by that Calamity, and at the same Time the wild Beasts will be destroyed, whose savage Nature Man had put on. Natural. Quæst. Lib. III. Cap. XXX. GROTIUS.

See Mr. LE CLERC's Commentary on *Genesis* vi. 4. where he explains the Word *Nephilim*, commonly translated *Giants*.

²⁰ *Χερδίναι*. See HESIOD, *Oper. & Dier.* ver. 189. and the Annotators on that Place.

²¹ SENECA, in the Place already quoted, says, that the Innocence of those Men, whom he supposes would be produced after the Deluge, will be preserved only for a short Time. Quæst. Natur. III. 30. GROTIUS.

²² That Philosopher says, in the same Place, that monstrous Lusts, and criminal Pleasures, are the great Fruits of Drunkenness. GROTIUS.

The Author, who probably has on this Occasion trusted too much to his Memory, quotes one Writer instead of another: These are the Words of PLINY, *Hist. Nat.* Lib. XIV. Cap. XXII. p. 164. Edit. Hack.

²³ It may be reasonably doubted, whether Ambition prompted Men to build the Tower of *Babel*. See, on this Question, the *Origines Babylonice* of the late Mr. PERIZONIUS.

²⁴ *Georgic.* Lib. I. ver. 126.

²⁵ The Wells in *Oasis* were common to great Numbers of People, as we learn from OLYMPIODORUS, in a Fragment of his History, preserved by PHOTIUS. GROTIUS.

²⁶ Thus the *Scythians* lived, of whom PROCOPIUS gives us an exact Account. *Gothic.* Lib. II. (Cap. XV.) See likewise PLINY, *Hist. Nat.* Lib. XII. *Proem.* and VITRUVIUS, *Architect.* Lib. II. Cap. I. GROTIUS.

²⁷ There was no Need of a Contract for founding

expressly ²⁸, as by a Division; or else tacitly, as by Seizure. For as soon as living in common was no longer approved of, all Men were supposed, and ought to be supposed to have ²⁹ consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided. 'Tis no more, saith Cicero ³⁰, than what Nature will allow of, that each Man should ³¹ acquire the Necessaries of Life rather for himself than for another. To which we may also add that of Quintilian, ³² If it be so established, that whatever has fallen to the Share of a Person for his Use, properly belongs to him; surely whatever we possess by a lawful Title, can never, without Injustice, be taken from us? And when the Antients stiled Ceres a Legislator, and her Mysteries *Theismophoria*, they intimated, ³³ that the Division of Lands produced a new Sort of Right.

Macrob. Saturn. 3. 12.

III. Some Things can never become a Property, as the Sea, either taken in Whole or in Regard to its principal Parts, and the Reason why.

III. 1. This being admitted, we affirm that none can have a Property in the Sea, whether taken in the Whole, or in Respect to its principal Branches; and because some People are willing to allow this, with Regard to private Persons, but not with Regard to States and Nations, we will prove the contrary; first, from a moral Reason; and that is, the ¹ Cause which obliged Mankind to desist from the Custom of using Things in common, has nothing at all to do in this Affair: For the Sea is of so vast an Extent, that it is sufficient for all the ² Uses that Nations can draw from thence, either as to Water, Fishing, or Navigation. The same might be alledged of the Air too, could we put it to any Use, ³ without being posted on the Surface of the Earth. But this is necessary, in Order to enjoy the

ing the Right of the first Occupant; as I have shewn in my Notes on PUFENDORF, B. IV. Chap. IV. § 4, &c.

²⁸ See the Passages of the *Talmud* and the *Alcoran*, quoted by SELDEN, the *Glory of England*, in his *Mare clausum*, (Lib. I. Cap. IV. p. 24. Edit. Lond. 1636.) GROTIUS.

²⁹ CICERO says, that since those Things which were by Nature common, become the Property of particular Persons, each Man has a Right to maintain himself in the Possession of what has fallen to his Share. (De Offic. Lib. I. Cap. VII.) He illustrates this (Lib. III. Cap. X.) by a Comparison taken from CHRYSIPPUS, the Stoick, who observes, that When a Man runs a Race with another, he may exert himself, and do all in his Power for carrying the Prize; but he is by no Means allowed to trip up his Antagonist's Heels, or thrust him out of the Course with his Hands. HORACE's Scholiast says, that A House, or Land, which has no Master is common; but when it comes into the Possession of any one, it becomes his Property. In Art. Poet. (ver. 128. p. 127. Edit. Cruq.) In a Fragment of VARRO we are told, that In the early Times, Lands were assigned to such or such Persons in particular, that they might be cultivated. Thus Etruria fell into the Hands of the Tuscans, and the Country of Samnium came into the Possession of the Sabellians. In Age Modo. GROTIUS.

This Passage of VARRO, one Word of which (*hominibus*) is omitted by our Author, is preserved by PHILARGYRIUS; an ancient Grammarian and Commentator on VIRGIL, on the Words *Prolemque Sabellam*. Georg. Lib. II. v. 167.

³⁰ De Offic. Lib. III. Cap. V.

³¹ He elsewhere says, A Man is not to be blamed for improving his Fortune, whilst he does it without Damage to another; but that we are ever to be particularly careful to commit no Injustice. Lib. I. Cap. VIII. SOLON declared, He indeed wished for Riches; but would not acquire them unjustly. Ex Eleg. v. 7, 8. GROTIUS.

³² That Rhetorician speaks here in particular of Bees, which may be a Man's Property, *Ut quicquid ex his Animalibus in usum hominis cessit*, &c. Declam. XIII. Cap. VIII. p. 281. Edit. Burm.

³³ This is an Observation made by SERVIUS on *Æneid*. IV. 58. GROTIUS.

III. (1) Tho' the Property of Goods was introduced on the Multiplication of Mankind, which did not every where leave what was sufficient for supplying the Necessities of each particular Person, it doth not thence follow, that in the primitive State of Community, each Man might not lawfully seize on what Portion he pleased of the Things possessed in common, which were of such a Nature that there was enough still remaining for the Use of others; because, for that very Reason, no one could take Offence at the Liberty. The Retortion is unanswerable; and I have the Pleasure to find it employed by JOHN STRAUCHIUS, an able Lawyer of Germany, who flourished in the last Age, in an academical Dissertation *De Imperio Maris*, (Cap. II. § 8.) which has lately fallen into my Hands. So that, how sufficient soever a Thing may be for supplying the Necessities of the whole World, it may nevertheless be appropriated, as far as can be possessed. See what I have said on this Subject, in my Notes on PUFENDORF, B. IV. Chap. V. § 3, 4. Second Edition. And on the Abridgment of *The Duties of a Man and a Citizen*, B. I. Chap. XII. § 4. last Edition.

² This is not true in every Respect, nor in Regard to all Parts of the Sea: See the learned SELDEN's *Mare clausum*, Lib. I. Cap. XXII. and PUFENDORF, B. IV. Chap. V. §. 7, 8.

³ But hence it would follow, that we cannot hinder a Man not only from passing on the High-Ways, but even from going into what Lands he pleased. For if the Air, considered as Air, cannot be possessed in Property, and yet no Means is left for enjoying the Benefit of it, without being posted on the Surface of the Earth; the Surface of the Earth also must every where remain common; otherwise this pretended Community of the Air is intirely useless. Besides, there are some Cases in which one may make Use of the Air which corresponds with another Man's Lands, without touching the Soil, as when a Building projects, or a Balcony hangs over the Court of a neighbouring House. But this is not permitted by the Roman Law, except when a Right of Servitude (*proficiendi, protegendive*) is annex to the Building; which amounts to a Proof, that the Air is in itself considered as part of a Man's Property.

Benefit of it: And therefore Fowling, ⁴ for Instance, is permitted so far only as the Owner of the Land thinks fit.

2. The same may be asserted of Banks of Sand, which are incapable of Culture, and serve only to supply Men with Sand, but can never be exhausted. There is also a natural Reason which forbids, that the Sea, thus considered, should be any Body's Property, because the taking of Possession ⁵ obtains only in Things that are limited. Hence *Thucydides* called a desert Country ἀόριστον, ⁶ unbounded; and *Isocrates*, the Lands which the Athenians were possessed of, τὴν ὑφ' ἡμῶν ἀφεισθεῖσαν, ⁷ limited and bounded by us; but Liquids having no Bounds of their own, (τὸ ὑγρὸν ἀόριστον οὐκ εἶναι ὄρω, says ⁸ *Aristotle*) can never be ⁹ possessed, unless they are

⁴ Such likewise is the Right of Habitation. *POMPONIUS* the Lawyer says, that if any one has raised a new Work, (or Building) either in a forcible or private Manner, on another Man's Ground, or to his Prejudice, the Heaven (or Air) must be measured, as well as the Ground, or Soil. *DIGEST. Lib. XLIII. Tit. XXIV. Quod vi aut clam. Leg. XXI. § 2.* See also *Lib. XVII. Tit. II. Pro Socio. Leg. LXXXIII. GROTIUS.*

The former of these Laws confirms what I have said in the Close of the foregoing Note; and thus rather makes against our Author, than contributes toward the Support of his Principle: For it is there decided, that Enquiry is to be made, not only how much Ground the Builder has occupied on another Man's Estate, but also whether he has raised any Edifice, which, without touching the Ground, is carried into the Air, corresponding to it. The Case mentioned in the other Law is this. It supposes a Tree, grown of itself, on the Confines of two Fields, or a large Stone lying on part of both. *N. B.* By the Term *Confines, Confinium*, was understood a Space of five or six Feet, which was to be left between two neighbouring Fields, and which belong no more to one of the Proprietors than to the other; so that neither of them could plant or build on it. Now *PAUL*, the Lawyer, asks, *Whether, on cutting down this Tree, or removing this Stone, they are to be possessed jointly, and in common, by the Proprietors of the said two Fields, so that, if they will not consent to possess them in common, either of them keeps the Whole, paying the other the Value of his Moiety: Or whether each may take his own Part, in Proportion to the Extent of the Stone, or the Roots of the Tree in his Ground?* He declares for the latter, as consonant to natural Reason. I shall not undertake to examine the Niceties on which this Question is founded, and about which the learned Commentator, just quoted, owns the Roman Lawyers are not well agreed. I content myself with observing, that, in Order to find any Thing to the present Purpose in the Law under Consideration, it must be supposed that the Branches of the Tree hang over the two Fields; now it may happen that they hang over neither, if the Tree is small, or only over one; and the Lawyers do not suppose the first of these three Cases, whatever *SELDEN* says, with some other Interpreters, in his *Mare clausum*, *Lib. I. Cap. XXI. p. 155. Edit. Lond. 1636.* In the Case here proposed, the Roman Lawyers do not consider the Space which the Branches occupy in the Air, corresponding to the Ground, but only the Extent of the Root in the Earth. So likewise they suppose, that the Stone found in the Confines has entered the two neighbouring Fields, as it commonly happens. See the Commentators on § 31. of the Title of the *Institutes*, here quoted. As to the Question, Whether a Tree that extends its Branches only over the neighbouring Field, doth thereby become common to the two Proprietors? Of which I do

not know that the Roman Law takes any Notice; if the Lawyers reason consistently, they ought to decide it so as to suppose a Property in the Air, as the Saxon Law does; according to which, as *Mr. THOMASIUS* tells us, (*Not. ad HUBERI Prælect. in Institut. Lib. II. Tit. I. § 5.*) the Branches, and the Fruit they bear, belong to the Master of the neighbouring Field over which they hang. For, beside that the Decisions of the antient Lawyers, concerning some Services, are founded on this, they go farther, and give it as their Opinion, that when a Tree hangs over a neighbouring House, the Proprietor of that House may cut down the Tree, and appropriate it to himself, if the Master of the neighbouring Land doth not cut it down at the Request of the other. *DIGEST. Lib. XLIII. Tit. XXVII. De Arboribus cadendis. Leg. I.* If the Air is not in itself susceptible of Property, the Person on whose Ground the Tree stands, with its whole Root, may very well say, he only makes Use of the Air, which is common to all Men, and therefore his Neighbour hath no Right to touch the Branches of his Tree, or hinder them from spreading over his House.

⁵ For this Reason *HORACE*, speaking of such Lands as have no Proprietor, calls them Lands not distinguished by Bounds. *Immetata jугера* (*Lib. III. Od. XXIV. v. 12.*) *GROTIUS.*

⁶ Charging the People of Megara, with ploughing Ground that was sacred, and not distinguished by Boundaries, ἀόριστα. *Lib. I. Cap. CXXXIX. Ed. Oxon.* The Historian is there speaking of a Piece of Ground, situated between the Country of Athens, and that of Megara. It was consecrated to some Divinity, and ought to have remained uncultivated, to serve as a Boundary. See *DEMOSTHENES*, *Orat. De Rebus Ordinanda. p. 71. Edit. Basil. 1572.* And *HARPOCRATION*, under the Word ὄργυς; as also *POLLUX*, *Lib. I. § 10.* with the Commentators on those Authors.

⁷ In his Panegyric, p. 48. *Edit. H. Steph.* where the Word ἀφεισθεῖσαν may likewise be rendered assigned, as it is by the Latin Interpreter.

⁸ *De Generat. & Corrupt. Lib. II. Cap. II.*

⁹ This is by no Means a solid Reason. Here is no other physical Obstacle than the Impossibility of Possession. But a Man may possess a Thing, at least in part, which is inclosed in another, without possessing at the same Time what encloses it. Thus, tho' it is not possible to possess the whole Ocean, may not a Man become Master of some of its Parts, to a certain Distance? As to Boundaries, there are always Shores on one Side; and on the other several Ways of limiting the Extent of the Sea possessed; as *SELDEN* has shewn at large, in his *Mare clausum*, *Lib. I. Cap. XXII.* See also *PUFENDORF*, *B. IV. Chap. V. § 3, &c.* with the Notes in the second Edition; and *Mr. DE BYNKERSHOEK's* Dissertation *De Dominio Maris*, *Cap. IX.*

inclosed by something else, as Lakes and Ponds; and also Rivers are subject to Property, because confined within their Banks. But the Sea is not contained in the Earth, as being equal to it, if not ¹⁰ greater, as the ¹¹ Antients believed, and therefore affirmed, that the Earth was contained in it, τὸν ὠκεῖον δεσμεῖ ἔνεια, &c. *The Ocean encompasses the Earth, and, as a Band, girds and ties it in,* are the Words of *Apollonius in Philostratus*. And as *Sulpitius Apollinaris* says in *Gellius*, *What can be said to be without the Ocean, when the Sea does on all Sides environ the Earth?* And again, *Since then on all Sides it flows round the Body of the Earth, nothing can be said to circumscribe it; but every Land being thus intrenched with the Circuit of its Waters, all Things which are shut up within its Borders are in the midst of it.* So *M. Acilius*, the Consul, in his Harangue to the Soldiers, in *Livy*, *The Ocean*, says he, *which incircles and confines the Globe.* So in *Seneca's* *Advices*, the Ocean is stiled *the World's Ligament*, and *the Earth's Rampart*. So by *Lucan*, *unda mundum coercens; a Water that environs the World.* Nor is there any Room to suppose ¹² a Division here: For when the Lands began to be divided, the Ocean, at least the major Part of it, was undiscovered; and therefore it cannot be conceived, that People so distant from each other should agree about any such Partition.

3. Wherefore those Things that remained undivided after the first Partition, and were in common to all Mankind, begin now to belong to one, not by vertue of a Division, but by Right of First - Possession, and they are not divided till after they are become a Property.

IV. Lands not inhabited are his who takes Possession of them, unless a whole Nation lay Claim to them by the same Right of Possession. See *Bembis*, Hist. b. 6.

IV. We now proceed to those Things which may become a Property, but are not so yet. Of this Kind are many desert and uncultivated Places, some ¹ Islands in the Sea, wild Beasts, Birds, and Fish. But here are two Things to be remarked; one is ², that a Country is taken Possession of, either in the Lump, or by Parts: The former is usually done by a whole People, or by him who is their Sovereign; the latter by the particular Persons of which the People is composed, but yet so that it is more common to assign to every one his Share, than to leave each Portion to the first Occupant. But if, in a Country possessed in the Lump, any Thing remains unassigned to private Persons, it ought not therefore to be accounted vacant; for it still belongs to him who first took Possession of that Country, whether King or People; such as Rivers, Lakes, Ponds, Forests, and uncultivated Mountains.

¹⁰ This was the Opinion of *Iarchas*, one of the Indian Sages, as is observed by *PHILOSTRATUS*, *Vit. Apoll. Tyan.* Lib. III. Cap. XI. (Edit. Morell. Cap. XXXVII. Edit. Lips. Olear.) *GROTIUS*.

That Sage makes the Sea less or greater than the Earth in several Respects. He says, that *If the Earth is compared with the Sea*, (I suppose he means the Surface of one with the Surface of the other) *the Earth is larger, because it incompasses the Sea; but if we compare the Earth with the whole liquid Substance*, (that is, the Mass of the Earth with the Mass of Waters contained in the Ocean) *the Earth is less, because it floats in the Water.* The learned Mr. *OLEARIUS*, Author of the last Edition, understands by ὅλη ἡ γῆ, the whole Æther, or the grand Vortex of the Earth. But the Indian Philosopher sufficiently explains himself in the following Words, where ὕδωρ, *the Water*, plainly signifies the same as ὅλη ἡ γῆ. But he distinguishes between ὕδωρ and αἰθήρ, as appears from Chap. XXXIV. It is another Question, whether his Opinion is just in itself, and supported by good Reasons. I shall not trouble myself with that Enquiry, since it is nothing to the present Purpose, for the Reason alledged in Note 9.

¹¹ *Vita Apoll. Tyan.* Lib. VII. Cap. XII. (Edit. Morell. Cap. XXVI. Edit. Olear.) *AULUS GELLIUS*, *Noct. Attic.* Lib. XII. Cap. XIII. *LIVY*, Lib. XXXVI. Cap. XVII. Num. 15.) *SENECA*,

Suafor. I. p. 2. Edit. Elzivir, 1672. *LUCAN Pharsalia*, Lib. V. ver. 619, 620.

¹² Nor is it necessary to suppose a Division: It is sufficient, that, as the several Parts of the Sea came to be known, People sooner or later possessed themselves of some of them to a certain Extent. The first Division of Things, which our Author conceives as prior to the Acquisition of Right in the first Occupant, is a mere Chimera. See what I have said on *PUFENDORF*, B. IV. Chap. IV. § 4. Note 4. and § 9. Note 3. second Edition.

IV. (1) As the *Echinades*, which *Alcmaeon* made his own by prior Occupancy; as we learn from *THUCYDIDES*, Lib. II. *GROTIUS*.

Alcmaeon did not seize on the Islands here mentioned; for a little before the Historian represents them as uninhabited; but some Places about the City of *Oeniadae*, which was formed by some one of the small adjacent Islands joined to the Continent by the River *Achelous*. He expressly says, that *Alcmaeon* called the Country where he reigned, *Acarmania*, after the Name of his Son. Cap. CII. Edit. Oxon. Our Author, in his *Florum sparsio ad Jus Justinianum*, ranks the *Echinades* among those Islands which appeared on a Sudden in the Sea; and gives several Instances of the same Sort. p. 28. Edit. Amst.

² See *PUFENDORF*, B. IV. Chap. VI. § 3, 4.

V. As to wild Beasts, Fish, and Birds, ¹ we must observe too, that whoever has Dominion over the Lands or Waters in which they are, may prohibit the taking of these Sorts of Animals, and so hinder any Person from acquiring them by taking them; and the same Law is obligatory on Foreigners. The Reason of which is this, that it is morally necessary for the Government of a People, that those who mingle with them, tho' but for a Time, as one does by entering their Territories, should conform to their Laws, as well as the Natives of the Country. Neither is it any Argument to the contrary, what we often read in the ² Fragments of the *Roman* Lawyers, that every Man has by the Law of Nature and Nations, a Privilege to catch such Sort of Animals; which is only true, when there is no Civil Law in being to forbid it: So that in this Case, as in many other Things, the *Roman* Laws left the Liberty of the primitive Times, without Prejudice to the Right which other Nations believed they had to dispose of them otherwise, as we see they have actually done. But when a Civil Law regulates Things otherwise, the Law of Nature itself commands us to observe it. For tho' the Civil Law can enjoin nothing which the Law of Nature forbids, nor forbid any Thing which that enjoins; yet it may restrain natural Liberty, and prohibit what was naturally lawful; and consequently, by its own Authority, may prevent and hinder that Property and Dominion which might otherwise be naturally obtained.

V. *Wild Beasts, Fish, and Birds, are his who catches them, unless there be a Law to the contrary.* Covarr. c. peccatum. part 2. § 8. Dd. in C. cunctos populos. C. de sum. Trin. Innoc. & panorm. in Can. 21. 1. de Sent. excomm. Covarr. ubi supra.

VI. 1. Let us now see whether Men may not have a Right to enjoy in common those Things that are already become the Properties of other Persons; which Question will at first seem strange, since the Establishment of Property seems to have extinguished all the Right that arose from the State of Community. But it is not so; for we are to consider the Intention of those who first introduced the Property of Goods. There is all the Reason in the World to suppose that they designed to deviate as little as possible from the Rules of natural Equity; and so it is with this Restriction, that the Rights of Proprietors have been established: For if even written Laws ought to be thus explained, as far as possible; much more ought we to put that favourable Construction on Things introduced by a Custom not written, and whose Extent therefore is not determined by the Signification of Terms.

VI. *In Case of Necessity Men have a Right of using that which others have a Property in; and from whence this Right arises.*

2. From whence it follows, first, that in a Case of ¹ absolute Necessity, that antient Right of using Things, as if they still remained common, must revive, and be in full Force: For in all Laws of human Institution, and consequently, in that of Property too, such Cases seem to be excepted.

3. Hence it is, that at Sea, when there is a ² Scarcity of Provisions, what each Man has reserved in store, ought to be produced for common Use. So in Cases of Fire, I may demolish ³ my Neighbour's House, if I have no other Means of preserving my own; or if my Ship be entangled in ⁴ the Cables of another Ship, or in the Nets of Fishermen, I may cut those Cables and Nets, if there is no other Way of being disengaged. All this is not introduced by the Civil Law; it only explains by such Regulations, the Maxims of natural Equity, and enforces them by its Authority.

4. Even amongst Divines it is a received Opinion, that whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft: That Sentiment is not founded on what some alledge, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is

Thom. 2. 2. 66. 7. Covarr. cap. peccatum. p. 2. § 1. Soto, 1. 5. q. 3. art. 4.

V. (1) See PUFENDORF, B. IV. Chap. VI. § 4, 5, 6, 7. with the Notes. As also Note 2. on the Abridgment of the *Duties of a Man and a Citizen*, B. I. Chap. XII. § 6. third and fourth Editions.

2 The following Passage in the *Institutes* is sufficient, *Wild Beasts, Birds, and Fishes, that is, all Animals bred in the Sea, in the Air, or on the Earth, are, by the Law of Nations, the Property of the Person who takes them.* Lib. II. Tit. I. *De rerum Divisione*, § 12. See Chap. VIII. of this Book, § 2, &c.

VI. (1) See PUFENDORF, B. II. Chap. VI. § 5, 6, 7.

2 DIGEST. Lib. XIV. Tit. II. *Ad Leg. Rhod. De factu.* Leg. II. § 2.

3 DIGEST. Lib. XLVII. Tit. IX. *De Incendio*, &c. Leg. III. § 7.

4 DIGEST. Lib. IX. Tit. II. *Ad Leg. Aquil.* Leg. XXIX. § 3. As ULPIAN observes, this is not to be done, but when something considerable is at stake, and in a pressing Necessity. DIGEST. Lib. XLIII. Tit. XXIV. *Quod vi aut elam.* Leg. VII. § 3, 4. where he adds the Case of pulling down a House, to stop the Progress of a Fire. GROTIUS.

supposed to have been established with this favourable Exception, that in such Cases one might enter again upon the Rights of the primitive Community. For had those that made the first Division of common Goods been asked their Opinion in this Matter, they would have answered the same as we now assert. ⁵ *Necessity*, says *Seneca* the Father, *that great Resource of human Frailty, breaks through the Ties of all Laws*; that is, all human Laws, or Laws made after the Manner, and in the Spirit of human Laws. So *Cicero* ⁶, *Cassius passed over into Syria, another's Province, if Men had regarded written Laws; but these suppressed, into a Province now his own by the Law of Nature*. So *Curtius* ⁷ says, that *In a common Calamity, every Man looks to himself, and takes Care of his own Interest*.

VII. This holds good, unless where the Necessity is avoidable some other Way.

VII. But here some Precautions are to be observed, that the Privileges of Necessity may not be too far extended. And first, that all other possible Means should be first used, by which such a Necessity may be avoided; either, for Instance, by applying to a Magistrate, to see how far he would relieve us, or by entreating the Owner to supply us with what we stand in Need of. *Plato* ¹ did not permit one Man to draw out of another's Well, 'till he had digged so far in his own Ground that there was no longer any Hopes or Expectation of Water. And *Solon* required, that a Man should first dig to the Depth of forty Cubits: Where *Plutarch* ² adds, *ἀπορία γὰρ, &c.* He thought it convenient to assist Mens Necessities, but not to indulge their Sloth. And *Xenophon*, in his Answer to the *Sinopenes*, *ἔπει δ' ἀνελθόντες ἀγορεύ, &c.* ³ *Wherever we come, and have not the Freedom of a Market, whether in a Barbarian or a Grecian Country, we take what we have Occasion for, not out of Insolence but Necessity*.

VIII. Or unless the Owner's Necessity is equal to ours.

VIII. But secondly, this is no Ways to be allowed, if the right Owner be pressed by the like Necessity; for all Things being equal, the ¹ Possessor has the Advantage. He is no Fool, says *Lactantius*, ² *who tho' it be for the Preservation of his own Life, will not rob the shipwrecked Wretch of his Plank, nor throw down the wounded from his Horse; because he thus abstains from doing an Injury which is a Sin, and to avoid this Sin is Wisdom*. But what, said *Cicero*, ³ *if a wise Man be ready to perish with Hunger, must not he take away Victuals from another, tho' a perfectly useless and insignificant Fellow?* No, by no Means; for the Preservation of Life is not more useful to us, than a Disposition of Mind which hinders us from consulting our own Conveniency at the Expence of another. And we read in *Curtius*, ⁴ *He who will not part with his own, has still a better Cause than he that demands what is another's*.

IX. An Obligation to Restitution, where it can be made.

IX. Thirdly, When my Necessities shall compel me to take any Thing from another Person, I certainly ought to make that Man Restitution as soon as I am able to do it. There are some tho' of a contrary Opinion, and argue thus, that ¹ whoever makes use of his own Right only, is not obliged to Restitution: Where-

⁵ He adds, that *It justifies those Actions to which it forces us*. Lib. IV. Controv. XXVII. The same Author illustrates this Maxim by the Example of Goods thrown into the Sea to save the Ship, and that of Houses demolished to stop a Fire. Excerpt. Controv. Lib. IV. Controv. IV. THEODORE PRISCIAN, an antient Physician, makes Use of the Example last mentioned, for proving the Necessity of destroying a Child in the Birth, in Order to save the Mother's Life. In that Passage he had an Instrument in View, called by the Grecians *Ἐμβρυοβλάστης*, of which we have a Description in GALEN and CELSUS, (Cap. XXIX.) a Word which ought to be restored in a Passage of TERTULLIAN, *De Animâ*. GROTIUS.

The Passage of TERTULLIAN is in Chap. XXV. of that Treatise; where some read *Ἐμβρυοπαύνην*, others *Ἐμβρυοσφάλην*. The Emendation proposed by our Author, may be found in the *Treasure of the Greek Tongue*. Tom. I. p. 796. Where HENRY STEVENS tells us, that several had before him observed this was the true Reading.

⁶ *Orat. Philippic. XI. Cap. XII. p. 844.*

⁷ *Lib. VI. Cap. IV. § 11.*

VII. (1) *De Legib. Lib. VIII. p. 844. Tom. II. Edit. H. Steph.*

² *In Vit. Solon. p. 91. Tom. I. Edit. Wech.*

³ *Expedit. Cyri, Lib. V. Cap. V. § 9. Edit. Oxon.*

VIII. (1) See PUFENDORF, B. II. Chap. VI. § 6. Note 3. second Edition.

² The Author in this Place has given us the Sense rather than the Words of LACTANTIUS, which occur *Lib. V. Cap. XVII. Num. 27. Edit. Cellar.*

³ *De Offic. Lib. III. Cap. VI.* This Passage contains a Decision as extravagant in itself, as misapplied by our Author. For the Roman Orator doth not suppose the useless Person in the same necessitous Condition with the wise Man.

⁴ *Lib. VII. Cap. I. Num. 33.*

IX. (1) This Difficulty is very well grounded, admitting our Author's Principles; but it vanishes when we lay it down as a Rule, as we ought to do, that Necessity only gives a Right to make Use of another Man's Goods, and doth not revive a Right to all Things in common. See PUFENDORF, B. II. Chap. VI. § 6.

as the Truth of it is, this Right is not absolute, but limited to this, that Restitution shall be made when that Necessity's over. For it is sufficient that it go so far and not further, to maintain the Laws of natural Equity against the Rigour of the Rights of a Proprietor.

X. Hence we may infer, how far he that is engaged in a just War may possess himself of any Place in a neutral Country; ¹ provided that there be not an imaginary, but a certain Danger of the Enemy's getting it into his Hands, and of his being thereby capable of doing irreparable Injuries; and provided too, that he takes nothing but what is necessary for his Security; that is, the bare Custody of the Place, leaving the Jurisdiction and the Revenue to the true Proprietor. And lastly, that this be done with an Intention of resigning even the Custody of the Place itself, as soon as ever the Danger is over. *Enna*, says *Livy*, ² is detained either by Injustice or Necessity; because whatsoever does but deviate the least from Necessity, is Injustice. The *Grecians* who were with *Xenophon*, when they had the most pressing Occasion for Shipping, by *Xenophon's* Advice, seized such as passed by; but so that the Cargo was preserved untouched for the Owners, and to the Seamen they not only gave Provisions, but paid them the Freight. The first Right therefore that remains of the ancient Community, since Property was introduced, is this of Necessity.

XI. The next is that of ¹ innocent Profit; when I only seek my own Advantage, without damaging any Body else. *Why should we not*, says *Cicero*, ² *when we can do it without any Detriment to ourselves, let others share in those Things that may be beneficial to them who receive them, and no Inconvenience to us who give them.* *Seneca* therefore denies that it is any Favour, properly so called, to permit ³ a Man to light a Fire by ours. And we read in *Plutarch*, *ἐπε γὰρ τροφῆν, &c.* ⁴ *'Tis an impious Thing for those who have eat sufficiently, to throw away the remaining Victuals; or for those who have had Water enough, to stop up or hide the Spring; or for those who themselves have had the Advantage of them, to destroy the Sea or Land Marks; but we ought to leave them for the Use and Service of them, who, after us, shall want them.*

XII. So a River, considered merely as ¹ such, is the Property of the People through whose Lands it flows, or of him under whose Jurisdiction that People is; and they may, if they please, make Sluices, and appropriate to themselves whatever that River produces. But if this River be considered ² as a running Water, it is so far common, that any Body may drink or draw thereof. *What Man would refuse to let another light a Candle by his? Or who would guard the Waters of the Sea, to hinder others from taking of them?* says *Ovid* ³, who also brings in *Latona* thus speaking to the *Lycians*, ⁴ *Why do you refuse me Water? The Use of Water is common.* Where also he calls Water a ⁵ publick Gift, that is, a Gift common to all Mankind; the Word *publick* being improperly used; in which Sense some Things are said to be *publick by the Law* ⁶ of Nations. So *Virgil* asserted ⁷ Water to be *cunctis patentem, open to all Men.*

X. (1) This Question is discussed, and that with more Exactness, by PUFENDORF, in the last Paragraph of the Chapter quoted in the foregoing Note.

² Lib. XXIV. Cap. XXXIX. Num. 7. But the Historian there speaks of a Roman Governor, who had ordered the Inhabitants of that City to be massacred, upon being informed of their Design to revolt; so that the Example is not to the Question in hand.

XI. See PUFENDORF on these innocent Advantages, B. IV. Chap. III. § 3, 4.

² This Passage, tho' distinguished in *Italic* Character, is not quoted exactly; and the learned GRONOVIVS even finds a Barbarism in it, as it stands in our Author. The *Roman* Orator's Words are, *Unde ex re satis præcipit [Ennius] ut quicquid sine detrimento possit commodari, id tribuatur, vel ignoto. Ex quo sunt illa communia; non prohibere aquâ profluente: Pati ab igne ignem capere, si quis velit: Consilium fidele deliberanti dare; quæ sunt iis utilia, qui accipiunt, danti non molesta.* De Offic.

Lib. I. Cap. XVI.

³ De Benef. Lib. IX. Cap. XXIX. The same Philosopher asks likewise, *Who ever reckoned it a Favour (Beneficium) to bestow a Bit of Bread, or a small Piece of Money on a poor Man? ibid.*

⁴ Symposiac. Lib. VII. Quest. IV.

XII. (1) That is, considered as a Collection of Waters, flowing in a certain Bed. See the following Note.

² That is, in Regard to the Particles of Water gliding along each Moment. But this Distinction is not well grounded, as has been observed by PUFENDORF, B. III. Chap. III. § 4. See what I have said on the Abridgment of the Duties of a Man and a Citizen, B. I. Chap. XII. § 6. Note 2. of the third and fourth Edition.

³ Art. amat. Lib. 3. ver. 93, 94.

⁴ Metamorph. Lib. VI. ver. 349.

⁵ Ibid. 350, 351.

⁶ See the following Chap. V. § 9. Note 5.

⁷ Æneid. VII. 230.

XIII. *The Right of passing Lands and Rivers, explained.*
Bald. III.
Confil. 298.

XIII. 1. So likewise a free Passage ought to be granted to Persons where just Occasion shall require, over any Lands and Rivers, or such Parts of the Sea as belong to any Nation: As for Instance, if being expelled their own Country, they want to settle in some uninhabited Land, or if they are going to traffick with some distant People, or to recover, by a just War, what is their own Right and Due. The Reason is the same with that which we have applied above, *viz.* that the Right of Property may have been established with the Reservation of such a Use, ¹ as is advantageous to some, without injuring others; and therefore the Authors of that Establishment are to be supposed to have done it on that Foot.

Numb. xx.
— xxi.

2. A remarkable Instance we have of this in the History of *Moses*, who being to march through another People's Country, offered first to the *Edomite*, and then to the *Amorite*, these Conditions, that for his Part he would pass by the King's Highway, neither would he turn to the Right or the Left, nor enter any Man's private Possessions, and if he should have Occasion for any Thing that was theirs, he would pay them the full Value of it; which being rejected, was a sufficient Reason for that just War ² he made on the *Amorites*. *They refused him*, says Saint *Augustin*, ³ *a Passage which could not do them any Prejudice; a Passage that, by the most equitable Laws of human Society, ought to have been granted him.*

Plut. Apoph.

Idem. Apo. &
Vit. *Lysander*.

3. Thus too the *Greeks* ⁴ under *Clearchus*, *προσέβουθα* ⁵, &c. *We intend to go home peaceably, if no Body obstruct or molest us; but, by the Assistance of the Gods, we will endeavour to defend ourselves against any who shall injure us.* Not much unlike this was *Agessilaus's* Question, who returning out of *Asia*, and being come to ⁶ *Troas*, asked them whether they would permit him to pass as an Enemy or a Friend. So *Lysander* to the *Bæotians*, whether they were willing that he should march through them with Pike erected or inclined. And the antient *Batavians*, in *Tacitus*, declare to the Inhabitants of *Bonne*, ⁷ *If no one oppose us we will go peaceably along; but if Resistance is made, we will cut out our Passage with our Swords.* *Cimon*, the *Athenian* General, going to the Assistance of the *Lacedæmonians*, led his Troops through the Territories of the *Corinthians*, without giving them Notice of it. The *Corinthians* reproved him on that Account, and told him,

XIII. (1) *SERVIVS*, on the Passage quoted from the *Æneid*, in the preceding Note, *Litusque rogamus, Innocuum, &c.* explaining the Epithet *innocuum*, observes, that the Shore on which Men land is not called *innocuum*, because it hurts no one, but because such a Demand doth no Man any Prejudice. *Cujus Vindicatio nulli nocere possit. GROTIUS.*

The Author corrects this Passage, without apprizing his Reader of the Alteration. All the Editions which I have seen, read *cui vindicato nullus possit nocere*. But his Correction seems judiciously made. In Regard to the Question itself, he takes it for granted, that the Liberty of passing over Lands, or on Rivers belonging to other Men, is always a Matter of innocent Advantage. The contrary is solidly proved by *PUFENDORF*, B. III. Ch. III. § 5. with the Notes. And, after all, even tho' we have nothing to apprehend from those who desire such a Passage, we are not therefore obliged in Rigour to grant it. It necessarily follows from the Right of Property, that the Proprietor may refuse another the Use of his Goods. Humanity indeed requires, that he should grant that Use to those who stand in Need of it, when it can be done without any considerable Inconveniency to himself; and if he even then refuses it, tho' he transgresses his Duty, he doth them no Wrong, properly so called; except they are that in extreme Necessity, which is superior to all ordinary Rules. Thus far and no farther extends the Reserve, with which it is supposed the Establishment of Property is accompanied.

2 Thus *Hercules* killed *Amyntor*, King of *Orchomenus*, who obstructed his Passage through his Dominions; as we learn from *APOLLODORUS*,

(*Bibliothec. Lib. II. Cap. VII. § 7.*) The Scholiast on *HORACE*, in his Remarks on *Epod. XVII.* against *Caninia*, says, that the *Grecians* made War on *Telephus*, King of *Mysia*, for refusing to let them pass through his Country, in their Way to *Troy*. See also the Laws of the *Lombards*, B. II. Tit. LIV. Cap. II. *GROTIUS.*

Concerning *Telephus*, see *DICTYUS* of *Crete*, Lib. II. Cap. I. &c.

3 On *Numb. XX. Quæst. XLIV.* This Passage is quoted in the *Canon Law*, *Caus. XXIII. Quæst. II. Cap. III.* But begging St. *AUGUSTIN's* Pardon, no Consequence can be drawn from this Example. For, first, *Sihon* King of the *Amorites*, not only denied the *Israelites* Passage, but marched out against them, met them in the Wilderness, at the Head of an Army, and thus reduced them to a Necessity of Fighting him in their own Defence, rather than for forcing their Passage. Secondly, It is true, the *Israelites* certainly designed to pass, by some Means or other; but as GOD had given them the Land of *Canaan*, with express Orders, not only to destroy the seven accursed Nations, but also to combat all Opposition to the Execution of the Designs of Heaven, their Case was extraordinary, and such as cannot reasonably give Occasion to a general Rule for deciding the Question in hand.

4 *De Exped. Cyri. Lib. II. Cap. III. § 12. Edit. Oxon.* See likewise what *Cherisophus* says to *Mithridates*, Lib. III. Cap. III. § 3.

5 Or rather, into the Country of the *Trallians*, *Τραλλῆες*, as *PLUTARCH* himself calls them, in the Life of *Agessilaus*, Tom. I. p. 604.

6 *TACITUS, Hist. Lib. IV. Cap. XX. Num. 2.*

⁷ that

7 that *When one wanted to go into a House, it was usual to knock at the Door, and to wait for Admission. Very well,* replied he, *and did you yourselves knock at the Door of the Cleonians and Megarenies? Did you not break it down, thinking that all ought to lie open to the strongest?* The middle Opinion then is the best, that the Liberty of Passing ought first ⁸ to be demanded, and if that be denied, it may be claimed by Force. So *Agefilaus*, when in his Return from *Asia* he demanded of the King of *Macedon* Leave to pass through his Dominions, and that Prince told him he would consider of it, answered briskly, *Yes, let him consider of it, and in the mean Time we will pass through.*

*Plut. in ejus
Vit. & Apoph.*

4. Neither can it be reasonably objected, that there may be Suspicion of Danger from the Passing of a Multitude; for one Man's Right is not diminished ⁹ by another Man's Fear; and much less so, because there are Methods of providing against it; as, for Instance, they may be divided into small Bodies, or be obliged to pass ¹⁰ unarmed, as the Inhabitants of *Cologne* ¹¹ formerly required of the *Germans*; which Custom, as *Strabo* remarks, was antiently observed amongst the ¹² *Ælians*; or he that permits another to pass through his Dominions, may have Garrisons or Troops maintained at the Expence of him who demands this Passage; or Hostages may be given, as *Seleucus* required of *Demetrius*, before he would agree to let him stay any Time in his Dominions. Nor is a Fear of provoking that Prince, against whom he that thus passes is engaged in a ¹³ just War, a sufficient Reason for refusing him Passage. Nor is it any more an Excuse, that he may pass some other Way; for this is what every Body may equally alledge, and so this Right of Passing ¹⁴ would be intirely destroyed: But 'tis enough that the Passage be requested, without any Fraud or ill Design, by the nearest and most convenient Way. If indeed he who desires thus to pass, undertakes an unjust War, or if he brings People who are my Enemies along with him, ¹⁵ I may deny him a Passage; for in this Case I have a Right to meet and oppose him, even in his own Land, and to intercept his March.

*See an Exam-
ple in Proco-
pius.
Perfic. l. 2.
Plut. in Demet.*

5. Neither is this Liberty of Passing due to Persons only, but also to Goods and Merchandize; for no Body has a Right to hinder one Nation ¹⁶ from trading with another distant Nation; it being for the Interest of Society in general, and no

7 PLUTARCH, in *Cimon*. p. 486. Tom. I. Edit. Wech.

8 ARISTOPHANES introduces one saying, that when the Athenians went for Delphos, they desired Leave of the Boeotians to pass through their Country. Avib. ver. 188, 189. On which the Scholiast observes, that at that Time they only desired a Passage for an Army. The Venetians granted the Germans and French the same Liberty, when those two People disputed the City of *Marano*. PAUL PARUTA, *Hist. Venet.* Lib. XI. The Germans complaining that their Enemies were allowed a Passage, the Venetians said, by Way of Excuse, that it was not in their Power to hinder them, without appearing in Arms, and that it was not their Custom to proceed so far, but when they had to do with a declared Enemy. *Ibid.* The Pope had Recourse to the same Apology. *Idem.* Lib. XII. GROTIUS.

9 This is supposing the very Thing in Question.

10 We have an Example of this Kind in the *Excerpta Legationum* XII. And in BEMBO, *Hist. Ital.* See also some remarkable Treaties about Passage, between *Frederick Barbarossa*, Emperor of Germany, and *Isaac Angelus*, Emperor of *Constantinople*, in NICETAS, Lib. II. *De Vit. Isaaci*, (Cap. IV. and VII.) In the German Empire, he who demands a Passage, gives Security for repairing what Damage he may do. See ALBERT KRANTZIUS, *Saxonic.* Lib. X. and MENDOZA, *Belgic.* The antient *Suisses*, demanding a Passage through the Roman Province, it was refused by *Julius Cæsar*, who was apprehensive that a People like them, who bore no good Will to the Commonwealth, would hardly forbear committing some Disorders. *De*

Bell. Gall. Lib. I. (Cap. VII. VIII.) GROTIUS.

Our Author, or his Printers, have forgot the Name of the Historian, from whom the *Excerpta Legationum*, here quoted, are taken; and as I am not furnished with all those Writers whose *ExTRACTS* are extant, I cannot find the Passage here produced.

11 TACIT. *Hist.* Lib. IV. Cap. LXV. Num. 6.

12 Those who marched through that Country, delivered up their Arms, which were restored to them on their leaving it. *Geograph.* Lib. VIII. p. 548. Edit. Amst. (358, Paris.)

13 But how just a Cause soever he may have for making War (which is not always easy to determine) we are not on that Account more obliged to expose ourselves to the Vengeance of his Enemy, by granting him a Passage, than to assist a Person when we are not strong enough to undertake his Defence.

14 This is once more begging the Question.

15 Under this Pretence the *Franks*, who were in the *Venetian* Territories, formerly refused to let *Narses* pass, who had some *Lombards* in his Army. PROCOPIUS; *Gothic.* Lib. IV. (or *Hist. Miscellan.* Cap. XXVI.) See other Instances of such a Refusal, in BEMBO, *Italic.* Lib. VII. and in PAUL PARUTA, *Hist. Venet.* Lib. V. and VI. GROTIUS.

16 That is, either mediately or immediately. See my first Note on PUFENDORF, B. III. Chap. III. § 6. that Paragraph, and the Notes on it, may serve to rectify our Author's Notions on this Subject.

Way detrimental to any Person ; for if any one be disappointed of a Profit which he only expected but had no Title to, this ought not to be reputed an Injury. To the Testimonies we have elsewhere¹⁷ produced to this Purpose, we shall subjoin one out of *Philo*, *πάντα ἡ θάλαττα*, &c.¹⁸ Under a good Government, Merchant Ships sail securely on every Sea, in Order to carry on Trade,¹⁹ whereby different Countries, from the natural Desire of Society, mutually communicate what each affords peculiar to itself. For Envy never yet possessed the whole World, nor even any great and entire Part of it. And another out of *Plutarch*, who speaking of the Sea, delivers himself thus, *ἀγερον ὄντα*, &c.²⁰ Human Life would have been wild and savage, there would have been no Intercourse between Men, were it not for this Element, which furnishes them with the Means of supplying one another's Wants, and of forming Acquaintances and Friendships by the Exchanges they make. To which agrees that of *Libanius*,²¹ *ὃ μὲν τοῖς*, &c. GOD has not bestowed all his Gifts on every Part of the Earth, but has distributed them among different Nations, that Men wanting the Assistance of one another, might maintain and cultivate Society. And to this End has Providence introduced Commerce, that whatsoever is the Produce of any Nation may be equally enjoyed by all. And *Euripides*,²² in the Person of *Theseus*, reckons Navigation in the Number of those Things that human Reason has found out for publick Advantage ; the Expression is this,

Πόντος τε ναυτολήμαός, &c.

What Nature denies to one Country, is supplied from another, by Means of Navigation. So *Florus*,²³ Take away Commerce, and you break the Bond that ties Mankind together.

XIV. Whether a Duty may be laid on Goods that only pass by.

XIV. 1. But it is questioned, whether the Sovereign of the Country¹ can impose a Duty on Goods that are transported either by Land, or upon a River, or some Part of the Sea, which may be called an Accessory to his Dominions. Now it is certain, that Equity does not permit the Exacting of Duty for Goods, which has no Manner of Relation to them, as it would be unjust to make Strangers, who only pass through a Country, pay a Poll-Tax which is laid on the Subjects to defray the Charges of the State.

2. But if one is obliged to be at any Charge,² either expressly, and merely for securing the Transportation of Goods, or amongst other Things for that Use : Then

¹⁷ In his Treatise *De Mari Libero*. Cap. VIII.

¹⁸ *De Legat. ad Caium*. p. 998, 999. Edit. Paris.

¹⁹ *SERVIVS ON VIRGIL, Eclog. IV.* (ver. 39.) *Omnis feret omnia tellus*, observes, that Navigation owes its Rise to Commerce. And, from those Words in *Georgic. Lib. I.* ver. 137.

Navita dum Stellis numeros & nomina fecit.

He takes Occasion to remark, that *The Invention and Improvement of Navigation, are owing to a Necessity of procuring certain Things in other Countries.* *St. AMBROSE*, speaking of the Usefulness of the Sea, calls it *The Receptacle of Rivers, the Source of Rain*; and adds, that it is convenient for transporting Provisions, and uniting distant Nations. *De Creatione (Hexaëm. III. 5.)* A Thought borrowed from *St. BASIL, Hexaëm. IV.* *THEODORET* elegantly called the Sea the common Market of the World; and the Islands so many Stations in the Sea. *De Provid. Lib. II.* To all which let us add the following Words of *St. CHRYSOSTOM*, Can we sufficiently express our great Facility, of trading one with another? For, that the Length of the Way might not deter us from a mutual Converse, GOD has given us a shorter Road, the Sea, which lies near every Country; that the whole World being considered as one House, we may frequently visit one another, and mutually and easily communicate what each Country affords peculiar to itself; so that each Man

who inhabits a small Portion of the Earth, enjoys whatever is produced elsewhere, as freely as if he were Master of the Whole: And, as if we were at a well furnished Table, we need only stretch out our Hand, and give what stands before us to those who are placed at a Distance from us, and in our Turn receive from them what stands within their Reach. *Ad Stelechium. GROTIUS.*

Our Author closed the latter Passage from *SERVIVS* with these Words, *Commune Bonum erat patere commercium Maris*, that is, the free Use of the Sea is a common Good. They are *SENECA's, De Benef. Lib. I. Cap. VIII.*

²⁰ *De Aquæ & Ignis compar.* p. 957. Tom. II. Edit. Wech.

²¹ Our Author has given no Hint for guessing out of what Part of *LIBANIUS* these Words are taken.

²² *Supplic.* ver. 209, 210.

²³ *Lib. III. Cap. VI. Num. 1.*

XIV. (1) See *PUFENDORF, B. III. Chap. III. § 7.* with the Notes.

2 This and other such Reasons only tend to render the Imposition of Duties more just. But even independent of that Consideration, something may be demanded for the bare Permission of Passage, which, strictly speaking, one was not obliged to grant. Every Proprietor, in Consequence of his Right of Property, is at full Liberty not to allow another the Use of his Property, but on certain Terms.

to recompense this, some Duty may be laid on those foreign Commodities; provided it be not higher than the Reason for exacting it requires; for on that depends the Justice³ of Customs and Taxes: Thus *Solomon* received Tolls for Horses and Linnen, that passed over the *Syrian Isthmus*. So *Pliny* says, ⁴ that *Frankincense* could be no otherwise transported than by the *Gebanites*, and therefore a Duty was paid to that King. So, as *Strabo* ⁵ informs us, the People of *Marseilles* were greatly enriched by a Canal, which *Marius* had made from the *Rhone* to the Sea, *περὶ Ἰσθμοῦ τῆς, &c.* exacting a Duty from all Ships that went up or down. The same Writer informs us, ⁶ that the *Corinthians* did by a very antient Custom impose Duties on all Goods that passed over from the *Ægean* to the *Ionian* Sea, by Land, to avoid going about the Cape of *Malea*: The same did the *Romans* ⁷ require for the Passing of the *Rhine*, and was likewise given for going over Bridges, as *Seneca* ⁸ testifies; and as to what relates to the passing over Rivers, our Law-Books are all very particular.

3. But it is too frequent, that Impositions of this Nature are excessive, on which Account *Strabo* ⁹ complains of the *Phylarchi*, (or Chiefs of divers Nations of *Arabia*) adding, *καλεπὸν γὰρ, &c.* With such poor and brutish People as they are, it is difficult to regulate the Imposts on a Footing that is not grievous to the Merchants.

XV. Persons also that pass either by Land or Water, may, on Account of their Health, or for any other just Cause, make some Stay in the Country; this being likewise¹ an innocent Utility. And therefore *Ilioneus*, in *Virgil*, ² when the *Trojans* were not permitted to refresh themselves on the Coasts of *Africa*, presumed to invoke the Gods to be Judges of the Injury. And the Complaint that was made by the *Megarenses*, that the *Athenians* had refused them Entrance into their Harbours, was thought well grounded by the *Grecians*, as being, according to *Plutarch*, *ἄρτι τὰ νόμιμα δίκαια*, ³ contrary to the Law of Nations: So that the *Lacedemonians* looked on it as one of the most just Causes of War.

2. And consequently, any little Cottage or Hut may be built upon the Shore, tho' we grant that this Shore belongs to the People of the Place. For what *Pomponius* ⁴ says, that Leave must be first asked, and an Order had of the Magistrate, before we build any Thing in the Sea, or on the Shore, relates only to such Structures as are permanent and lasting. To which Purpose is that of the Poet,

*Contracta Pisces æquora sentiunt
Factis in Altum molibus.*

³ See the Laws of the *Lombards*, Lib. II. Tit. XXXI. and the Letter from the Bishops to King *Lewis*, which may be found among the Capitularies of *Charles the Bald*, Cap. XIV. GROTIUS.

⁴ *Hist. Nat.* Lib. XII. Cap. XIV. We have something of the same Kind towards the Beginning of *LEO* of *Africa's* Voyage. *ARISTOPHANES* in his Comedy of the *Birds*, (ver. 190, &c.) alludes to such Sorts of Imposts, when he proposes shutting the Passage of the Air, that the Gods might be obliged to pay some Duty, for the Smoke arising from their Victims. GROTIUS.

⁵ *STRABO*, Lib. IV. p. 279. Edit. Amst. (183, Paris.)

⁶ Lib. VIII. p. 580. Edit. Amst. (378, Paris.)

⁷ The Author here quotes in the Margin *TACITUS*, *Hist.* Lib. IV. The following Passage in Cap. LXV. Num. 6. is probably what he had in View; for I find nothing more to his Purpose, either in that Book or any other. The *Teneterians*, who inhabited on this Side of the *Rhine*, having sent a Deputation to those of *Cologne*, who lived on the other Side of that River, soliciting them to shake off the *Roman* Yoke; received for Answer, among other Things, that they were ready to ex-

cuse the Payment of Customs, and other Impositions on Goods.

⁸ *De Constantia*. Sap. Cap. XIV.

⁹ *Geo.* Lib. XVI. p. 1085. Edit. Amst. (748, Paris.)

XV. (1) This doth not always take Place. See *PUFENDORF*, B. III. Chap. III. § 8.

² *Æneid.* Lib. I. ver. 543, &c. *SERVIVS* on this Place observes, that, according to the Law of Nature, The Coast was common to all, and belonged to the first Occupant. From whence he infers, that It was a Piece of Cruelty to hinder any one from Landing. The same Commentator, (on Ver. 619.) says, that *Hercules* killed *Laomedon* for opposing his Entrance into the Port of *Troy*. GROTIUS.

³ *In Vit. Pericl.* p. 168. Tom. I. Edit. Wech. where it is added, that this was done also in Violation of Oaths. But *THUCYDIDES* speaks only of the Infraction of Treaties, Lib. I. Cap. LXVII. Edit. Oxon. Besides the Thing disputed, there was a Liberty of Trading, not a bare Permission of Landing for Refreshment, or on any such Account.

⁴ *DIGEST.* Lib. XLI. Tit. I. De acquir. rerum Dominio. Leg. I. See the following Chapter, § 9.

⁵ *The Fish perceive the Waters of the Sea shrunk, by the huge Piles of Stone that are raised in it.*

XVI. *Those who are driven out of their own Country have a Right to settle in any other, provided that they submit to the Rules and Government of the Place.*

Herod. 1. 1. c. 150.
Paus. 1. 7. c. 11.
Diod. 5. c. 58.
Herod. 4. c. 145.
Oros. 1. 7.

XVI. So likewise, a fixed Abode ought not to be refused to Strangers, who being expelled their own Country, seek a Retreat elsewhere: ¹ Provided they submit to the Laws of the State, and refrain from every Thing that might give Occasion to Sedition: Which just Distinction the divine Poet has judiciously observed, when he introduces *Æneas* offering these Conditions, ² *King Latinus then become my Father-in-Law, shall still retain the sovereign Authority, both in War and in Peace.* And *Latinus* himself, in *Dionysius Halicarnassensis*, pronounced the Cause of *Æneas* to be just, if having no other Habitation he were forced thither. *Strabo*, from *Eratoſthenes* ⁴ says, it belongs to Barbarians only to drive away Strangers: and the *Spartans* ⁵ who did so, have not been commended on this Account. So in the Opinion of *St. Ambrose*, ⁶ those People who refuse to admit Foreigners amongst them, are very much to blame. Thus the *Eolians* kindly received the *Colophonians*, the *Rhodians*, *Pborbas* and his Companions; the People of *Caria*, those of *Melos*; the *Lacedæmonians*, the *Minyæ*; and the *Cumæans*, some others who came over to them. But when the *Minyæ*, after their Reception, demanded a Share in the Government, what *Herodotus* says of them is very just, ἐξέβλεψαι καὶ πρὸς αὐτοὺς καὶ ἔστω, ⁷ *They acted insolently, and against all Right and Reason.* And *Valerius*, ⁸ that *They basely requited a Favour with an Injury.*

XVII. *ARight to waste Places, how to be understood.*

XVII. And if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, ¹ because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the antient People. And *Servius* ² remarks, that seven hundred Acres of bad unmanured Land were granted to the *Trojans*, by the original *Latins*: So we read in *Dion Prusæensis*, εἰδὲν ἀδυνασῶν, &c. that ³ *They commit no Crime who cultivate and manure the untitled Part of a Country.* Thus the *Ansibarians* formerly cried, that ⁴ *As the Gods have Heaven, so the Earth was given to Mankind, and what is possessed by none, belongs to every one.* And then looking up to the Sun and Stars as if present, and within bearing, they asked them, whether they could bear to look on those uninhabited Lands, and whether they would not rather pour in the Sea upon those who hindered others to settle on them. But these general Maxims were ill applied by them to the present Case; for those Lands were not waste and desolate, but were employed in the Feeding of their Soldiers Cattle; which was a just Reason that the *Romans* should refuse them. Neither was it less just what the *Romans* formerly inquired of the *Galli Senones*, ⁵ *What Right any one had to demand a Country from the lawful Owners, and, in Case of Refusal, to threaten them with a War?*

⁵ HORAT. Lib. III. Od. I. ver. 33, 34.

XVI. (1) See PUFENDORF, B. III. Chap. III. § 10.

² ÆNEID. Lib. XII. 192, 193.

³ ANTIQ. ROM. Lib. I. Cap. LVIII.

⁴ That Author doth not say it belongs to Barbarians only, to drive Strangers out of their Country; he only relates this historically, as a Custom common to all the barbarous Nations; that is all but the Grecians. STRABO, Geog. Lib. XVII. p. 1154. Edit. Amst. (802, Paris).

⁵ See the Treatises written by NICOLAS CRAIGIUS, De Repub. Lacedæm. Lib. III. Tab. III. Instit. 3. p. 210, &c.

⁶ De Offic. Lib. III. Cap. VII.

⁷ Lib. IV. Cap. CXLVI.

⁸ Lib. IV. Cap. VI. extern. Num. 3.

XVII. (1) I am not of our Author's Opinion in this Point; nor can I think the Reason here alleged solid. All the Land within the Compass of each respective Country is really occupied; tho' every Part of it is not cultivated, or assigned to any one in particular: It all belongs to the Body of the People. The Author here reasons on a false Idea of the Nature of taking Possession. He has him-

self owned, § 4. that not only the Rivers, Lakes, Ponds, and Forests, but also the rough and uncultivated Mountains (*Montes asperi*) belong (*manent in Dominio*) to that People, or King, who has first taken Possession of the Country. He does not there distinguish Jurisdiction from Property; and that Distinction is equally ill grounded in this Case, and liable to great Inconveniencies. The Inundations of so many barbarous People, who under Pretence of seeking a Settlement in uncultivated Countries, have driven out the native Inhabitants, or seized on the Government, are a good Proof of what I advance. See PUFENDORF, B. III. Chap. III. § 10.

² Therefore we are rather to adhere to the Authority of LIVIUS SISENNA and CATO; for almost all the antient Writers agree in this Point. CATO, in his Origines, tells us, that the *Trojans* received from *Latinus* the Land lying between *Laurentum* and the *Trojan Camp*. He likewise gives us the Measure of that Land, which he says was seven hundred Acres. On ÆNEID. XI. 316.

³ Orat. VII.

⁴ Annal. Lib. XIII. Cap. LV. Num. 4, 5.

⁵ LIVY, Lib. V. Cap. XXXVI. Num. 5.

XVIII. Having

XVIII. Having already spoken of the common Right to Things, the next in Course is the common Right to Actions: And this is to be considered either absolutely, or by Supposition ¹. The absolute Right extends ² to certain Acts whereby those Things may be procured, without which we cannot conveniently subsist; I say *conveniently*, for here is not required a Necessity, like that which justifies the taking of what is another Man's; because we are not discoursing now of what may be done without the Owner's Leave, but the Question is about acquiring in a certain Manner, what one has Occasion for, with the Consent of the lawful Possessors; and that only so as they cannot hinder him, either by any Law, or by Combination: For such an Impediment would, in the Things I mentioned, be contrary to the Nature of human Society; and this is what St. Ambrose ³ calls, *the cutting off ⁴ from Men the Communication of the Goods of their common Mother, the refusing one the Fruits of the Earth that grow for all; the destroying of Commerce, which is necessary for Life*. For we are not talking here of what is superfluous, and what serves only for Pleasure, but of such Things as there is no living without, such as Food, and Cloaths, and Medicines.

XIX. We affirm therefore, that every Man has a Right of buying these Things at a reasonable Rate, unless the Persons from whom we would purchase them, have themselves an Occasion for them; as in the Time of Famine, the common Sale of Corn ¹ is prohibited, and yet even in such an Extremity as this, we cannot ² expel those Foreigners we have once admitted, but must, as St. Ambrose shews, be common Sharers in a common Calamity.

XX. But one has not the same Right ¹ to sell his own Commodities as to buy those of another. For every Man is at Liberty to purchase, or not purchase, as he thinks fit. Thus the antient *Belgæ* prohibited the Importation of Wine, and other foreign Goods. So Strabo, ² speaking of the Nabatean Arabians, says, *εἰσαγώγιμα ἔστι, &c.* that *Some Commodities may be imported there, and some not*.

XXI. 1. I am of Opinion, that in the Right I just now spoke of, is also included, a Liberty to contract Matrimony amongst neighbouring Nations; when, for Instance, a People, consisting only of Men, ¹ having been banished their own Country, is settled in another. For tho' Celibacy be not intirely repugnant to human Nature, yet it is contrary to the natural Disposition of most Men, and is suitable only to Minds exalted above the common Level. And therefore Marriage ought not to be denied. Upon this Foundation Romulus ² intreated his Neighbours, that *they would not refuse to mix their Blood, and join in Affinity with his People, who were Men as well as they*. So Canuleius, ³ *We desire to contract Marriage with you, a Thing that is usually granted, not only to Neighbours, but even*

XVIII. A Right to such Actions as the Occasions of human Life require.

XIX. A Right to purchase Necessaries. Covarr. Var. Res. l. 3. c. 14. ibi, tertio. De Offic. l. 3. c. 7.

XX. But no Right always to sell their own Commodities. Molina, Disp. 105. Egi. Reg. de Act. supern. Disp. 31. du. 2. n. 52. Cæs. 1. Bell. Gall.

XXI. A Right to Marriage explained.

XVIII. (1) That is, supposing the Liberty of doing such or such a Thing, once granted to all in general.

2 The Author by these Terms understands Contracts of Sale, Exchange, or such other Agreements, in Consequence of which, we provide for the Necessaries of Life in a strange Country. See PUFENDORF, B. III. Chap. III. § 11.

3 De Offic. Lib. III. Cap. VII.

4 See a Passage in PLUTARCH's Life of *Pericles*, already quoted, (§ 15. Note 3.) SENECA, having mentioned two Verses of VIRGIL, where the Poet says every Country doth not produce all Things, (*Georgic. I. 53, 54.*) adds, that *This was thus ordered by Nature, to render Commerce among Men necessary*. Epist. LXXXVII. In another Place, he considers the Establishment of Commerce, which unites distant Nations, as one of the Wonders of Providence. *Quæst. Natur. Lib. V. Cap. XVIII.* See the Complaints of the *English*, in Regard to the *Spaniards*, in Mr. DE THOU's History, Lib. LXXI. at the Year 1580. GROTIUS.

XIX. (1) CASSIODORE observes, that *It is just the Inhabitants of a Country, should be first provided*

with the Corn that grows in it: Var. Lib. I. Epist. XXXIV.

2 See PUFENDORF, B. III. Chap. III. § 9.

XX. (1) Consult PUFENDORF, § 12. of the Chapter specified in the preceding Note.

2 STRABO, *Geogr. Lib. XVI. p. 1130. Edit. Amst. (784, Paris).*

XXI. (1) All the Inconveniencies that would result to those Men, from their being refused Wives, would be that, their Race failing, the Body of that People would be entirely extinct. But it is not necessary that every Body of People should be perpetual; nor consequently, that, to prevent the Extinction of a People, Persons should lose their natural Liberty of marrying only such as they themselves chuse, or bestowing their Daughters on those only whom they approve of for Sons-in-Law. Besides, how difficult soever it may be for the Generality of Men to live without Wives, this is not one of those Cases of extreme Necessity which gives us a Right to force others to grant us what we want. See PUFENDORF, B. III. Chap. III. § 13.

2 LIVY, Lib. I. Cap. IX. Num. 4.

3 Idem. Lib. IV. Cap. III. Num. 4.

to Foreigners. And St. *Augustin* testifies, ⁴ that By the Right of War the Victor might justly take away her, who was unjustly denied him in Marriage.

2. But the Civil Laws of some Countries, which prohibit Foreigners the Privilege of Marrying, do it either for this Reason, that when such Laws were made there was no Scarcity of Women in any Nation, or else that they do not here design Marriages in general, but only such as are called *lawful*, that is, such as produce some particular ⁵ Effects of Civil Right.

XXII. A Right of doing what is permitted indifferently all Strangers to do. *Vid. ubi supra* Rel 2. n. 2, 3. Judges xx.

XXII. By Supposition there is a common Right to all those Actions which any Nation is supposed to allow to all Strangers indifferently; for then it would be an Injustice to exclude any People: ¹ For if it be allowed that Foreigners may any where hunt, fish, fowl, gather Pearls, inherit by Will, sell their Goods, and even, where there is no Scarcity of Women, contract Marriages, the same cannot be refused to any particular People, unless by some Crime they have rendered themselves unworthy of it: For which Reason it was, that the Tribe of *Benjamin* was denied the Privilege of Marrying with the other Tribes.

XXIII. This Right is to be understood of those who are entitled to it by the Law of Nature, and not through Favour and Indulgence. Disp. 10.

XXIV. Whether a Contract made with a People to oblige them to sell their Commodities to those only with whom they have bargained, and not to any others, be lawful?

XXIII. But what we have said of Permissions, is to be understood of such Acts as are allowed, as it were, by Vertue of natural Liberty, ¹ never taken away by any Law whatever; not of such as are permitted in Favour of certain People, ² in Regard to whom the Law is dispensed with: For 'tis no Injustice to deny a Man a Favour. And thus, I think, we may reconcile ³ what *Molina* observes, with the Principles of *Francis Victoria*, tho' the former pretended to establish something contrary to them.

XXIV. I remember I have heard it questioned, ¹ whether one Nation may contract with another, to purchase all the Commodities of a particular Kind, which are the Produce of that Country only; and I think it may be lawful, provided the Buyer shall be ready to dispose of them to others, at a reasonable Rate; for it signifies nothing to other People, from whom they are supplied with what Nature has Occasion for. But in Matter of mere Profit, one may lawfully prevent another, especially if there be any particular Reason for it, as when a Nation has taken under their Protection the People with whom they make such a Contract, and are therefore obliged to be at an extraordinary Expence. This Sort of Monopoly, practised in the Manner, and with the Intention I observed, is no Ways repugnant to the Law of Nature, ² tho' the Civil Laws, out of Regard to the publick Advantage, do sometimes prohibit it.

⁴ *De Civit. Dei*, Lib. II. Cap. XVII. where that Father gives his Opinion with Caution, *Aliquo fortasse jure belli, &c.* Perhaps by some Right of War, &c. He says that tho' the *Sabines* were to blame for refusing the *Romans* their Daughters, the *Romans* were still more so for forcing them; that therefore the *Sabins* engaged in a just War against the Ravishers. But he afterwards says, the *Romans* would have had more Justice on their Side, if they had only revenged the Affront by Force of Arms, and thus made their Way to the Women whom they desired. It is easy to see this is not very consistent.

⁵ See Chap. V. § 15.

XXII. (1) But see PUFENDORF, B. III. Chap. III. § 14.

XXIII. (1) But since the Things in Question are such as the Sovereign may take away the Liberty of doing them; it follows, that they are allowable only as far as he pleases. So that while there is no particular Agreement, by Vertue of which he is obliged to permit them, it will be a Favour, whether he grants them to some Foreigners only, or to all without Distinction; even tho' there was a Law which allowed such Kind of Things to all Foreigners in general; yet, as the Legislator has a

Power of abolishing or changing that Law, he may either revoke the Permission in Regard to all Foreigners, or let it subsist only with Relation to some of them. Much more ought a bare tacit Permission to be considered as merely precarious; so that, when a Sovereign, for Reasons which he is not obliged to lay before Foreigners, has excluded some from the Privilege which he before refused to none, he only makes Use of his Right; and consequently, those whom he from that Time refuses, what he was not obliged to grant, have no Reason to think themselves injured. It is another Question, whether the Sovereign may not, in so doing, transgress the Rules of Prudence? Here, as in other Cases, we must distinguish between Equity and Policy.

² As when some Foreign Nation is excused the Payment of Customs, or other Imposts, while they are demanded of others.

³ It is with good Reason doubted whether this Way of reconciling the two Writers be sufficient. See PUFENDORF, B. III. Chap. III. § 9.

XXIV. (1) See above, § 13. Note 15.

² This will be treated more fully in Chap. XII. § 16. of this Book.

C H A P. III.

Of the original Acquisition of Things; where also is treated of the Sea and Rivers.

I. **T**HE particular Right we have to a Thing, is either by ¹ original or derivative Acquisition. Original Acquisition, when Mankind were so few in Number, as to be able to assemble together in one Place, might be made by first Occupancy and by Division, as we observed before. But now it can ² be made only by first Occupancy.

I. *Original Acquisition made by Division or Seizure.*
Ch. 2. § 2.

II. Some may say, perhaps, that when the Proprietor of a Ground grants his Neighbour a Right of Servitude, or when a Creditor receives any Thing in Pledge, both the one and the other acquire a Sort of primitive Right. But if the Matter be thoroughly considered, we shall find that this Right is only new in Appearance, and that it is only a Modification of a Right already established; for it was virtually ¹ included in the Property of the Master of the Ground, and of the Thing pledged.

II. *Other Means of Acquisition rejected; such as the granting an incorporeal Right.*

III. To the Ways of Acquisition, *Paulus* the Lawyer adds this, which indeed seems very natural, *viz.* ¹ when we are the Cause that a Thing exists in Nature. But since nothing can be naturally produced, except from some Matter that did itself exist before; if that be ours, we do but continue our Right of Property, by producing a new Form in it: If it be no Body's, then is our Property in it acquired by the Right of a first Possessor: But if it be some other Person's, it does not become our natural and absolute Property, as will appear ² in another Place.

III. *Or a Specification.*

IV. ¹ Our Business then here, is to treat of taking Possession by Right of *prior Occupancy*; which, since those early Times we just now mentioned, is the only natural ¹ and primitive Manner of Acquisition. Now, as to what belongs properly

IV. *Possession is double, Jurisdiction and Property. The Distinction explained.*

I. (1) When a Thing, which before belonged to no Man, begins to be the Property of some particular Person, this is called *Original Acquisition*. Consequently, *Derivative Acquisition* is that by which the Right of Property, already established, passes from one to another.

his Creditor, as a Security for his Money; this is no more than disseizing himself of Possession, and making a Step toward Alienation, in Case he becomes insolvent.

III. (1) *DIGEST. Lib. XLI. Tit. II. De acquirendâ vel amittendâ possessione, Leg. III.* The whole Passage runs thus, *There are as many Kinds of Possessions as there are Means of acquiring what was not before our own; which may be done by Purchase, Gift, Legacy, Dowry, Inheritance, Fine, or Propriety; as in those Things which we take by Sea and Land, or from the Enemy, or such Things as we cause to exist in Nature.* It is plain that the Lawyer here speaks of all Sorts of Acquisition in general, without distinguishing the original from the derivative.

² See *Chap. VIII.* of this Book, § 19, &c.

² But, beside that when a Multitude having possessed themselves of a Country in general, divides it afterwards, such Division is, in Regard to each Individual, a Title of primitive Acquisition; let us suppose several Persons landing at the same Time in a desert Island, without any previous Agreement among themselves, and that, before they go up into the Country, they agree that one shall have such a Part of the said Island, and another another; in this Case, will not the Division be the Foundation of an original Acquisition of the Island in general, and of each of its Parts in particular; since the Whole was not actually seized before, the Thing being only in the Power of such as should attempt it. To this it may be added, that the Author reasons both here, and in the Place quoted in the Margin, on the false Supposition, that the Establishment of the Property of Goods requires the general Consent, either tacit or express, of all Men, to whom they before belonged in common. See Note 12 on Paragraph 3 of the preceding Chapter.

IV. (1) In the first Edition of this Work, as well as in those that have appeared latest, we have *solus est naturalis, an & originarius Modus*. But in that published in 1632, and corrected by the Author, we read only *naturalis & originarius Modus*. I know not how that *an* was replaced in the Edition of 1642, from which it has been copied in the succeeding Editions to that printed in 1712, which preceded mine, and from which it was once more struck out. As I think that Word very ill placed here, I have ventured to follow the Edition of 1632, for the following Reasons. According to the other Editions, the Author is made to say, that *taking Possession by Right of prior Occupancy is, since the first Ages, in which the Right of Property was established, the only natural, and perhaps, the only original Manner of Acquisition.* On this Foot

II. (1) A Proprietor, as such, may dispose of his Goods as he shall judge proper: When therefore he shall allow his Neighbour a Right to pass over his Grounds, or go into them to draw Water, he only communicates to him a Part of what was included in his Right of Property. In like Manner, when a Debtor deposits a Pledge in the Hands of

properly to no Body, there are two Things which one may take Possession of, ² Jurisdiction, and the Right of Property, as it stands distinguished from Jurisdiction. Seneca has made that Distinction, ³ Kings, says he, have Power over every Thing in their own Dominions; but yet every Man has his distinct Property. Dion Prusseus thus, ἡ χώρα τῆς πόλεως ἀλλ' ἐθεῖν, &c. ⁴ The Country belongs to the State; but yet is every Man in it Master of his own Possessions. Jurisdiction is commonly exercised on two Subjects, the one primary, viz. Persons, and that alone is sometimes sufficient, as in an Army of Men, Women, and Children, that are going in quest of some new Plantations; the other secondary, viz. the Place, which is called Territory.

2. But altho' Jurisdiction and Property are usually acquired by one and the same Act, ⁵ yet are they in themselves really distinct; and therefore Property may be transferred, not only to those of the same State, but even to ⁶ Foreigners too, the Jurisdiction remaining as it was before. Siculus, in his Book of the Conditions of Lands, tells us, that amongst the antient Romans, ⁷ when the Lands assigned

he would have us consider taking Possession by Right of prior Occupancy, as the only Kind of natural Acquisition, that is, founded on the Law of Nature, since the Establishment of Property; and thus he would contradict what he himself teaches elsewhere, viz. that Alienation, on which a derivative Acquisition is grounded, is of natural Right, since the Establishment of Property. See Chap. VI. § 1. and Chap. VII. where he speaks of other derivative Acquisitions, which, according to him, are made by Vertue of the Law of Nature. Secondly, The Author would express himself doubtfully, in Regard to the second Part of his Proposition; now he entertained no Doubt on that Head, as appears from the whole Tenour of the preceding Paragraphs. Mr. DE COURTIN, tho', as he owns in his Preface, he had the Edition before him, which I have followed in mine, renders the Sense of this Passage still more perplexed. For, not understanding the Elegance of the Particle *an*, he makes our Author speak as if he proposed to examine that Question in another Place: *Il est donc question de parler ici de l'Occupation, — Et de voir aussi si c'est un moyen primitif et originel.* But it will be objected, that it is not probable that either the Author, or his Printers, could let this Fault escape in the first Edition. As to the Printers, it is possible that the Author having written, *naturalis ac originarius*, they put *an* instead of *ac*. Nor is it improbable that the Author himself, for want of close Attention, expressed himself thus at first; and, having afterward considered better on the Matter, changed his Expression for the Reasons already offered. Since that Time, some Corrector having by Chance compared this Place with the first Edition, or some other antierior to that of 1632, might imagine he did great Matters by restoring the Text, so as to give it a very different Sense.

2 See PUFENDORF, B. IV. Chap. VI. § 14. where he clears up the false Ideas which those Words of our Author are capable of giving.

3 De Benef. Lib. VII. Cap. IV. That Philosopher makes the same Distinction a little after. Under the best of Kings, the Prince possesses all Things by Jurisdiction; but each Man has his distinct Property. Cap. V. Cæsar possesses all Things; his Treasury only is his own private Property: All Things are subject to his Jurisdiction, tho' each Man is Master of his own Patrimony. Cap. VI. SYMMACHUS tells the Emperors Theodosius and Arcadius, that tho' they governed all Things, they were obliged to leave every Man in quiet Possession of his own Property. Lib. X. Epist. LIV. (p. 297. Edit.

Juret.) PHILO the Jew observes, that tho' Kings are Masters of all the Goods in their Dominions, without excepting the Possession of every private Person, they are Proprietors of that Money only which they remit to their Governors, and other Officers acting under them, and from which they receive their yearly Revenue. De Plant. Noe. (p. 222. Edit. Paris.) PLINY the Younger, says, in Commendation of Trajan, that, in his Reign, the Prince's Dominions were larger than his Patrimony. Paneg. (Cap. L. Num. 2. Edit. Cellar.)

4 Orat. XXXI. entitled Rhodiaca.

5 So we find that the Lands of Arcadia, and those of Attica, were formerly divided in such a Manner that the whole Jurisdiction, (ἡ τῶν τῶν ἀρχῶν) remained to one only of those between whom the Division was made. (APOLLODORUS, Biblioth. Lib. III. Cap. IX. § 1. and Cap. XIV. § 6. Edit. Paris. Tb. Gal.) GROTIUS.

6 That is, to Foreigners, even living in their own Country. This appears to be our Author's Meaning from the following Examples. See Chap. VIII. § 26. I should not have made this Remark, had not the learned GRONOVIVS explained the Words of Strangers or Foreigners, settled in our Country without the Right of Citizens. He might have considered, that such Foreigners, while they live in the Country, are subject to the Jurisdiction of the State in the same Manner as the Natives; as our Author acknowledges in several Places. So that we are not to wonder if they cannot make the least Acquisitions there, without infringing the Right of the Sovereign, on whom they themselves depend. Whereas when a Foreigner, living in his own Country, acquires Lands in another, he is a Proprietor not personally subject to the Jurisdiction of the Lord of the Country where the Lands lie, and the Jurisdiction in that Case is merely local.

7 Page 25. Edit. Gœs. The last Words of this Passage, as quoted by our Author, are, *Sed Jurisdictio in agris, qui assignati sunt, penes eos remansit, ex quorum territorio sumpti sunt.* The Words, which are corrupted in the Manuscripts and printed Copies, stand thus, *Sed Jurisdictio eis agris, qui assignati sunt, per eos remansit.* The Correction of *penes* instead of *per*, is incontestable, and is admitted by SALMASIVS, in his Exercitationes on SOLINUS. But the same cannot be said of that of *in agris*, in the Place of *eis agris*. The late Mr. VANDER GOES, Counsellor in the sovereign Court of Holland, who published a beautiful Edition of the antient Writers, *De Re Agraria*, in 1674, reads *eis agros*. This Conjecture comes nearer to the Manuscripts; and the other forms a Sense not

signed to a Colony were not sufficient, they took what was wanting from the neighbouring Territories; but that then the Magistrates of those Territories retained the Jurisdiction over what had been taken from them. And Demosthenes, ⁸ in his Oration de Halonesô, calls those Lands that were possessed by the People of the Country, ἐκλήματα, but those that belonged to Foreigners, κλήματα.

V. We have before observed, that in a Place already possessed, so far as regards Jurisdiction, the Right of seizing upon and possessing Things moveable, may be rendered void by the Civil Law; for this Right ¹ is indeed permitted by the Law of Nature, but not commanded that it should always be so permitted; nor does human Society require it. But if any one objects, that this seems to be allowed by the Law of Nations, I answer, that altho' in some Part of the World, this is or may have been commonly received, yet it has not the Force of a general Compact amongst Nations, but is only a Permission of the Civil Law of this, or that, or t'other People, which each of them may at any Time abolish if they think fit. And indeed there are many other Things ² of this Nature, which our Lawyers stile the *Law of Nations*, when they treat of the Division of Things, and of acquiring a Property in them.

VI. It is also to be observed, that if we have Regard to the Law of Nature alone, Property can only be his who has the Use of Reason. But the Law of Nations has so ordained it, for the common Good, that not only Infants but Madmen may both have and keep a Property in Things; Mankind representing them, if I may say so, whilst they are in that State; for human Laws may enjoin many Things that are no where commanded by the Law of Nature, but can enforce nothing that is contrary to it. And therefore this Sort of Property, which, by the unanimous Consent of all civilized Nations, was introduced in Favour of Infants, and other Persons that resemble them, stops *intra actum primum*, and never passes *ad actum secundum*, as the Schools term it; that is, they have indeed the Right, but not the Power of exercising it by themselves. For Alienation, and such other Ways of disposing of Goods, do in their Nature suppose an Act of a reasonable Will, which cannot exist in such Persons. To which that of St. Paul may be applied, *The Heir, tho' he be Lord of all, yet during his Minority differs nothing from a Servant*. That is, as to the exercise of his Right of Property.

VII. Let us now finish what we began to say ¹ concerning the Sea. Rivers might be held in Property, tho' neither where they rise nor where they discharge themselves be within our Territory, but they join to both, or to the Sea. It is

V. The taking of Things moveable may be hindered by a Law.

VI. Upon what Right the Property of Infants and Madmen is founded.

Gal. iv. 1.

VII. Rivers may be held in Property.

conformable to Truth, as that learned Commentator has shewn against SALMASTIUS, who was of Opinion, that the Magistrates of the neighbouring Country retained a Jurisdiction over the Lands taken from the former Possessors. But it is evident from other Passages of antient Authors, who have written on this Subject, that when a certain Extent of Land was taken out of the Neighbourhood, to make up what was wanting to a Colony, tho' that whole Extent had been measured by Acres, yet, if only Part of it was assigned to those of the Colony, the Remainder still belonged to the Territory and Jurisdiction of those from whom it was taken. Which is what SICULUS FLACCUS means by the Words thus corrected.

⁸ Ἐκλήματα. Κλήματα. The Passage runs thus, *They (the Gardians) pretend that they inhabit their own Land, and deny it to belong to you. They likewise affirm, that your Lands are ἐκλήματα, as lying in the Country of others; and that those by them possessed, are κλήματα, as being their own Property.* p. 34. Edit. Basil. 1572. where it is evident, our Author has directly reversed the Signification of the two Words in Question.

V. (1) Or rather such Things really belong either to the whole Body of the People, or to him who represents them; so that the Liberty enjoyed by particular Persons, of appropriating them to themselves by the Right of prior Occupancy, arises only

from a Concession of the Sovereign, either express or tacit; who may revoke it, when, and as often, as he pleases. See PUFENDORF, as quoted in Note 1 on § 5. of Book II.

² See Chap. VIII. of this Book, § 1.

VI. (1) See PUFENDORF, B. IV. Chap. IV. § 15. In Order to acquire or preserve one's Right, it doth not seem necessary that the Person should be actually in a Condition of making his Title good, or that he should even know his Right; as a Man may be wronged without knowing or comprehending the Matter. It is sufficient that he may hereafter have the Knowledge and Power, requisite for accepting of and exercising his Right. Till that Time, tho' the Right is suspended, it is not therefore less real, in its own Nature, and independent of positive Laws, which, in my Opinion, in this Case only, afford their Protection to such as are not in a Condition of prosecuting their own Right.

VII. (1) Concerning the Sea. Mr. BARBEYRAC adds, and Rivers. Because in the foregoing Chapter the Author treats of the Dominion of both the Sea and Rivers; and in this goes on with, and finishes the Examination of Questions relating to Rivers, and even begins with them. He thinks he may lawfully follow his Author's Thought, rather than his Expression; and imagines the two Words & *fluminibus* were omitted by the Printer.

sufficient for us, that the larger Part of the Water, that is, the Sides, is shut up in our Banks, ² and that the River, in Respect of our Land, is itself small and insignificant.

VIII. *Whether the Sea may not be so too?*

VIII. By this Instance it seems to appear, that the Property and Dominion of the Sea might belong to him who is in Possession of the Lands on both Sides; tho' it be open above, as a Gulph, or above and below, as a Streight; provided it is not so great a Part of the Sea, that when compared with the Lands on both Sides, it cannot be supposed to be some Part of them. And now what is thus lawful to one King or People, may be also lawful to two or three, if they have a Mind to take Possession of a Sea, ¹ thus inclosed within their Lands; for 'tis in this Manner that a River, which separates two different Nations, has first been possessed by both and then divided.

IX. *'Twas not allowed formerly in Countries depending on the Roman Empire.*

IX. 1. But it must be owned, that in all Parts of the Sea that were known in the Time of the Roman Empire, from the first Ages, even down to the Time of the Emperor *Justinian*, 'twas the Law of Nations, that no People whatever should claim a Property in the Sea; no, tho' it were no more than the Right of Fishing; neither are they to be regarded who think, that when by the Roman Laws the Sea is declared to be ¹ *common to all Men*, it should be only understood to be the common Right of the Roman Citizens. For in the first Place, these Terms are in themselves so general, that they can no Ways admit of such a Restriction. For what the *Latins* meant by *Omnium commune*, *common to all*, *Theophilus* calls, *κοινὴν πάντων ἀνθρώπων*, ² *the common Right of all Mankind*. And *Ulpian* ³ says, that the Sea is by Nature open and free for all, *and is as common as the Air itself*. And *Celsus*, ⁴ that the Use of the Sea is in common to all the World. Besides, the Lawyers do plainly distinguish those Things that are publick in Regard to one People only, among which Rivers are included, from those that are common in this Manner; for so we read in the *Institutes*, ⁵ *There are some Things which are common* ⁶ *to all Men by the Law of Nature, and others which are only publick*:

² Neither of these is necessary, as appears from what we have said on the preceding Chapter.

VIII. (1) See PUFENDORF, *B. IV. Chap. V. § 8.*

IX. (1) DIGEST. *Lib. I. Tit. VIII. De divisione rerum, &c. Leg. II. § 1.* See also *Institut. Lib. II. Tit. I. § 1.* Mr. DE BYNCKERSHOEK, in his Dissertation *de Dominio Maris*, *Cap. IX. p. 73, &c.* says, the Reason why the Roman Lawyers rank the Sea among Things that are common, is, because in their Time the greatest Part of the Sea was not occupied, or, perhaps, no Part of it, beyond the Space which Men can command from the Land.

² *Lib. II. Tit. I. § 1.*

³ DIGEST. *Lib. VIII. Tit. IV. Communia prædiorum, &c. Leg. XIII.*

⁴ DIGEST. *Lib. XLIII. Tit. VIII. Ne quid in loco pub. &c. Leg. III. § 1.*

⁵ *Lib. II. Tit. I. § 1, 2.* Mr. NOODT, in his *Probabilia Juris*, *Lib. I. Cap. VII. VIII.* has proved at large, that, according to the Language of the Antients on this Subject, the Terms *publick* and *common* meant the same Thing. Whence he concludes, that either TRIBONIUS forged a new Division, for want of understanding MARCIAN, whose Words he copies; or that here is an Error in the Text; so that, according to the Conjecture of some learned Men, instead of *Quædam naturali jure communia sunt omnium; quædam publica*, we ought to read, *Quædam naturali jure communia sunt omnium, quæ eadem publica*. That is, *Some Things are common to all Men, which are also called publick*. What that excellent Lawyer says on this Head, seems to me very plausible. As to the Merits of the Question itself, the Antients were agreed that, tho' all Mankind are to be allowed an innocent Use of Shores, Rivers, &c. yet such Things

still depended on the Jurisdiction of the People, so that if a Man had a Mind to build; for Example, on the Sea-Coast, a Permission from the Magistrate was necessary. See the Law cited hereafter, in Note 10. and Mr. NOODT, *Probab. Juris*, *Lib. IV. Cap. I.* This being granted, I do not see how we can avoid conceiving an Idea of Property, if we would think and reason justly. I easily conceive that the Jurisdiction of the Sovereign is reconcilable with the Property of particular Persons, in the Lands lying in his Territories; because that Jurisdiction, and that Property, tho' separate, have an equal Tendency toward hindering any but the Proprietor and the Sovereign from having a Right to demand in Rigour a free Use of a Land. But I do not comprehend how *Jurisdiction* can be compatible with a *Community*, properly so called, of the Place over which this Jurisdiction is exercised; the Establishment of one, in my Opinion, is the Destruction of the other. Besides all that is said of this *Community*, implies no more at the Bottom, than the Liberty of making an innocent Use of the Sea, Banks, Rivers, &c. which depend on another Man's Jurisdiction. Now, on this Foot it no more excludes the Right of Property, than that Jurisdiction, which will plainly appear by the following Example. A Spring which rises in my Grounds, certainly belongs to me, but I am obliged by the Law of Nature, to allow such as want it to drink of it, or draw Water out of it, when that can be done without incommoding my self. Mr. NOODT allows this, after the Antients, *Lib. IV. Cap. VII. § 2.* And, even according to the Roman Law, the Banks of a River are of publick Use, tho' they belong to the Proprietors of the adjacent Lands. See *Chap. VIII.* of this Book, § 8.

Note 1.

⁶ Thus MICHAEL ATTALIATES expresses himself,

lick: By the Law of Nature these, the Air, running Waters, the Sea, and consequently, the Shores, are common; but all Rivers and Ports are publick. So in Theophilus, *Φυσικὴ μὲν ἐν δυνάμει κοινὰ πάντων ἀνθρώπων, &c.* What by a natural Right are common to all Mankind, are these, the Air, Water that's perpetually flowing, and the Sea. And then presently, *ποταμοὶ δὲ πάντες, &c.* But all Rivers and Ports are publick, that is, ⁷ belong to the Roman People.

2. And Neratius, speaking of ⁸ Shores, says, they are not publick in the same Manner as that which is the Patrimony of a People, ⁹ but as that which is originally a Present of Nature, and which as yet has no Proprietor, that is, belongs to no private Person or Nation. Which seems to be contrary to what Celsus writes ¹⁰; 'Tis my Opinion, that through the whole Extent of the Roman Empire, the Sea-Coasts do properly belong to the Romans; but as for the Use of the Sea, 'tis in common to all Mankind. But these two Opinions may be easily reconciled, if we say that Neratius only meant, as far as the Shore was serviceable to those who sailed or passed by; but that Celsus speaks of the Shore as it is appropriated to some Use ¹¹, as when one builds an Edifice upon it; which Pomponius ¹² informs us, could not be done without the Prætor's Leave, no more than one might presume on a Right of Building in the Sea; that is, in that Part of it which is next the Shore, and is, as it were, the Shore itself.

X. 1. But however true these Things be, it was yet in Consequence ¹ of an arbitrary Establishment, and not by Vertue of any Prohibition of the Law of Nature, that the Sea was not then possessed, or that it could not be lawfully possessed, in the Sense I spoke of. For tho' a River certainly belongs to the Publick; yet, if it enters by any Place into the Lands of a private Person, that private Person may appropriate to himself the Right of Fishing ² in that Sort of Branch or Gulf of the River. Even in Reference to the Sea itself, Paulus ³ says, that if any one has a Right of Property in it, he is admitted to demand an Order of the Prætor for Possession; because it is then a private Affair, and not an Affair that regards the Publick: Since the Question is concerning the Enjoyment of a Right that one possesses on Account of private Acquisition, and not concerning the Enjoyment of a common Right. Where, without Doubt, he is speaking of some small Portion of the Sea ⁴ let

X. But the Law of Nature is not against a Property in a Part of the Sea, which is as it were inclosed in the Land.

self, Some Things belong to all Men, as the Air, running Water, the Sea, and the Sea-Shore. (Pragmatic. Tit. II.) GROTIUS.

7 Lib. II. Tit. I. § 2.

8 In the Body of the Greek Law we have this Expression, *The Coasts, or Shores, are in every Man's Power.* BASILIC. Eclog. Lib. I. Tit. I. Cap. XIII. See also Lib. LIII. Tit. VI. GROTIUS.

9 DIGEST. Lib. XLI. Tit. I. De acquir. rerum Dominio. Leg. XIV.

10 DIGEST. Lib. XLIII. Tit. VIII. Ne quid in loco publico, &c. Leg. III.

11 Quatenus ad utilitatem assumitur. Mr. BARBEYRAC, in his Latin Edition, adds *perpetuam*, which he translates *durable*; being persuaded that his Author designed to write so, as the Context manifestly requires; the Opposition being imperfect without that Word.

12 DIGEST. Lib. XLI. Tit. I. De acquir. rerum Dominio, Leg. I. The Term here used by GROTIUS, is *Prætor*, and the common Reading in the Place quoted is *decretum Prætoris*. Some, as the learned GRONOVIVS observes, read *decretum Principis*; which Correction is followed by Mr. NOODT, in his Commentary on the DIGEST. Lib. I. Tit. VIII. p. 53. But Mr. DE BYNKERSHOEK, in his Dissertation *De Dominio Maris*, Cap. IX. p. 81. expresses his Surprise, that any one could think of such an Alteration in the Text. The Thing is of little Importance, in Regard to the Substance of the Question. Mr. SCHULTING is likewise of Opinion that the Correction is unnecessary. See his *Enarratio primæ partis Pandect.*

Tit. De divisione rerum. § 5.

X. (1) The English alledge such an Establishment against the Danes. See CAMDEN's Reign of Queen Elizabeth, Anno 1600. GROTIUS.

2 DIGEST. Lib. XLIV. Tit. III. De diversis tempor. præscript. &c. Leg. VII.

3 DIGEST. Lib. XLVII. Tit. X. De injuriis & famosis libell. Leg. XIV.

4 SALLUST, speaking of the Luxury of his Times, says, *Several private Persons beat down Mountains, and built in the Sea.* (Bell. Catal. Cap. XIII. Edit. Wech.) HORACE reproaches the Romans with *streightening the Sea, and contracting the Habitation of the Fishes, by the Moles they built.* Lib. II. Od. XVIII. v. 20, 21. and Lib. III. Od. I. 33, 34. The same Observation is made by SENECA, in *Excerpt. Controv.* Lib. V. Controv. V. PLINY tells us, that *The Earth was suffered to be washed away by the Waters, to make Way for the Sea.* Hist. Nat. Lib. II. Cap. LXIII. The Emperor Alexander Severus raised several magnificent Works at Baixe, in Honour of his Relations, and Ponds of a stupendous Bigness, by letting in the Sea. LAMPRIDIUS, in his Life. (Cap. XXVI.) CASSIODORE in his Time admired those Ponds, as appears from *Variar.* Lib. IX. Cap. VI. TIBULLUS represents the Fishes thus secured and screened in the enclosed Spaces of the Sea, as laughing at Storms:

*Claudit & indomitum moles mare, lentus ut intra
Negligat bibernas piscis adesse minas.*

Lib. II. Eleg. VI. 27, 28.

PLINY mentions this Sort of Fish-Ponds, made out of

L. 9. c. 1.

let into the Land of some private Person, as we find it done by ⁵ *Lucullus*, and some others. So *Valerius Maximus* records of *C. Sergius Orata*, that *He made himself several private Seas, by enclosing the Waters with Bars or Basins, and making Moles for keeping each Sort of Fish apart.* The Emperor *Leo* afterwards extended this Right, contrary to the Decisions of the antient ⁶ Lawyers, to ⁷ those Parts of the Sea that are before Houses built on the Shore of the *Thracian Bosphorus*, so that he permitted each Proprietor to inclose with Damms that Space of Sea, and to appropriate it to himself.

2. Now if a certain Space of Sea may be, as it were, an Appurtenance to the Ground of a private Person, so far as it is shut up there, and so inconsiderable that it may be thought a Part of the Ground; and if this be not repugnant to the Law of Nature, why may not a Part of the Sea that is surrounded with the Land, belong to one or more Nations, who are in Possession of the Shores, when that Part of the Sea, compared with the Land, is not larger than a small Slip of the Sea, compared with the Ground of a private Person? Neither is it any Objection to say, that the Sea is not surrounded on all Sides with the Lands of one or more Nations. For notwithstanding that, it may be appropriated, as appears by the Example of a Corner of a River, or the Sea, that is brought up to some Gentleman's Seat.

3. But there are many Things tolerated by the Law of Nature, which the Law of Nations, by ⁸ common Consent, might prohibit and restrain; therefore, wherever this Law of Nations was in Force, and is not repealed by common Consent, the most inconsiderable Part of the Sea; nay, tho' it be almost inclosed by the Shore, can never be the Property of a particular People.

XI. Such a Property may be had, and how long it may endure.

XI. But it is here to be noted, that if in any Place this Law of Nations about the Sea should not be received, or tho' it were, should be afterwards abolished, it does not follow that a People, merely because they are in Possession of the Lands, are likewise in Possession of the Sea inclosed in them: Nor is an intentional Act sufficient in this Case; ¹ but the taking of Possession must, by an Overt Act, be signified and made known. And if afterwards the Possession, thus gained by the Right of *prior Occupancy*, shall be quitted, then the Sea returns to its original Nature; that is, to the common Use of all Mankind; as *Papinianus* has decided, ² in Regard to an Edifice built on the Shore, and Fishing in the Turning of a publick River.

XII. It

of the Sea, *Hist. Nat. Lib. XXXI. Cap. VI.* See COLUMELLA, *De Re Rusticâ*, Lib. VIII. Cap. XVI. XVII. where he observes, among other Things, that *The Luxury of the Wealthy had inclosed the very Seas and Neptune.* (p. 377. Edit. Commelin. 1595.) We find something to the same Purpose in St. AMBROSE, *Hexaem.* Lib. V. Cap. X. and in his Treatise of *Naboth*, Cap. III. as also in several Places of MARTIAL, (*viz.* Lib. X. Epigr. XXX. ver. 19, &c.) GROTIUS.

5 VARRO tells us, that *Lucullus having hollowed a Mountain near Naples, and let the Waters of the Sea into Reservoirs for Fish, which had a Sort of Flux and Reflux, boasted he would not yield to Neptune in the Point of Fishing.* (*De Re Rusticâ*, Lib. III. Cap. XVII. p. 129. Edit. 3. H. Steph.) PLUTARCH speaks of that celebrated Roman's Country-Seats, round which he made the Sea pass, and had large Fish-Ponds; and adds, that *He built Apartments in the Sea.* (*Whereupon Tubero, the Stoick, called him the Roman Xerxes.*) *Vit. Lucull.* (p. 518. Tom. II. Edit. Wech.) PLINY ascribes that Expression to *Pompey the Great.* *Hist. Nat. Lib. IX. Cap. LIV.* VELLEIUS PATERCULUS relates it in the same Manner. (*Lib. II. Cap. XXXIII.*) GROTIUS.

6 DIGEST. Lib. XLVII. Tit. X. *De Injuriis*, &c. Leg. XIII. § 7

7 *Prohuez.* See LEONIS, *Novell.* LVII. CII. CIII. CIV. MICHAEL ATTALIATES, *Pragmat.* Tit. XCV. HARMENOPULUS, *Prochir. jur.* Lib.

II. Tit. I. § *περὶ προθύρων.* See also CUIJAS, *Observ.* Lib. XIV. Cap. I. GROTIUS.

8 But this common Consent of Nations, supposed to have the Force of a Law, is a Thing that will never be proved.

XI. (1) There is a certain Space which is supposed to belong to every People who has Lands on the Sea-Shore, without any corporal Act of taking Possession. See PUFENDORF, *B. IV. Chap. V. § 7, 8.* with the Notes.

2 It is not usual to allow the Prescription of long Possession, in Order to obtain Places publick by the Law of Nations. Which proceeds thus, if any one having entirely demolished a Building, which he had raised on the Shore, or abandoned the Building, another Man afterwards building on the same Ground, opposes the Occupier with the said Exception; or if any one, because he hath fished several Years in a Winding of a publick River, hinders another Man of the same Privilege. DIGEST. Lib. XLI. Tit. III. *De usurp. & usucaption.* Leg. XLV. In producing this Law, where the most able Lawyers agree there is some Mistake, I have followed the Florentine Edition; only I have used the Word *occupanti* which appears in other old Editions, instead of *occupantis*, which can have no Place here. Mr. NOODT, in his Commentary on the first Part of the DIGEST. p. 54, &c. conjectures that the Words *or abandoned the Building*, are a Gloss which was afterwards foisted into the Text; and his Explication of this Law appears very ingenious. Others give

XII. It is also certain that he, who is in Possession of any Part of the Sea, cannot lawfully hinder Ships that are unarmed, and give no Room to apprehend Danger, from Sailing there: Since ¹ such a Passage, even through another's Country, cannot justly be hindered, tho' it be commonly less necessary, and more dangerous.

XIII. 1. But it was more easy to take Possession of the Jurisdiction only, ¹ over some Part of the Sea, without any Right of Property: Nor do I think, that that

Law

XII. Such a Property can give no Right of obstructing an inoffensive Passage.

XIII. That there may be a Jurisdiction over Part of the Sea, and how.

give it a different Sense. The Reader may see CUJAS on the Law under Consideration, p. 1165, 1166. Tom. I. Opp. Edit. Fabrott. and Mr. DE BYNCKERSHOEK's Dissertation, *De Dominio Maris*, Cap. IX. p. 85. We have something on the same Subject, in a Dissertation written by Mr. DE FOULLIEU, *De Luitione Pignoris, & Rebus moræ Facultatis*, § 45. to which I refer the Reader with Pleasure.

XII. (1) But we have no Right, in Rigour, to pretend that any one should let us pass over his Lands, as I have shewed on the foregoing Chapter.

XIII. (1) PHILO, the Jew, speaking of Kings, says they have no Reason to boast of having made themselves Masters of all the Rivers, and even of Seas infinite in Number, and immense in Extent. (De Plant. Noe, p. 223. Edit. Paris.) LYCOPHRON introduces *Cassandra* foretelling the Romans should enjoy the Empire of both Sea and Land. (In Allusion to which, VIRGIL, to flatter *Augustus*, tells him) *Tethys should give all her Waters to purchase him for her Son-in-Law*. (Georg. Lib. I. v. 31.) And JULIUS FIRMICUS says, that such as are born under a certain Situation of the Stars, shall be Masters of Land and Sea, wherever they lead their Armies. (Mathes. Lib. VI. Cap. I.) NONNUS speaks of *Beroe*, (or *Berythus*, a City of *Phenicia*) as being possessed of the Empire of the Sea. (Dionysiac. Lib. XLIII. p. 1106. Edit. Wech.) QUINTUS CURTIUS says, that *Tyre* was a long Time Mistress, not only of the neighbouring Sea, but of all the Seas where her Ships had sailed. (Lib. IV. Cap. IV. Num. 19.) Hence arose the proverbial Expression *Maria Tyria*; the Tyrian Seas. FESTUS under the Word *Tyria*. The Athenians and Lacedemonians, as ISOCRATES observes, had in their Turns the Empire of the Sea, so that as each of them prevailed, they held most of the Cities (of Greece) in Subjection. (Panathen. p. 243. Edit. H. Steph.) DEMOSTHENES says, The Lacedemonians formerly commanded all the Sea, and all the Land (of Greece). Philip. III. (p. 49. Edit. Basil. 1572. See also his Oration on the Crown, p. 326.) The Author of the Life of *Timotheus*, (CORNELIUS NEPOS) says, that after the Exploits of that General, the Lacedemonians willingly yielded the Athenians the Empire of the Sea, which they had long disputed with that People. (Cap. II. Num. 2. Edit. Cellar.) The Author of the Oration concerning the Island of *Halonos*, which appears among the Works of DEMOSTHENES, says, that Philip had no other View than that the Athenians should put him in Possession of the Sea, and acknowledge they could not keep the Dominion of the Sea without him. (p. 31.) According to the Emperor JULIAN, *Alexander the Great*, in his military Expeditions, proposed to make himself Master of the whole Earth and Sea. (Orat. III. p. 107. Edit. Spanhem.) JOSEPHUS, the Son of *Gerion*, makes *Antiochus Epiphanes*, one of *Alexander's* Successors, ask, *Are not the Earth and the Sea mine?* (Lib. III. Cap. XII. Edit. Munster.) *Ptolomy Philadelphus*, another of his Successors, is commended by THEOCRITUS for extending his Dominions over much Sea and Land. Idyll. XVII. ver. 76, 91, 92. So much for the

Grecians, it is now Time to speak of the Romans. *Hannibal*, speaking to *Scipio Africanus*, the first of that Name, tells him that The Carthaginians, enclosed by the Shores of Africa, consented that the Romans, since such was the Pleasure of the Gods, should command elsewhere, both by Sea and Land. LIVY, (Lib. XXX. Cap. XXX. Num. 26) CLAUDIAN represents the other *Scipio*, as subjecting the Spanish Ocean to the Laws of Rome, (De secundo Consul. Stilicon. Præf. ver. 7, 8.) Hence it is that the Roman Authors, as SALUST, FLORUS, POMPONIUS MELA, &c. frequently call the inward Sea our Sea. (See Bell. Jugurth. Cap. XX. with Wasse's Notes. FLORUS, Lib. III. Cap. VI. Numb. 9. POMPONIUS MELA, Lib. I. Cap. I. Numb. 34. Edit. Waff. 1700.) But DIONYSIUS HALICARNASSENSIS goes still further, and pretends that the Romans were Masters not only of all the Sea on this Side of *Hercules's Pillars*, but also of the Ocean, where it is navigable. (Antiq. Rom. Lib. I. Cap. III. p. 3. Edit. Oxon.) DION CASSIUS says, They reigned over almost the whole Earth and Sea. [GROTIUS perhaps quotes this Historian by Heart, instead of the Orator THEMISTIUS, who, speaking of *Theodosius* the Emperor, says, *What would you say of one who commands almost the whole Earth and Sea?* Orat. V.] APPIAN, in his Preface, describing the Grandeur of the Roman Empire, comprehends in it the *Euxin Sea*, the *Propontis*, the *Hellepont*, the *Egean*, *Pamphylian*, and *Egyptian Seas*. A Decree of the Senate gave *Pompey* a Power of commanding all the Sea on this Side of *Hercules's Pillars*. APPIAN, *Alexandr.* (Bell. Mithridat. p. 391. Edit. Amstel. 235. H. Steph.) PLUTARCH, (in his Life of *Pompey*, p. 631. Tom. I. Edit. Wech.) OVID introduces *Jupiter* foretelling, that even the Sea should obey *Augustus*. Metam. Lib. XV. ver. 831. An ancient Inscription in Honour of that Emperor, tells us, *He shut the Temple of Janus, after he had established Peace both by Sea and Land*. (In GRUTER, 1 Edit. p. 194. Numb. 4.) See also Suetonius, in his Life, (Cap. XXII.) That Historian elsewhere speaks of two Fleets which *Augustus* had, one at *Misenus*, the other at *Ravenna*, for guarding the upper and the lower Sea. (Cap. XLIX.) VALERIUS MAXIMUS tells *Tiberius*, that he had been made Master of the Earth and Sea, by the joint Consent of Gods and Men. (Prefat. p. 2.) PHILO the Jew observes, that the same Emperor held the Empire of the Earth and Sea twenty-three Years. (De Legat. ad Caium. p. 1012. Edit. Paris.) He attributes the like Extent of Dominions to *Caligula*, Successor to *Tiberius*. (Ibid. p. 993.) JOSEPHUS, the Jewish Historian, calls *Vespasian* Lord of the Earth and Sea. (De Bell. Jud. Lib. III. Cap. XXVII.) ARISTIDES says the same of *Marcus Antoninus* in several Places. (See, for Example, Orat. IX. p. 119. Tom. I.) PROCOPIUS relates, that there were some Statues of the Emperor, representing him holding the World in one Hand, in Order to signify that the whole Earth and Sea were subject to him. (De Ædific. Justinian. Cap. II. de Augustæo). *Constantine Monomachus*, Emperor of the East, is stiled Lord and Master of the Earth and Sea. (JOANNES, Episcop. in Euchaist. p. 51.) The Egean

Bossius. tit. de
Aquis. n. 36.
allegans Bal.
Capoll. & al.
See Cod. l. 11.
tit. 12. De
Classicis. Leg.
unic.

Law of Nations, of which we have spoken, did any Ways oppose or contradict it. The *Argives* formerly complained of the *Athenians*, that they suffered the *Spartans*, who were their Enemies, to pass unmolested through their Seas, looking upon this as a Breach of the Treaty that was betwixt them, in which it was stipulated that ² neither People should permit the Enemies of the other to pass, *Ἀλλὰ τῆς ἐαυτῶν, through any Part of their Jurisdiction.* And by the one Year's Truce, which was made during the *Peloponnesian War*, a free Passage was granted to the *Megarenses* ³ not only through *their own Seas*, but *those of their Confederates*, *τῇ θαλάσῃ ὅσα ἀν κατὰ τὴν ἐαυτῶν καὶ κατὰ τὴν συμμαχίαν.* So *Dion Cassius* said, ⁴ *θάλασσαν, τὴν τῶν ῥωμαίων πᾶσαν, Every Sea that belongs to the Romans.* And *Themistius* speaking of a *Roman Emperor*, *τὴν γῆν καὶ θάλασσαν ὑπὸ ἑκόντων ἔχων, Having both Land and Sea subject to him.* So *Oppianus* ⁵ to the Emperor,

Σοῦς μὲν γὰρ ὑπὸ σκήπτρῳσι θάλασσα εἰλεῖται.

The Seas roll under thy Scepter. So *Dion Pruseensis*, in his second Oration to the People of *Tarsus*, among the many Privileges that were granted by *Augustus* to that City, mentions, *ἐξουσίαν τῇ ποταμῷ τῆς θαλάττης τῆς κατ' αὐτῷ, The Dominion of the River (Cydnus) and that Part of the Sea adjoining to it.* So we read in *Virgil*, ⁷ that *The Romans should be absolute Masters of Sea and Land.* In *Gellius*, ⁸ *The Rivers that flow into such Seas as are subject to the Roman Empire.* And *Strabo* observes, ⁹ that the People of *Marseilles* took abundance of Prizes; when in their Engagements at Sea, *They conquered τὰς ἀμφοτεροῦν τῆς θαλάσσης ἀδικῶς, those who unjustly disputed the Dominion of the Sea with them.* And that ¹⁰ *Sinope* commanded the Sea among the *Cyaneæ Islands*.

Sea is reckoned among the Provinces of the *Roman Empire*. (*CONSTANTINE Porphyrogen. Lib. I. Them. XVII.*) The ancient *Franks* commanded the Sea of *Marseille*, and the adjacent Places; as we learn from *PROCOPIUS, Hist. Gothic. Lib. III. (Cap. XXXIII.)* In the Letter of *LEWIS II.* to *Basil. Emperor of the East*, we read of *Nicetas*, a noble *Venetian*, who was *Master of the Adriatick Sea.* (*GOLDAST. Constit. Imperial. Tom. I. p. 118.*) Concerning the Jurisdiction of the Republick of *Venice*, see *PARUTA, Lib. VII.* and the particular History of the *Uscchi*. The Bounds of the Kingdom of *Sweden* are in the Middle of the Straights of *Oresund*. *JOANNES MAGNUS, Hist. Metropolit. seu Episcop. & Archiepiscop. Upsal. Cap. XV.* Add to all this the modern Lawyers on the *Decretals*, in VI. *Lib. I. Tit. VI. De Electione, &c. Cap. III.* *BARTOLUS, ANGELUS, FELINUS* on *Lib. V. Tit. VI. De Judæis. Cap. XVII.* *BALDUS*, on the Title of the *Digest. de rerum divisione*, Col. II. *AFFLICTUS*, on the Title *Quæ sunt Regalia.* *FEUD. Lib. II. Tit. LVI.* *CACHERANUS, Decis. Pedemont. CLV. Numb. 4.* where it is said; after *BALDUS*, that this Right is established through the whole World. And lastly, *ALBERIC GENTILIS, Advocat. Hispan. Lib. I. Cap. VIII. GROTIUS.*

Almost all these Authorities are produced by *SELDEN*, in his *Mare clausum*, who sets down a great many more; to which several others might still be added, as appears by the Sample given in *Mr. DE BYNCKERSHOEK's Dissertation De Dominio Maris, Cap. VIII.* But the Lawyer last mentioned with Reason rejects our Author's Distinction between the *Jurisdiction* and the *Property* of the Sea. He observes (*Cap. IV. p. 26, &c.*) that till it is proved by good Reasons, (those alleged by our Author are far from being such) that the Sea of its own Nature is not susceptible of Property, we may be allowed to say, that by taking Possession of the Sea, the same Right is acquired as by taking Possession of other Things. Ju-

risdiction and Property, he adds, are really distinct in Regard to Goods contained in the Lands of a State, as *SENECA* explains the Matter, *De Benef. Lib. VII. Cap. IV. V.* (See above, § 4. Note 3.) but in Regard to the Sea, they are only two Names for one and the same Thing; unless a Man would say, that all who sail on a Sea of which any one is in Possession, are subject to him. And even in that Case, it would not be on Account of the Sea, the Dependence ought to be derived from some other Cause, because it is supposed that the Master of the Sea has no Right of Property in it. If several Persons, having at the same Time taken Possession of a Sea, had appointed one of their Number to command the Rest, the Property would then be distinct from the Jurisdiction. But as there neither is, nor ever was, such a Regulation, he who commands a Sea, and the real Proprietor of it, is the same Person. So that, whoever is Master of a Sea, may, like the Proprietor of all other Things, sell that Sea, exchange it, give it away; in short, dispose of it in any other Manner as he pleases; provided he transfers no more Right than he himself hath; that is, that those who shall purchase such a Sea of him, shall keep their Property no longer than they keep Possession. See Note 6. on *PUFENDORF, B. IV. Chap. V. § 8.*

² *THUCYDIDES, Lib. V. Cap. LVI. Edit. Oxon.*

³ *Idem. Lib. IV. Cap. CXVIII.*

⁴ *Lib. XLVI. p. 211. Edit. H. Steph.*

⁵ *Halientic. Lib. III. ver. 4, 5.*

⁶ *Orat. II. ad Tarsenses, § 34.*

⁷ *Æneid. I. ver. 235, 236.*

⁸ *It is agreed, that the Nile is the largest of all those Rivers which flow into the Sea, subject to the Romans, called by the Grecians ἡ εἰς τὴν θάλασσαν.* *SALLUST* writes that *The Ister is the next to it in Greatness.* *Noct. Attic. Lib. X. Cap. VII.*

⁹ *Georg. Lib. IV. p. 272. Edit. Amst. (180, Paris.)*

¹⁰ *Lib. XII. p. 821. Edit. Amst. 545, Paris.*

2. Now the Jurisdiction or Sovereignty over a Part of the Sea is acquired, in my Opinion, as all other Sorts of Jurisdiction; that is, as we said before, in Regard to Persons, and in Regard to Territory. In Regard to Persons, as when ¹ a Fleet, which is a Sea-Army, is kept in any Part of the Sea: In Regard to Territory, as when those that sail on the Coasts of a Country may be compelled from the Land, for then it is just the same as if they were actually upon the Land.

XIV. Neither is it contrary to the Law of Nature, or that of Nations, that those who shall take upon them the Burden and Charge of securing and assisting Navigation, either by erecting or maintaining Light-Houses, or by affixing Sea-Marks, to give Notice of Rocks and Sands, should impose a reasonable ¹ Tax upon those who sail that Way. Such was that which the Romans levied upon the ² Red Sea, to defray the Charge of a Fleet against the Excursions of Pirates; and that Duty ³ which the Byzantines demanded in the Euxin Sea; and that which the Athenians ⁴ long before imposed on the same Sea, when in Possession of Chrysopolis, both which are mentioned by Polybius. And that, which Demosthenes, in his Oration against Leptines, shews, the same Athenians required ⁵ in the Hellespont; and which Procopius says, in his secret History, that the Roman Emperors exacted in his Time.

XIV. A Duty upon some certain Occasions may be imposed on those who go by Sea.

Cap. 25.

XV. 1. We have some Instances of Treaties, by which one People has engaged to another, not to sail beyond such and such Bounds: So it was formerly agreed between ¹ the Kings bordering on the Red Sea, and the Egyptians, that the Egyptians should not come into the Red Sea with any Man of War, nor with above one Merchant Ship; so betwixt the Athenians and Persians, ² in Cimon's Time,

XV. Of Treaties which forbid some People to pass beyond certain prescribed Bounds.

¹¹ That is, when a Prince, or a People, keeps a Fleet constantly on Foot, in a certain Place of the Sea, with a Design to make themselves Masters of it. Mr. DE BYNCKERSHOEK, (*De Dom. Mari, Cap. IX.*) draws his Advantage from this Confession against our Author. *If, says he, a Prince or a People may, with a small Fleet, make themselves Masters of a small Part of the Sea, why may they not, with a larger Fleet, make themselves Masters of a larger Part of the Seas, and with several Fleets, of the whole Mediterranean, as the Romans formerly did?*

XIV. (1) The Romans formerly exacted an Impost of the Islands as far as Pharos of Alexandria; as appears from AMMIANUS MARCELLINUS, *Lib. XXII. (Cap. XVI. p. 373. Edit. Vales. Gron.)* CÆSAR, speaking of the Veneti, the antient People of Vennes, observes, that *Their Sea was very impetuous, entirely open, and furnished with but few Ports, they received a Tribute from almost all who sailed in that Sea.* (*De Bell. Gall. Lib. III. Cap. VIII.*) FLORUS tells us, that after the first Punic War, the Romans (the Carthaginians) were ashamed of the Loss of the Sea and Islands, and being obliged to pay Tribute, which they had been used to command from others. (*Lib. II. Cap. VI. Num. 2.*) PLINY, in his *Nat. Hist. Lib. VI. Cap. XXII.* speaks of one Annius Plocamus, who had farmed the Customs of the Red Sea. And in the following Chapter, where he treats of the Navigation to the Indies, he says, *The Ships that sailed thither every Year, carried Companies of Bow-Men on board, as a Defence against Pirates.* (*p. 350. Edit. Elziv.*) As to the Quantity of Customs, see CAMDEN's excellent Discourse, in his Life of Queen Elizabeth, Anno 1582, and 1602. GROTIUS.

² In all Editions of this Work, we have STRABO, *Lib. XVII.* and PLINY, *Hist. Nat. Lib. XIX. Cap. IV.* in the Margin. The first Passage is *p. 1149. Edit. Amst. (798, Paris.)* but I can find nothing like the second. Our Author certainly had his Eye on those Passages of PLINY which he had quoted in the preceding Note.

³ HERODIAN speaks of this Impost which the Byzantines demanded, in his History of the Emperor Severus. (*Lib. III. Cap. I. Num. 11. Edit. Boecler.*) PROCOPIUS, both in his *Publick and Secret History*, (*Cap. XXV.*) mentions the antient Impost laid on the Hellespont; as also, the new one established at the Entrance of the Euxin Sea, and in the Streights of Byzantium. THEOPHANES tells us, that the Byzantin Impost was paid in the Place where the Church of Blacherns now stands; and that of the Hellespont at Abydos. AGATHIAS, *Lib. V.* calls the latter an Impost of a Tenth, *Δεκάτου μέρος*. But it was afterwards reduced by the Empress Irene. Immanuel Comnenus gave some Monasteries maritime Revenues, *θαλάσσια δίκαια*, as we are assured by THEODORUS BALSAMON, in *Concil. Chalced. Can. IV. and Can. XII. Synod. VII. GROTIUS.*

⁴ In B.V. of his History, *Chap. XLIV.*

⁵ He says in the same Place, that when Thraibulus took Possession of Byzantium, the Athenians became Masters of the Hellespont. *Orat. ad Leptinem.* (*p. 369.*) On which the Scholiast ULPIAN observes, that *The Athenians received the Tenth of the Value of all the Goods and Merchandize that sailed through that Sea: That the Athenians sold those Customs, and thus enriched their Country.* *p. 134. Tom. II. Opp. Demosthen. and Æschin. Ed. Basil. GROTIUS.*

See also XENOPHON, *Hist. Græc. Lib. IV. Cap. VIII. § 27, 31. Edit. Oxon.*

XV. (1) PHILOSTRATUS, whom our Author here quotes in the Margin, speaks only of King Erythras, who, he says, was Master of the Red Sea. *Vit. Apollon. Tyan. Lib. III. Cap. XXXV. Edit. Lips. Oleari.*

² This is that famous Treaty of Peace, *εἰρήνη περὶ Ἑλλάδος*, as PLUTARCH terms it, in which it was also stipulated, *That the Persians should not come nearer to the Grecian Sea than the Distance of a Horse-Race; that is, XL. Stadia.* *p. 486, 487. Edit. Wech. in Vit. Cimon. See likewise DIODO-*

RUS

Time, that no *Median Ship of War* should fail between the *Cyaneæ* and the *Chelidonian Islands*, and between the *Cyaneæ* and *Phaselis* ³ after the Battle at *Salamin*. In the one Year's Truce of the *Peloponnesian War* ⁴ it was stipulated, that the *Lacedæmonians* should not send to Sea any Ships of War, or Ships of Burden above twenty Tun. And in the first Treaty which the ⁵ *Romans* made with the *Carthaginians*, immediately after the Expulsion of their Kings, they agreed, that neither the ⁶ *Romans*, nor any of their Allies, should sail beyond the Promontory *Pulchrum*; and that if at any Time they should be driven further, either by a Storm or an Enemy, those who were thus driven should carry nothing with them but only Necessaries, and should be obliged to depart in five Day's Time. And in the second Treaty it was agreed, ⁷ that the *Romans* should neither exercise Piracy, nor drive a Trade, beyond the *Promontorium pulchrum*, *Massia*, and *Tarsejus*. In a Treaty of Peace with the *Illyrians*, the *Romans* required, that they should not pass beyond *Lissus* with more than two Frigates, and those unarmed. In the Peace with *Antiochus*, that he should not sail on this Side the Promontories of *Calycadnus* and *Sarpedon*, ⁸ unless with such Ships as should carry Tribute, Ambassadors, or Hostages of War:

Appian in Illy.
p. 760. Edit.
H. Steph.

RUS SICULUS, *Lib. XI. (Cap. XLI.)* ISOCRATES takes Notice of this Treaty in his *Penathenæic*. (p. 244. Edit. H. Steph.) GROTIUS.

This *Equi cursus*, ἵππας δρόμου, is a Day's Journey of a Horse; as appears from a Passage of ARISTIDES, quoted by our Author in the Margin. The Words are τῆς ἵππας δρόμον ἡμέρας. *Orat. Panath.* p. 294. Tom. I. Edit. Paul. Steph. See also his Oration in praise of Rome, p. 349. where we read ἵππας δρόμου ἡμερήσιου ὅτι θάλατταν. I may add the Authority of a much more antient Greek Orator, viz. DEMOSTHENES, who, speaking of *Callias*, deputed by the *Athenians* for concluding that famous Treaty, uses the Terms ἵππας δρόμον ἡμέρας. *Orat. de falsâ legat.* p. 287. Edit. Basil. 1572. I am much mistaken if PLUTARCH had not this very Passage in View. Our Author is mistaken in fixing the Distance to forty *Stadia*, which make only one League and two Thirds, reckoning three thousand Paces to a League; for it is well known, the *Stadium* was a hundred and twenty-five Paces. PLUTARCH himself, as JAMES PAUMIER, *de Grentesmenil*, observes, explains what was then understood by a Day's Journey of a Horse, when, towards the Close of *Cimon's* Life, he says, that while that General had the Command, no Persian Courier, or Horse dared come within four hundred *Stadia*, (or sixteen Leagues and two Thirds) of the Sea, p. 491. I take the Liberty on this Occasion of observing a Mistake in a very useful Treatise of Mr. EISENSCHMID, *De Ponderib. & Mens. Veterum*, &c. printed at *Strasbourg*, in 1708. where he (*Seçt. III. Cap. III. p. 113.*) confounds ἵππας δρόμου with what PLUTARCH elsewhere calls ἵππωνόν, *Vit. Solon.* p. 91. and says, contained four *Stadia*, or five hundred Paces. But the latter Word signifies the Space of Ground that a Horse runs when he goes full Speed in a Race, which it is evident cannot be a Day's Journey.

³ This new Treaty is a chimerical Treaty, as the learned GRONOVIVS. remarks. There was none made after the Battle of *Salamis*, which was soon followed by those of *Platea* and *Mycale*. Besides, it appears from the Thing itself, that there is no Difference between those two pretended Articles of Peace; for the *Chelidonian Islands* are three Islands situated in the *Pamphylian Sea*, over-against the City of *Phaselis*; so that it is exactly the same Space of Sea. I do not understand what induced our Author thus to multiply Beings without Necessity, for in the first Edition we read only, *Ne qua*

navis Medica Cyaneas navigaret.

⁴ THUCYDIDES, *Lib. IV. Cap. CXVIII.*

⁵ POLYBIUS, *Lib. III. Cap. XXII.*

⁶ SERVIUS, on *Æneid. IV. (628.)* observes, that By this Treaty, neither the Romans were allowed to land on the *Carthaginian Coasts*, nor the *Carthaginians* on those of the Romans. The People last mentioned, made a like Treaty with the *Tarentins*, by which they engaged themselves, not to send any of their Ships beyond the Cape of *Lacinium*. Excerpt. Legat. ex APPIANO. We learn from STRABO, that The *Carthaginians* made a Practice of sinking all foreign Ships which they found sailing toward *Sardinia*, or *Hercules's Pillars*. *Geogr. Lib. XVII. p. 1154. Edit. Amst. (802, Paris.)* GROTIUS.

⁷ POLYBIUS, *Hist. Lib. III. Cap. XXII.* In the same Treaty it was stipulated, That no Roman should land in *Sardinia*, or *Libya*, unless it was to take in Provisions, or refit their Vessels. *Ibid. Cap. XXIV.* After the third *Punic War*, a Complaint was made of the Senate of *Carthage* for fitting out a Fleet, and raising a naval Army. *Epitome LIVII, Lib. XLVIII, XLIX.* An Article of the Treaty of Peace with *Antiochus* obliged that Prince to Have only twelve Ships of War, for keeping his Subjects in Order. APPIAN, *De Bello Syriac.* (p. 181. Edit. Amst. 112. H. Steph.) By an Agreement between the Sultan of *Egypt* and the *Grecians*, the former was allowed to send two Ships beyond the *Bosphorus* every Year. NICEPH. GREGORIUS, *Lib. IV.* The *Venetians* pretend, that, by Vertue of several Treaties, no Ship of War ought to enter their Gulf. See Mr. DE THOU. *Lib. LXXX.* at A. C. 1584. (p. 200. Edit. Franckfort.) GROTIUS.

Our Author, in all the Editions of this Work, has written *Massia*, instead of *Maſtiâ*, (μάστια) as also *Leſſum*, instead of *Lisſum*. POLYBIUS has ἕξω τῆς Λισσῆς, *Lib. II. Cap. XII.* This Article concerning the Treaty concluded with the *Illyrians*, is taken from thence, though our Author quotes only APPIAN of *Alexandria*, in his Margin, who relates the Matter somewhat differently. Besides, by the By, *Maſtia* and *Tarſejus* are omitted in CELLARIUS's antient Geography; an Omission which may be supplied by consulting BOCHART, *Phaleg. Lib. III. Cap. VII.*

⁸ LIVY, *Lib. XXXVIII. Cap. XXXVIII. Num. 9.*

2. But all this does not prove that those, who thus limited the Navigation of any other People, had taken Possession of the Sea, or of the Right to sail there. For Nations, as well as private Persons, may⁹ give up not only that Right which is properly their own; but that also which they have in common with all Mankind, in Favour of him for whose Interest it may be: And when this happens, we may say as *Ulpian* did, ¹⁰ in the Case of an Estate sold, on Condition that the Purchaser should not fish for *Tunny*, to the Prejudice of the Seller: That indeed the Sea cannot be rendered subject to a Service; but yet Honesty requires that one should submit to the Clause of the Contract: And therefore the Purchaser, and those that succeed to his Rights, are personally obliged to observe such a Clause.

XVI. 1. It is often disputed amongst neighbouring People, whether the Bounds of the Jurisdiction be not altered as often as the River that runs betwixt them changes its Course; and whether the Addition that the River thus makes does not accrue to them who are on that Side where the Addition is made? Which Controversy must be determined from the Nature and Manner of the Acquisition. Authors who have writ on *The Boundaries of Lands*, inform us, ¹ that there are three Sorts of Lands; one Sort is divided and assigned, which ² *Florentinus* the Lawyer calls *limited* ³; because it is inclosed by Limits made by the Hands of Man: Another is ⁴ *assigned in Gross*, or comprised within some certain and determinate Measure, as ⁵ Hundreds, suppose, and Acres: And a third is *arcifinious*, called

XVI. Whether if the Course of a River be changed, it alters the Territory, explained with a Distinction.

⁹ True: But still, when Men enter into Treaties, like those under Consideration, they may have a Design of securing to themselves, by such Negotiations, the Property of some one Sea, and obliging others to acknowledge their Right. Mr. VITRIARIUS, in his Abridgment of our Author, *Lib. II. Cap. III. § 18.* pretends, that if the Person engaged by such a Treaty, was before that Time Master of the Sea, which he would hinder another contracting Party from using, it would be unnecessary to insert such a Clause. But he forgets what he had himself laid down, after our Author, *Lib. II. Cap. XV. viz.* that some Treaties turn on Things, before due, even by the Law of Nature.

¹⁰ *Lib. VIII. Tit. IV. Communia Prædiorum, &c. Leg. XIII.*

XVI. (1) FRONTINUS, *De Agrorum Qualitatibus.* p. 38. *Edit. Goës.*

2 DIGEST. XLI. Tit. I. *De acquirendo rerum Dominio.* Leg. XVI.

3 GRONOVIVS, and the late Mr. GOES, Editor of the Writers, who treat on the *Res Agraria*, criticize our Author in this Place, as not rightly understanding the Nature of these three Sorts of Lands, and the Difference made between them by the antient Romans. They tell us, the *Limited Lands* were not called so, because as to their exterior Extent, they were enclosed by Limits made by the Hands of Man; but because their whole Extent, both interior and exterior, was cut and divided by Limits, which distinguished the Acres, or hundreds of Acres, to be allotted to each of those, to whom the Distribution of those Lands was to be made. Besides, these Sorts of Lands might be bounded by a River; and in that Case, the Portions assigned to such and such Persons, sometimes reached to the River, which served as a Boundary to them. See AGGENUS URBICUS, *De Controversiâ Agrorum*, p. 70. I observe, however, that our Author has some Kind of Authority for his Manner of explaining the Terms in Question; the same AGGENUS URBICUS understanding by *Limits*, whatever is made by the Hand of Man, for determining the Bounds. *Comment. p. 46.* Mr. GOES indeed maintains, that this Work either doth not belong to him whose Name it bears, or has been corrupted by the Interpolation of a great Number

of Falsities and Absurdities. It is certain, however, that the Lands under Consideration were commonly bounded by some exterior Limits, made by the Hand of Man, which determined their just Extent, and this is sufficient for our Author's Purpose, who, in my Opinion, was not ignorant that the interior Extent was divided by Limits, as well as the exterior.

4 These were such as were given in the Whole to any one City or People, without Division, so that they belonged to the Publick, not to any one in particular. FRONTINUS, p. 38. Thus the Imposts were paid out of Lands belonging to the Publick; not out of the Property of each private Person. See Mr. GOES's Notes, p. 153, 198.

5 *Per Centurias ac Jugera.* An Acre, *Jugerrum*, was a Measure of 120 Feet in Breadth, and 240 in Length. *Centuria* contained 200, or 250, such *Jugera*; and was called *Centuria*, because it was the Portion of a hundred Persons; for no one had less than two Acres or, *Jugera*; so that it may with good Reason be said, this Sort of Measure does not agree to the Lands in Question, which were measured only by the Extremities. Here again I find our Author has been misled by AGGENUS URBICUS's Commentary on FRONTINUS; for he says there expressly, that *Some give the Name of Centuria to a Measure taken by the Extremities.* p. 45. I imagine our Author conceived, that tho' the Lands under Consideration, were not divided and intersected by Boundaries, yet there was a Necessity of measuring their whole Extent in some Manner, in Order to determine the Measure of their Extremities. He may have taken up this Notion from a Passage in FRONTINUS, who says, that *In many Places the Measurers, tho' they measured such Lands by their Extremities, formed the Plan of them, as if they were limited.* p. 38. But whatever our Author's Mistake may be, it is sufficient for his Purpose, that the two first Sorts of Lands, which he distinguishes, are opposite to the last, in having fixt Boundaries. Mr. GOES owns that the Emperor *Antoninus Pius*, who by a Constitution, mentioned in the DIGEST. *De acquirendo rerum Dominio.* *Lib. XLI. Tit. I. Leg. XVI.* refused the Alluvions to the Proprietors of limited Lands, would have refused them likewise to a People, in Regard to such Lands as had been given them in the

called so, as *Varro* observes, ⁶ because it has (*Fines arcendis Hostibus idoneos*) Boundaries fit to keep the Enemy out; that is, it has ⁷ natural Limits; such as Rivers and Mountains. And these are what *Aggenus Urbicus* styles ⁸ *Occupatory*, because they are generally such Lands as are occupied or possessed, either as being vacant, or else by the Power of the Sword. In the two first Instances, tho' the River should change its Course, yet is there nothing ⁹ of the Territory changed: And what is added by *Alluvion*, belongs to the prior Occupant.

See *Joan. And.*
and others, ci-
ted by *Rein-*
kink, l. 1. clafs
5. c. 1.

2. But in *arcifinious* Lands, the River, by gradually altering its Course, does also alter the Borders of the Territory; and whatever the River adds on one Side, shall be under his Jurisdiction who has his Lands there; because both Nations, between which the River runs, are supposed to have taken ¹⁰ originally the Middle of the River for a natural Boundary of their Jurisdictions. *Tacitus* said ¹¹, *That the Rhine began there to have a fixed Channel, which was proper to serve for a Boundary.* And *Diodorus Siculus* ¹², relating the Controversy that was between the Inhabitants of *Egesta* and *Selinus*, says, *περίαυξεν τὴν χώραν ἐκείνην*, *The River bounding the Country.* And *Xenophon* ¹³ calls such a River simply, *τὸν ἐκείνην*, *The Bounder.*

3. The Antients report, that the River *Achelous*, keeping no constant steady Course, but one While dividing itself into several Branches, another While turning and winding about, (which gave Rise to the fabulous Story of its being changed in-

the Whole; his Reason is, *Because this Land (assigned in gross) has its certain and determinate Extremities.* — And, says he, *what is it to the Purpose, that one is divided by interior Limits and not the other, as long as there is no Difference in the Exterior?* Not. p. 198. I shall however observe another Mistake of our Author, which has escaped the Censure of his Commentators. It is in a short Note on this Place, where, in Order to give his Readers an Example of Lands enclosed within a certain Measure, he refers them to *SERVIVS*, on the ninth Eclogue of *VIRGIL*. Now it is certain, the Lands there mentioned were limited, since the Poet is speaking of such as were taken from the *Mantuan*s, to make up for the Defect of the Territories of *Cremona*, which *Augustus* divided among his Soldiers. See that antient Commentator on *Verfes* 7, and 28.

6 *FRONTINUS*, p. 38. But *SICULUS FLACCVS* tells us, these Lands were called *Arcifinales*, (or *Arcifinii*) because every Man appropriated to himself as much Ground as he hoped he should be able to cultivate, and thus kept off his Neighbours, (*arcendo vicinos*) p. 3. The Etymology, given by *GRONOVIVS*, seems to me more natural, and comes to the same in the Main. He derives it *ab arcendis finibus*; because such Lands had no Boundaries fixt and determined by any Measure. This is in my Opinion, the very Idea which our Author would give us of these *Agri arcifinii*; and if he speaks of natural Boundaries, it is because Lands which have such Boundaries, are not usually measured. As Mr. *GOES* observes, after *FRONTINUS*, the Boundaries of the *Agri arcifinii* were sometimes made by the Hands of Men, and the Disputes which afterwards arose among Neighbours, made it necessary to limit the Extent of them by some Measure. But it is sufficient, that originally such Lands were in themselves unlimited.

7 *TACITUS* observes, that *Germany* was divided from the *Sarmatæ* and the *Dacians*, either by their mutual Fear, or by Mountains. *De morib. Germ.* Cap. I. Num. 1. *PLINY*, speaking of the *Alps*, says, *We carry away what was designed as Boundaries between different Nations.* *Hist. Nat. Lib. XXXVI. (Cap. I.) GROTIUS.*

I am very much mistaken, if the first Word in the Passage of *PLINY*, *evehimus*, is not corrupted, but may be easily restored. That Historian is

speaking of the Stones, and particularly the Marbles, which were cut in the Mountains, and which he represents as Boundaries, that ought to be treated with Respect: So that, I think, it should be read *evellimus*, &c. *we tear up*, &c. Every one sees how easily the Transcribers might write one of these Words instead of the other. I own the Word *evehimus* may form a good Sense in this Place; but the other is without Doubt more to the Purpose: And besides, it prevents a Repetition in the following Words, *The Tops of the Mountains are carried (portantur) from Place to Place, &c.* To which it may be added, that no Term is more proper for expressing the Removal of Boundaries than *evellere*, or *revellere*, as *HORACE* speaks,

*Quid quod usque proximos
Revellis agri terminos* —

Lib. II. Od. XVIII. v. 24.

8 Page 45: Edit. *Goes*.

9 Because their Extent and Bounds are fixed and determined. See *PUFENDORF*, B. IV. Chap. VIII. § 11.

10 See an Example of this Kind in *MARIANA*, *Hist. Hisp.* Lib. XXIX. Cap. XXIII. in Regard to the River *Vedafus*, (now called *Bidassoa*.) *GROTIUS*.

11 *De morib. Germ.* (Cap. XXXII. Num. 1.) *SPARTIAN*, in his Life of the Emperor *Hadrian*, (Cap. XII.) tells us, that Prince planted great Posts joined together, like a Sort of Wall, in several Places, (on the Frontiers of the Roman Empire) where there were no Rivers for separating them from the Barbarians. *CONSTANTINE*, *Porphyrogenetus*, calls the River *Phasis* *σύνεστος*, as serving for a Boundary. Cap. XLV. *GROTIUS*.

12 Lib. XII. Cap. LXXXII. p. 328. Edit. *H. Steph.*

13 He there speaks of a River, without naming it, which discharged itself into another, not named. The former divided the Country of the *Macronians*, from that of the *Scythinians*. *De Exped. Cyri.* Lib. IV. Cap. VIII. § 1. Edit. *Oxon.*

N. B. The Word, by which the River is distinguished, by the Historian, is *ὁ ἐκείνων*; which may have been its proper Name, on the Account of its serving as a Boundary.

to a Bull and a Serpent) was the Occasion of frequent Wars between the *Ætolians* and *Acarnanians* about the adjacent Land, 'till *Hercules* confined it within Banks; and for the important Service, obtained in Marriage the Daughter of *Oeneus*, King of the *Ætolians*. Strabo. l. 10. p. 703. Ed. Amst. (458, Ed. Paris.)

XVII. 1. But this will only take Place where the River has not changed its Channel; for a River that separates two Jurisdictions, is not to be considered barely as Water, but as Water confined in such and such Banks, and running in such and such a Channel. Therefore the Additions, Diminutions, and other Changes of the Parts, which allow the Whole ¹ to subsist in its antient Form, do not hinder the River from being considered as the same. But if the Form of the Whole be changed at the same Time, 'tis then a quite different Thing: And consequently, as when any River is dammed up above, and a Passage made to convey the Waters another Way, it is no more the same, but a new River. So in Case ² a River should force its Way through some unusual Passage, and entirely forsake its former Channel, it is no more the River that it was before, but a new one. So too, if a River should be exhausted or dried up, as the Middle of the neighbouring Channel would remain the common Boundary of the two Jurisdictions; because we are to presume, that the Intention of the People was to take the River for the natural Limit of their States, and that if the River should at any Time cease, each might possess what they had before; the same Thing is to be said if the Channel of a River should be altered. XVII. What Judgments must we make if the Channel be quite altered? L. Proponetur, D. de judiciis. See Digest. l. 43 tit. 20. De Aqua quotid & altiva, l. 3. § 2.

2. But in any Doubt of the Bounds of a State, those Lands that reach to some River are to be reckoned *arcifinious*, because nothing is so proper to distinguish Jurisdictions, as ³ that which is of such a Nature that it is not easily passed over. It rarely happens that such Sort of Lands are limited, or comprised in a certain Measure; and when it falls out so, it is not so much in Consequence of the original Acquisition, as by Vertue of another's Concession.

XVIII. But tho', as I said, in Case of any Doubt, the Jurisdictions on each Side reach to the Middle of the River that runs betwixt them, yet it may be, and in some Places it has actually happened, that the River wholly belongs to one Party; either because the other Nation had not got Possession of the other Bank, 'till later, and when their Neighbours were ¹ already in Possession of the whole River, or else because Matters were so stipulated by some Treaty. XVIII. A River belongs sometimes wholly to one Territory.

XIX. 1, Nor is it undeserving our Observation, that the Acquisition of such Things as have had an Owner once, ¹ but are now without one, either because they are abandoned, or because the Owners themselves ² are dead and gone, is to be judged an original Acquisition: For in such a Case they return to the State in which all Things were at first. XIX. Things that are quit- ted, are the Right of the next Possessor, unless the State has acquired a Right to a general Property.

2. But it is likewise to be observed, that the original Acquisition of a Country is sometimes made by a People, or a Prince, in such a Manner, that not only the Jurisdiction and Sovereignty, which comprehends that eminent Right we have elsewhere ³ spoken of, but also the full and compleat Property is at first, in general, vested in that People or Prince; and that afterwards a particular Distribution is made amongst private Persons, but so that their Property should still depend upon that prior Property; if not, as ⁴ the Right of a Vassal upon the Right of his

XVII. (1) See a Law in the *Digest*, referred to in the Margin, which shall be produced, in Note 3. on § 3. of Chap. IX. of this Book.

2 As did formerly the River *Bardanus* (or rather *Varadarus*) according to ANN. COMNEN. *Hist.* Lib. I. (Cap. V.) GROTIUS.

3 *Darius* called the *Tigris* and *Euphrates* the two great *Bulwarks* of his Kingdom. Q. CURTIUS, Lib. IV. Cap. XIV. Num. 10.

XVIII. (1) Thus the *Romans*, as GRONOVIVS observes, were sole Masters of the *Rhine*, the *Danube*, and some other Rivers; because the *Barbarians*, who inhabited on the opposite Bank, having no Boats, the *Romans* constantly kept what they called *Naves Lusitæ*, on them. See SALMASIUS, on VOPISCUS, *Vit. Bonofi.* Cap. XV.

XIX. (1) See PUFENDORF, B. IV. Chap. VI. § 12.

2 When a Man dies without leaving an Heir: On this is founded a Passage of JUSTIN, which the learned GRONOVIVS quotes in this Place. *Imilcar*, General of the *Carthaginians*, having lost his Army in *Sicily*, by the Plague that raged in that Island, consoles himself, after his Return to *Carthage*, by observing, that *The Enemy had plundered his Camp, not in Quality of Conquerors, but as Persons who seized on such Goods as, by the Death of the Owners, belonged to the first Occupant.* Lib. XIX. Cap. III. Num. 6.

3 B. I. Chap. I. § 6.

4 See Note 4. on PUFENDORF, B. IV. Chap. VIII. § 12.

Lord; or the Right of a ⁵ Tenant, upon the Right of him who owns the Farm; however, by some flighter Sort of Dependence, as there are many Kinds of ⁶ Right to a Thing, among which is the Right of him who upon a certain Condition expects a ⁷ Feoffment of Trust. Thus Seneca, ⁸ 'Tis no Argument at all, that because you may not dispose of, consume, spoil, or mend, 'tis therefore not yours; for that too is yours, which is conditionally such. So Dion Prusænsis, ⁹ *μυρία γὰρ εὐρήσκει τρόπους, &c.* There are many Ways; and those very different, by which Things are said to belong to one; so that sometimes be to whom they belong can neither sell nor dispose of them as he pleases. And in Strabo ¹⁰ we meet with, *κώρας ἦν πλὴν τῆς πωροῦσκειν*, He was Master of it, excepting the Power of selling it. Now an Example of what we have been speaking of, Tacitus gives us in the Germans, They take Possession in common of as much Land as they are able to cultivate all together, and afterwards they divide it according to every Man's Condition.

3. When the Property of private Persons depends on the general Property of the State, in the Manner I have just mentioned, that which has no particular Owner does not therefore belong to the first Occupant, but returns to ¹¹ the whole Society

⁵ See PUFENDORF, B. IV. Chap. VIII. § 3.

⁶ *Jus in rem*, or rather, *in re*, as we commonly say, in Opposition to *Jus ad rem*; a Distinction used by the scholastick Interpreters of the Roman Law. The Reader may see what I have said on it in my second Note on PUFENDORF, B. IV. Chap. IX. § 8. as also Mr. NOODT's Commentary on the first Part of the DIGEST. p. 60, 61.

The Right of a Proprietor over his Goods, that of a Creditor over the Pledge lodged in his Hands, the Rights of Servitude over the Goods of another, the Right of Possession, and that of an Heir, are placed among the Rights *in rem*. But the Doctors are not universally agreed in admitting the Right of Possession into that Class, according to the Notions of the antient Law. See Mr. SCHULTING's excellent Notes on the *Jurisprud. Antequistin.* p. 428.

⁷ *Institut.* Lib. II. Cap. XXIII. *De Fidei commissariis hereditatibus*, § 2. Our Author is censured for placing this Right, as he understands it, contrary to the scholastick Notions, among Rights over a Thing. It is observed against him, that, according to the Civil Law, a Legacy bequeathed under a certain Condition, is not acquired by the Legatee, but when the Condition is accomplished by the Event. 'Till that Time, the Legatee is not considered as a Creditor. (See DIGEST. Lib. XLIV. Tit. VII. *De obligat. & Actionib.* Leg. XLII. And CUIJAS's publick Lectures on that Law. Tom. VIII. *Opp. Edit. Fabrot.* p. 400.) and if he dies before the Condition is performed, he even transmits no Hope to his Successors. Much more ought the same to hold good in Regard to an Heir in Trust, while the Condition is depending: As he yet acquires nothing, he has neither a Right over the Thing, nor even a Right to the Thing; and only amuses himself with vain Hopes. All this is true, according to the Roman Law; but, when we consider the Simplicity of natural Law, tho' the Right of such a Person has no Effect, and may never have any, in Regard to the actual Acquisition of the Thing; it is not therefore less real, or falls less on the Thing. This is evident, because he who is charged with a Feoffment of Trust, cannot dispose of the Goods according to his own Fancy, till the Condition fails entirely.

⁸ *De Benef.* Lib. VII. Cap. XII. The Philosopher had said, a little before, that Some Things belong to some Persons, under a certain Condition. GROTIUS.

Our Author quotes the last Passage, as if taken from B. VIII. Chap. XII. of the Treatise *De Be-*

nef. which, it is well known, has but seven Books. As to what concerns the Thing itself, see B. I. Ch. III. § 16.

⁹ *Orat. Rhod.*

¹⁰ *Lib. XII. p. 558. Edit. Casaub.*

¹¹ From a Passage in the Close of the second Book of the *Odyssy*, it may be gathered, that the Estate of a Man who died without Children, fell to the People. And thus EUSTATHIUS explains that Place in the *Iliad.* B. V. where the Poet says, that *The Magistrates of the City divided the Estate*, of such a Person,

— Χηρωσαὶ δὲ Διὶ κλῆσιν δαίμονιο.

Ver. 158.

For by *Χηρωσῆς* he understands a Magistrate, who undertook the Administration of the Estates of such as left no Children. We learn from History, that something like this was formerly practised in the Kingdom of Mexico. GROTIUS.

The Passage of the *Odyssy*, hinted by our Author, is probably that where one of Penelope's Suitors says, that, if *Telemachus* should be lost at Sea as his Father had been, they would divide his Effects, and leave only the House to his Mother, and to the Man she should marry.

Κλήματα γὰρ κεν πάντα δασαίμεθα· οἰκίαν δ' ἄντε
τῶτα μῆλεα δοῖμεν ἔχειν, ἥδ' ὅστις ὀπύοι.

Verses 335, 336. See also Verse 368. But I do not see how the Inference made by our Author can be sufficiently grounded on those Words. It is more probable, that HOMER only insinuates, as Madam DACIER observes, that Penelope's Suitors had agreed, that, if they could get rid of *Telemachus*, they would make an equal Division of all his Effects among themselves, that thus the Persons rejected by Penelope might have some Sort of Consolation. In Regard to the Passage of the *Iliad*, the Poet is there speaking of *Phenops*, an old Trojan, who had only two Sons. *Diomedes* killed them both, and thus, says the Poet, left their Father sufficient Cause for Mourning and Affliction: Then follow the Words in Question. The Word *Χηρωσαὶ* does not, in any Greek Author with whom we are acquainted, plainly signify such Magistrates as EUSTATHIUS mentions; so that this looks very like an Invention of his own. POLLUX and HESYCHIUS make this Word signify distant Relations, who succeed a Father thus deprived of his Children. Madam

ciety or superior Master. And even the Civil Law, without this Reason, may establish such a Right ; as we ¹² have already hinted.

dam DACIER indeed thinks the Word *Χηρωσαί* was not explained by *collateral Relations*, who had a *Right of Succession*, till after HOMER's Time. But then she ought first to have proved that HOMER speaks of such. I shall here insert her Translation, which gives a great Light to the Original, *Dans une Affliction & dans un Deuil, qu' augmentoit encore la Douleur de voir des Curateurs s'emparer de sa Succession, pour la conserver à des Collatéraux éloignez, qui la dévoient déjà des Yeux, & auxquelles elle n'étoit pas Destinée.* That is, *In an Affliction and Mourning, which was increased by the Grief at seeing the Guardians seize on the Succession, in Order to keep it for distant collateral Relations, who already devoured it with their Eyes, and for whom it was not designed.* She here supposes, that these pretended Guardians took the Administration of a Man's Estate into their Hands, even in his Life-Time, if he died without Children, But where did she learn this? It appears clearly, from a like Passage of HESIOD, that this Division was not made till after the Decease of the Person who left no Issue.

Ζώει, σπουδόμενος δὲ Ἀγὸ κλῆσιν δάτεον)
Χηρωσαί.

Theogon. ver. 605, &c.

That Lady indeed makes the *Χηρωσαί*, here mentioned, *those very collateral Relations* who enjoyed the Succession. But in Vertue of what does she give a different Sense to this Passage, which visibly treats of the same Thing, and which belongs to a Poet, who lived either at, or very near the same Time with the other? And what Probability is there, that the Administration of a Man's Estate, who had no Children, was taken out of his Hands, in Order to secure the Succession to his distant Relations? In Reality, this Passage of HOMER is not clear enough for proving either what Madam DACIER thinks she finds in it, nor what our Author infers from it. I do not, however, deny, that even in those Times, vacant Estates might be considered as devolving to the Publick. It is certain, that Sovereigns have long attributed to themselves a Right of appropriating such Estates to themselves, with the Consent of the People.

—'Ο δ' ἔ βίότῃ ἀπιδενῆς

¹² See the foregoing Chapter, § 45.

CHAP. IV.

Of a Thing presumed to be quitted, and of the Right of Possession that follows ; and how such a Possession differs from Usucaption and Prescription.

I. A Great Difficulty ¹ arises here, concerning the Right of Prescription. For whereas this Right receives its Being from the Civil Law, (Time, as such, having no Power to produce any Thing, for nothing is done by Time, tho' every Thing be done in Time) in *Vasquez's* Opinion, it cannot take Place between two free Nations, or two Kings, or between a free People and a King ; no nor between a King and a private Person who is no Subject of his, nor between ² two Subjects of different Princes or States ; which seems true ³ enough, unless the

I. Why Usucaption or Prescription, properly so called, has nothing to do among different People or their Sovereigns. Controv. Illuf. l. 2. c. 51. n. 28.

I. (1) As our Author, in the last Paragraph of the preceding Chapter, has placed Things as are abandoned by their Masters, among such as are acquired by Right of prior Occupancy ; he, on this Occasion, enquires into the Right of Prescription, founded on a tacit abandoning. According to the ancient Roman Law, however, there was this principal Difference between *Usucaption* and *Prescription*, that whoever acquired a Thing by Right of *Usucaption*, at the same Time acquired a Right of claiming it wherever he found it ; whereas *Prescription* only enabled him to elude the Demand of the former Master, but afforded no Means to recover Possession, when once lost. See the Commentators, particularly JANUS A COTTA, on the Title of the *Institutes*, *De Usucapionibus*, &c. Lib. II. Tit. VI. The Reader may likewise find several Things on this Subject in PUFENDORF, B. IV. Chap. XII. § 1. &c.

² CICERO observing that in antient Times, the Romans gave the Appellation of *Enemy* (*Hostis*) to the Person, in his Days called a *Foreigner*, (*Peregrinus*) confirms this Remark, by a Law of the Twelve Tables, which says, *Propriety is preserved eternally against a foreign Possessor. Adversus Hostem æterna auctoritas.* De Offic. Lib. I. Cap. XII. GROTIUS.

³ That is, supposing the Right of Prescription founded only on the Will of the Legislators, and that there is nothing in the Law of Nature and Nations to authorize it. Besides, even tho' it had some Foundation in the Principles of a Law common to all Men, and all People ; the precise Determination of the Time allowed for Prescription, which is not the same in different Countries, serves as a Rule only to the Subjects of the same Nation.

Y y

⁴ Thing

+ Thing or the Act depends on the Laws of the Country. But if we should admit this to be true, a very great Inconvenience would follow; the Disputes about Kingdoms, and their Boundaries, would never be at an End: Which, as it directly tends to create Uneasiness, Troubles, and Wars amongst Men, so is it contrary to the common ⁵ Sense of Nations.

II. But even among these long Possession is frequently urg'd as a Right. Judges xi. 14, &c.

II. For in the Holy Scriptures, when the King of the *Ammonites* demanded of *Jeftabab*, the Lands that lay between *Arnon* and *Jabbok*, and from the Desarts of *Arabia*, as far as the River *Jordan*, he pleaded three hundred Years Possession, and asked why he and his Ancestors had so long neglected to lay claim to them. And we find in *Isocrates*, that the *Laconians* laid it down as ¹ an avowed Maxim, established by the Consent of ² all Nations, that publick, as well as private Possessions, are, in a long Course of Years, so secured and confirmed that they can never be recovered; and they make Use of the same Reason to destroy the Pretensions of those who required *Messena* of them. The Greek Words are, τὰς κτήσεις ἢ τὰς ἰδίας ἢ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας ἢ πατρῴας, ἀπαντες εἶναι νομίζουσι. And the same *Isocrates*, writing to *Philip*, κάτοχον ἢ βεβαιον ἢ κτήσιν πεποιηκότῃ τῷ χρόνῳ. Time hath made the Possession firm and lasting. And it was this Right that induced *Philip* the second to declare to *Tit. Quintius*, that ³ he would evacuate those Cities which he had taken, but that he would by no Means part with the just and hereditary Possession of those which were derived down to him from his Ancestors. *Sulpitius*, speaking against *Antiochus*, ⁴ maintains that it was unjust in him to pretend, that because the Greeks in *Asia* had been formerly under the Dominion of his Ancestors, he had a Right to reduce them to his Obedience, so many Ages after the Recovery of their Liberty. *Tacitus* ⁵ considers as an *Impertinence*, the reviving of ⁶ old Pretensions. And *Diodorus*,

4 Even tho' Prescription were purely of Civil Right; yet, if any Native of the Country had been in Possession of Goods or a Right belonging to a Foreigner, during the Term fixed by the Laws, such Foreigner shall be cast at Law, when he enters his Claim after that Term; and that for the same Reason which would exclude him from an Inheritance, if the Laws did not allow the Estates of the Country to pass to Foreigners by Will, or by Persons dying intestate. This is our Author's Meaning, which at first Sight appears pretty obscure.

5 PETER DU PUY, in a Dissertation, tending to prove that Prescription doth not take Place between Sovereign Princes, reasons thus, "Those, who have asserted that the negative Opinion is repugnant to the common Sense of all Nations, will, I believe, find it difficult to make a Reply to that universal Consent of all Kings and Sovereign Princes, who have never waved any Part of their antient Pretensions. Some of them have retained the Titles of their pretended Kingdoms and Lordships, others the Arms, and a third Sort both the Arms and Titles of those Dominions, tho' not in Possession of one Foot of Land in them." The Author then sets down a great Number of Examples, which it is not necessary to specify in this Place. The late Mr. WERLHOF, Professor at *Helmstadt*, (of whom I have spoken in my third Note on PUFENDORF, B. IV. Chap. XII. § 11. second Edition) answers judiciously. First, That if such Princes, by keeping the Titles or Arms of a Kingdom, of which they have not been in Possession of a considerable Time, really design to preserve their Right, here is a Sort of Protestation made, which hinders Prescription; and thus, this is so far from proving that Kings and Princes look on Prescription as a Thing which hath no Place among them, that it may very reasonably be inferred from hence, that they are persuaded of the contrary; because, otherwise,

there would be no Necessity of their being so eager in interrupting, as much as in them lies, the Detainer's Possession of Fact. Secondly, It frequently happens, that Custom and Vanity have a great Share in this Care of retaining the Titles or Arms of a Kingdom, when they have abandoned the Possession of it. So that this Act cannot be supposed to interrupt the Possession, or in any Manner prejudice the Right of the Possessor, when there are other Acts and Circumstances sufficient for grounding a Presumption of abandoning such Right. *Vindiciæ Grotiani Dogm. de Præscript. inter Gent. liberas*, &c. § 47.

II. (1) *Orat. Archidam.* p. 121. Edit. H. Steph.

Our Author quotes the next Passage, as belonging to ISOCRATES, *Orat. ad Philippum*. But it is taken from DIONYSIUS of *Halicarnassus*, in that of his *Judgment on Isocrates*, where he gives us the Substance of the Oration made under the Name of *Archidamus*, Cap. IX. p. 155. Tom. II. Edit. Oxon.

2 *Lewis* of *Gonzaga*, Duke of *Nevers*, reasoned on the same Principle. See Mr. DE THOU, *Lib.* LIX. at the Year 1574. GROTIUS.

3 *LIVY*, *Lib.* XXXII. Cap. X. Num. 4.

4 *Idem*. *Lib.* XXXV. Cap. XVI. Num. 10.

5 It is where the Historian speaks of *Artabanus*, King of the *Parthians*, who attempted to invade the Possessions and Conquests of *Cyrus* and *Alexander*. *Annal. Lib.* VI. Cap. XXXI. Num. 3.

6 This is what the Greeks called, by Way of Allusion to a Fact in the History of *Athens*, τὰ πρὸ Ἐυκλείδου, to seek for that which was before *Euclides*. A proverbial Way of Speaking, made use of, among other Writers, by *NICETAS*, in the Life of *Alexis Comnena*, Brother of *Isaac Angelus*, where he speaks of the Emperor *Henry*, Son to *Frederick*, ἢ ταῦτα δὴ τὰ πρὸ Ἐυκλείδου ἀντιποσώδων

rus, ⁷ μυθῶδες καὶ παλαιὰς ἀποδείξεις, *Tales and idle Stories.* Thus Cicero ⁸ in his second Book of Offices, *Is there any Reason why Lands that a Man has been possessed of for many Years, or even many Ages, should be taken from him?*

III. What shall we say then? The Effects of Right, which depend on the Will, cannot however take Place, in Consequence of a mere Act of the Mind; but that internal Act must be manifested by some external Sign. For, since the Thoughts of Man cannot be discovered but by outward Signs, it would be absurd and repugnant to our Nature, to attribute any Effect of Right to the bare Act of the Mind, and therefore it is, that ² mere inward Motions do not come under the Cognizance of human Laws. Nor do Signs indeed give us a demonstrative, but only a probable Certainty of the Thoughts and Motions of the Mind; for Men may speak otherwise than they design or think, and by their Actions may give to understand a different Thing from what they have in their Thoughts. However, as the Constitution of human Society does not permit the Acts of the Mind, sufficiently manifested, to remain without Effect, whatever one declares by sufficient Signs, passes for the real Thought and true Intention of him that uses those Signs. ³ If his Words or Actions are contrary to his Intentions, so much the worse for him. What I have said is liable to no Difficulty, when the Question is in reference to Words.

III. The Reason inquired into, from the Conjectures of a Man's Will and Intention, which Conjectures are derived not from Words only.

IV. 1. As to Actions. A Man is supposed to abandon a Thing, when, for Instance, he throws it away; unless it be in such Circumstances, that we ought to presume he does it only through the Necessity of the Time, and with Intention to recover it if he can. Thus ² when a Note under Hand is returned, the Debt or Obligation is supposed to be discharged. A Right of Inheritance ³ may be renounced, says *Paulus*, not only by Words but by Actions, or any other Indication of the Will. Thus if a Man, who knows very well that a Thing belongs to him, should treat with the Person who is in Possession of it, as if he was the true and lawful Proprietor, he may reasonably be supposed to resign his Right; and why a Right cannot be made over the same Way, between Kings and free People, no Reason can be assigned.

IV. But also from an Overt-Act or Deeds done.

2. It is much the same, as if a Magistrate should allow or command one under his Government, ⁴ to do that which the Law forbids; he is presumed then to release him from the Obligation of that Law. In all these Cases, the Presump-

πρόσῳλος ἀνακινῶν. *He was not ashamed to go and seek for that which was before Euclides.*

This *Euclides* was *Aichon* at Athens, soon after that Office was introduced. Our Author might have shewn the Use of this Proverb from more ancient Writers; such as *LUCAN* in *Cataplo*, Tom. I. p. 426. and in *Hermotimo*, p. 563. Edit. Amstel. The learned *CASAUBON*, in his Remarks on *ATHENÆUS*, Lib. I. Cap. II. promised to explain and illustrate it at large, in a Treatise *Of Proverbs* which has never been published.

7 I know not from what Part of the *Greek* Historian our Author took these Words.

8 *De Offic.* Lib. II. Cap. XXII. *FLORUS*, speaking of the Sedition, raised by the Tribunes, who required a new Division of the Lands, which had been usurped by several Persons, observes, that this could not be effected without the Ruin of the Possessors, who were part of the People, and possessed those Lands by a Sort of hereditary Title, as having been left them by their Ancestors. Lib. III. Cap. XIII. (Num. 9, 10.) *GROTIUS*.

III. (1) See Chap. VI. of this Book, § 1.

2 This will be treated of Chap. XX. § 18. of this Book.

3 Even tho' he did it not with a Design of deceiving; for every one ought to think of what he says. See Chap. XVI. of this Book, § 1.

IV. (1) Thus, when Men throw their Goods into the Sea, with a View of saving the Ship, they do not design to abandon the Possession of them; on the contrary, they will take them up, if they find them, or look for them, if they suspect where they lie. In

which Case they act like a Traveller, who leaves what he cannot carry on the Highway, intending to return with Assistance, for carrying it off. This is the Decision of the Roman Lawyers, quoted by our Author in his Margin. *DIGEST. Lib. XIV. Tit. II. Ad Leg. Rhod. de jactu.* Leg. VIII. See also *Lib. XLI. Tit. I. De adquir. rerum Dominio.* Leg. IX. § 8. and *Lib. XLVII. Tit. II. De Furtis*, Leg. XLIII. § 11.

2 *DIGEST. Lib. XIV. Tit. II. De Pactis, &c.* Leg. II. Princip. and § 1. See *PUFFENDORF, B. III. Chap. VI. § 2. Note 7.* second Edition. But when there is any manifest Reason, which shews, that the Note is not given up, or cancelled; with a Design of releasing from the Debt, the Presumption ceases. *Lib. XXII. Tit. III. De probation. & præsumptionibus*, Leg. XXIV. See Mr. *NOODT's* excellent Treatise *De Factis & Transactionibus*, Cap. II. p. 651, 652. Opp.

3 *DIGEST. Lib. XXIX. Tit. II. De adquir. vel amittend. hæredit.* Leg. XCV.

4 In a Law of the *Digest*, quoted by our Author in his Margin, it is said, that If a Minor acts as a Magistrate, his Jurisdiction is not to be disallowed. — So that, if a Minor, being Pretor or Consul, pronounces Sentence, it will be valid; because the Prince, who gave him the Post, decreed that he should do every Act belonging to it. *Lib. XLII. Tit. I. De re judicatâ.* Leg. LVII. See also *Lib. I. Tit. XIV. De Officio Prætor.* Leg. III. and *JAMES GODEFROY's* Commentary on it, in his miscellaneous Dissertations.

tion is not founded on the Civil Law, but on the Law of Nature, according to which every one has the Liberty of parting with his own, and on a natural Conjecture, whereby every one is supposed to intend that which he has sufficiently given to understand. We may very well admit in this Sense what *Ulpian* the Lawyer has asserted, ⁵ that *Acceptilation* (or a verbal Discharge of a Debt) is founded on the Law of Nations.

V. And from
an Inaction or
a Forbearance
of Acting.

The Jewish
Lawyers call
this *Sh'at*.

V. 1. Now, morally speaking, under the general Name of *Action* are likewise comprehended Omissions, considered with the requisite Circumstances. Thus a Man by his Silence, in Case he is upon the Spot, and knows what is doing, is supposed to give his Consent to what is then done; which the *Mosaick* Law does also allow, *Numb.* xxx. 4, 5, and 11, 12; unless it appears that he was awed into Silence, or any other Way hindered from Speaking. On this Foundation it is that one reckons for lost, what the Person to whom it belongs has no Hopes of recovering. *Ulpian* ¹ says, that Hogs carried off by a Wolf, or Things lost by Shipwreck, cease to be ours, not *immediately*, but when there is no Way of recovering them; ² that is, when there is no Room to believe that the Proprietor considers them as his own; when there is not the least Sign that he intends to preserve any Pretension to them. For if he should send People to look for them. and promise a Reward to the Finder, the Case would be quite altered. Thus again, should a Man knowingly suffer another to enjoy what is his for a considerable Time, without demanding it, it might be concluded from his Forbearance, that he designed to part with it altogether, and looked upon it no longer as his Property; unless there was any other Reason, that manifestly hindered him from making Opposition. In this Sense *Ulpian* said, that ³ a House is looked upon to be abandoned, on Account of the long Silence of the Proprietor. ⁴ *You are in the Wrong*, (said the Emperor *Antoninus Pius*, in his Rescript) *to demand the Interest of your Money for the Time past. The long Space of Time which you have suffered to elapse without demanding it, shews that you have excused your Debtor for it; because it was to do him a Kindness, that you did not think fit to demand it of him.*

Thomas I. 2.

Qu. 97. Art. 3.

2. There is something very like this in the Establishment of a Custom. For this too (setting aside the Civil Law, which regulates the Time and Manner of it) may ⁵ be introduced by the Subjects, if the Sovereign tolerates and connives at it.

It

⁵ DIGEST. Lib. XLVI. Tit. IV. *De acceptilat.* Leg. VIII. Only the Formalities of *Acceptilation*, belonged to the Civil Law. See PUFENDORF, B. V. Chap. XI. § 7. and Mr. NOODT, *De Pactis & Transaction.* Cap. VIII. p. 671. as also his *Probabilia Juris*, Lib. I. Cap. II. *in fine*.

V. (1) DIGEST. Lib. XLI. Tit. I. *De adquir. rerum Dominio*, Leg. XLIV. See Chap. VIII. of this Book, § 3.

2 This Explication has been criticised by the late Mr. HUBER, in his Commentary on the Title of the *Institutes*, *De rerum Divisione*, &c. § 27. The Lawyer ULPAN, says he, does not speak of a Man's having or not having Hopes of recovering what he has lost. He means only, that Things thrown into the Sea, or carried off by some wild Beast, do not cease to belong to the Proprietor as long as they may be recovered. So that, if a Bird that flies by takes from us a Jewel, it still remains ours, because it is possible we may recover it; tho' in that Case we cannot venture to flatter ourselves with such a Prospect. As to the Question in itself, I own it does not follow, from the sole Consideration that we have little or no Hope of recovering a Thing, that we entirely abandon it; and even when we give over the Search, we do not thereby renounce our Right. Thus the Abandoning cannot well be presumed, so as to secure the Right of him who has found the Thing lost. but when there is all the Reason to believe the former Master will neither ever be known, nor have any Knowledge what is become of his Goods.

4

³ DIGEST. Lib. XXXIX. Tit. II. *De damno infecto*. Leg. XV. § 21.

⁴ DIGEST. Lib. XXII. Tit. I. *De Usuris*, &c. Leg. XVII. § 1. See Mr. NOODT's excellent Treatise *De Fœnore & Usuris*, Lib. III. Cap. XVI. where this Law is explained.

⁵ As the Sovereign, unless he be extremely negligent, cannot be ignorant of the Customs which are introduced into his Dominions, and it depends, on him only to hinder their taking Effect; if he suffers them to have the Force of Law for a certain Time, he is and may be supposed to authorize them. Farther yet, the Laws which he himself has made, are abolished by Non-Usage, or a contrary Custom. Princes may have good Reasons for thus letting a Law fall imperceptibly, which they do not judge necessary. But even tho' this happens by their Negligence, as is pretty often the Case, either because they themselves are not sufficiently careful of maintaining the Law, or have not been sufficiently attentive to the Conduct of inferior Magistrates, who were charged with enforcing the Observation of that Law; it doth not therefore fail of losing its Force after a considerable Time: The Reason of this is, because as every Law has a Tendency to lay a Restraint on the Liberty of the Subject, and the Sovereign may, and ought, to explain his Will in that Particular, in a clear and distinct Manner; the Moment there are on his Side sufficient Tokens of a Change of Will, the Interpretation ought naturally to be made in Favour of the Subject. Thus the Sovereign may,

if

It is true, the Time required to give this Custom any Effect of Right has in general no fixed Limits; but it ought to be sufficiently long, in Order to give Room to suppose the Consent of the Prince.

3. But before we can reasonably presume from a Man's Silence, that he has relinquished his Right, two Things are necessary. One is, that he should know that another possesses what belongs to him: And the other, that he should be voluntarily silent, tho' he has full Liberty to speak. For when one⁶ forbears to act through mere Ignorance, it can have no Effect: And if there appears any other Reason that hindered him from acting, the Conjecture drawn from Silence can have no Place.

VI. Amongst several other Conjectures, that serve to verify the two Conditions just mentioned, the Length of Time is of great Weight to shew that the Silence of a Proprietor is accompanied with both. ¹ For it is hardly conceivable, that the Knowledge of his Right should for so many Years escape him, since Time affords so many Opportunities of knowing it. Tho' indeed it does not require ² so much Time to found this Conjecture when the Parties are present, as when they are at a Distance, even tho' the Civil Law were silent in the Matter; neither can it be supposed but that the Fear which might once be impressed, will wear off in Time, which offers him so many Opportunities of providing for his Security, either by his own Care, or by the Assistance of his Friends; he may even fly out of the Reach of the Person feared; so that, at least, he may protect his Right, or, which is better, appeal to proper Judges or Arbitrators.

VII. But because ¹ a Space of Time, which exceeds the Memory of Man, is in a moral Sense taken for Infinite, therefore a Silence of so long a Continuance will ever be sufficient for a Conjecture, unless very good Reasons be alledged to the contrary, that the Thing in Dispute is really quitted. 'Tis indeed observed by the most eminent Professors of the Law, that Time Immemorial is not ² the same

Suarez. l. 7. de Legib. c. 15.

VI. How Time joined with Non-Possession, and with Silence, conduces to the Conjecture that the Right to the Thing is quitted.

VII. That a Time exceeding the Memory of Man is commonly sufficient for such a Conjecture, and what such a Time is.

if he pleases, order the Revival of the Law for the Time to come, by the same Right which he has to make entirely new Laws; but as to what has passed while the Law was not observed, we are to judge of it as if there never had been such a Law. *PLINY* the Younger gives a remarkable Example of this Kind: There was a Law originally made on *Pompey's* Proposal, which allowed all the Cities in the Province of *Bithynia*, to elect what Persons they pleased Senators, provided they were Natives of the City itself. In Process of Time it appeared that they contented themselves with chusing Men of the Province; and the Censors attempted, in Vertue of the old Law, to divest all the Senators of their Charge, who were not Natives of the City where they enjoyed that Dignity. *Pliny*, who was Pro-Consul of *Bithynia*, consulted the Emperor *Trajan* on that Affair, who answered, *The Authority of the Law, and the long Practice usurped against Law, might carry you different Ways. It is my Pleasure to accommodate the Matter thus; that we make no Innovation in Regard to what is past, but that the Persons chosen from every City remain in Possession of their Dignity; and that for the future the Pompeian Law be observed; the Force of which if we should attempt to revive by a retroactive Effect, much Confusion must necessarily ensue.* Lib. X. Epist. CXVI. See also a Dissertation of Mr. *THOMASIVS*, *De Morum cum Jure Scripto contentione.* § 52, &c. and Mr. *SCHULTING*'s Dissertations on the first Part of the *Digest.* Lib. I. Tit. III. § 20, 21. as likewise the *Interpretationes Juris*, by Mr. *AVERANI*, Lib. II. Cap. I.

⁶ See Chap. XXI. of this Book, § 2. and *BARTHOLOMÆUS*, *Consil.* CLXXXVII. Col. 8. *MEISCHREN*, *Decis. Cameral.* IX. Num. 113. Tom. III. *GROTIUS*.

VI. (1) I have shewn in the second Edition of my *PUFENDORF*, B. IV. Chap. XI. § 8. Note 3. that, without all these Presumptions, which are

most commonly not well founded, the Right of Prescription may be drawn from the Nature and End of Property itself, by Principles which suppose rather what the former Master ought to think, than what he really does.

² See the Chapter of *PUFENDORF*, last quoted, § 4. Note 6. and § 9.

VII. (1) Thus by the *Roman* Laws, such a Time is sufficient for establishing a Right of Service; as, for Example, that of carrying Water through another Man's Grounds. *DIGEST. Lib. XLIII. Tit. XX. De aquâ quotid. & æstivâ*, Leg. III. § 4. See *ANDREW KNICH*, *De Jure Territorii.* *THEODORE REINKING*, Lib. I. Class V. Cap. II. Num. 5. *OLDENDORP*, Class III. Art. 2. *GROTIUS*.

This Time is called *Immemorial*, not because there can be no Monument by which it may appear that the Possession was not originally acquired by a just Title; (for no Time is so long that some Writing concerning it may not remain; and thus the Length of Time would not give Place to the best grounded Prescription) but because there is no Man living who remembers a Thing belonged to any other than the Possessor, and those from whom he inherited it, or has heard it said by those of his Time; while no other Title appears, that gives Room for disputing the Right of the Possessor. Thus this Time may sometimes be pretty short, as after a bloody War, which has swept away great Part of the Inhabitants of a Country. See the late Mr. *WERLHOF*'s Dissertation, by me quoted, § 18, &c. as also the *Jus Controversum* of Mr. *COCCEIUS*, jun. Tom. II. p. 467, &c.

² This is observed by *BALBUS*, *De Præscriptio-nibus*; and *COVARRUVIAS* on the same Subject; as also *REINKING*, *Diſt.* Lib. I. Class V. Cap. XI. Num. 40. Concerning *Time immemorial*, see the learned *ANT. FAUKE*, *Consil. pro Ducatu Montis-ferrat.* *GROTIUS*.

Menochius,
1 Conf. 90.
Eustath. in Ili-
ad. l. 1. v. 250.

exactly with an hundred Years, tho' they do not often very much differ; because ³ the Life of Man is commonly computed at an hundred; and this Term of Years is what does usually make up three Ages or ⁴ Generations of Men; which three Generations, or Time immemorial, the *Romans* pleaded against *Antiochus* ⁵, when they shewed him, that he demanded of them Cities, to which neither he, nor his Father, nor his Grandfather, had ever pretended to have a Right.

VIII. An Answer to the Objection, that no one is to be presumed willing to abandon or throw away what he has got.

VIII. 1. It may be objected, that since all Men love themselves, and are fond of what is their own, 'tis not to be supposed that they will be inclined to throw it away; wherefore a mere Forbearance of Acting, tho' for ever so long a Time, cannot be a sufficient Ground for such a Conjecture. But on the other Hand, since we ought to judge charitably of all Mankind, ¹ we must not imagine that one Man, for the Sake of a perishable Good, will suffer another to live, as it were, under the Guilt of a perpetual Sin, which many Times he cannot avoid without such a Dereliction.

9. As for Crowns, tho' they are commonly so highly valued, yet must we know too, that ² they are great and weighty Burdens, and which, if not worn well, expose the Prince to the Wrath and Resentment of GOD; and, as it would be great Inhumanity to waste a Minor's Estate in contending for the Guardianship; or, to use *Plato's* Simile ³, if Mariners, at the Hazard of the Ship, should dispute the Management of the Helm; so those Princes are far from deserving Commendation, who, to the great Damage of the State, and frequently with the Blood of an innocent People, ambitiously strive for the Government. The Antients mightily applauded the Saying of *Antiochus*, who returned the *Romans* Thanks ⁴, for easing him of too ⁵ large and troublesome a Province, by contracting his Dominions.

³ This is what JUSTINIAN calls *Ἀιώνος μάλλον ἢ περ χρόνος*. in his fifth Edict, published among the Notes on PROCOPIUS's *Secret History*. GROTIUS.

4 For a Generation, γενεά, is a Space of thirty Years, Τριακονταετία, as PORPHYRY observes, in his Questions on HOMER, (p. 99. Edit. Barnes.) HERODIAN, speaking of the Secular Games, includes three Generations in one Age, (Lib. III. Cap. VIII. Edit. Boecl.) PHILO the Jew says, there were ten Kings in Egypt, in the Space of three hundred Years. *De Legat.* And PLUTARCH that there were fourteen at Lacedemon in five hundred Years. *Vit. Lycurg.* (p. 58. Tom. I. Edit. Wech.) JUSTINIAN refuses Permission for bringing a certain Affair to, a Trial, because four Generations had passed since the Fact in Question. *Novell. CXLIX.* (Cap. II.) GROTIUS.

There is some small Variation in the Number of Years, which the antient People of the East, and the Grecians, included in a Generation; but commonly they kept pretty near to thirty Years, and made an Addition of three or four Months, in Order to bring the three Generations exactly to a hundred Years. See Mr. LE CLERC, on *Genesis* v. 1. and xv. 16. as also the *Origines Egyptiacæ*, by the late Mr. PERIZONIUS, Cap. XI. p. 175, &c. and BOECLER's Notes on the Passage of HERODIAN, quoted by our Author. I do not find in PHILO, what is here produced as from his Treatise, *De Legatione*.

5 LIVY, Lib. XXXIV. Cap. LVIII. Num. 10.

VIII. (1) It has been very justly observed, that this Reason is more conformable to Christian Charity than to the common Sentiments of Mankind, and the Nature of Things. The Truth is, we are here to suppose a Possessor *bonæ Fide*, as I have shewn on PUFENDORF, B. IV. Chap. XII. § 3. Note 5. second Edition. So that the Presumption, or Kind of Absolution, mentioned by our Author, is by no Means necessary, since after the Expi-

ration of the Term of Prescription, the Possessor, having acquired a real Right, is guilty of no Crime.

2 The same is to be said of this Answer, as of the foregoing. Besides, it is more proper for consoling a Prince, who has lost his Dominions, without Hopes of regaining them, than for hindering him from recovering the Administration if he can, of which every one is very apt to think himself sufficiently capable. See the last Paragraph of PUFENDORF, as quoted in the preceding Note.

3 Our Author, in his Margin, quotes Lib. I. without telling whether it be of the Treatise *Of the Commonwealth*, or that of *Laws*. I imagine he meant the former, where the Philosopher frequently employs the Comparison of a Pilot and Sailors, with the Government of a State; but without applying it to the Subject before us. All I can find there, which has any Relation to it, is what PLATO says, that *If the Members of a State were all good Men, they would, on Consideration of the Danger, strive as much to avoid governing it, as they now do to get it into their Hands.* p. 347. Tom. II. Edit. H. Steph. But in the sixth Book of the same Treatise, p. 488. we find a Comparison nearly resembling this, which is too long to be inserted here.

4 VALERIUS MAXIMUS, Lib. IV. Cap. I. Num. 9. extern. See CICERO's Oration *pro Dejotaro*. Cap. XIII.

5 Jonathan, the Son of Saul, seems to have had the same Sentiments. GROTIUS.

Our Author, without Doubt, alludes to what Jonathan said to David, in the Desert of Zeph. I SAMUEL xxiii. 17. *Fear not, for the Hand of Saul, my Father, shall not find thee; and thou shalt be King over Israel, and I shall be next unto thee.* Here I cannot forbear taking Notice of the egregious Rashness, to say no worse, of the Commentator BOECLER, who has the Assurance to treat this short Remark of our Author as *impious and profane*. It is not easy to guess on what so harsh and

minions. Among several bright Passages in *Lucan*, ⁶ this is none of the least beautiful.

Tantone Novorum

Proventu scelerum quærent uter imperet Urbi?

Vix tanti fuerat Civilia Bella movere

Ut Neuter.

Must such a Number of new and unheard of Crimes be committed, to decide which of these two (Cæsar or Pompey) shall be Master in Rome? One would hardly purchase at that Price the good Fortune of having neither of them for Master.

3. Besides, it is for the Interest of human Society, that the Titles to Crowns should be one Time or other settled, and put out of all Dispute; wherefore such Conjectures as conduce to that End are to be reckoned favourable. For if *Aratus Sicyonius* ⁷ thought it hard for private People to lose those Possessions which they had enjoyed for fifty Years, how much more reasonable is that of ⁸ *Augustus*, who pronounced him a good Man, and a worthy Citizen, who is not for making any Alteration in the present State of publick Affairs; and who, as *Alcibiades* says in *Thucydides*, ἐπερ εἰδέσθω ἡμῶν τῆς πολιτείας, τῶτο συνδιασώζει, preserves the same Form of Government as was delivered down to him; which *Isocrates* terms, τὴν παρῆσαν πολιτείαν διαφυλάττειν, maintaining the present Government: And *Cicero* too, in his Speech to the Romans against *Rullus*, says, that 'Tis the Part of every one who has a Value for the Peace and Tranquillity of his Country, always to defend the State of the Commonwealth, whatever it be; and *Livy*, that Every good Man is pleased with the present State of the Publick.

4. Tho' what we have urged were not sufficient to answer the Objection, of every ones being desirous of preserving what he has got; yet a stronger Objection might be opposed to it, that it is by no Means probable, that a Man should intend the obtaining of his Right, and yet in so long a Time give no proper Indication of such his Intention.

Aug. de Clavatione, in Summa, verb. Inventa. Crantz. Saxon. l. 11. n. 10, 13.

and uncharitable a Censure is grounded, since *Grotius* here attributes to *Jonathan* none but very commendable Sentiments. If we read the Sacred History with Care and Attention, we shall there find, says our cholerick Grammarian, that *Jonathan* is cleared of all injurious Suspicions of Cowardise, and of all other Thoughts contrary to the Sentiments and Order of GOD. He acquiesces in the Will of one only GOD, as soon as it is made known to him; and, if he renounces his Pretensions to his Father's Kingdom, the Possession of which he, without Doubt, otherwise longed for, by a natural Desire, it was only out of Respect to the Orders of GOD. Is not the bare Representation of this wretched Reasoning sufficient for confuting it? But it is pleasant to find *Boecler* afterwards owning, as a Favour done to our Author, that he might mean that *Jonathan* to Sentiments of Resignation to the Divine Will joined Sentiments of Modesty, founded on the Difficulty of supporting so great a Weight as the Government of a Kingdom.

6 *Pharsal. Lib. II. ver. 60, &c.*

7 (*Cicero, De Offic. Lib. II. Cap. XXIII.*) Thus at *Athens*, when the Peace was concluded, *Thrasylbulus* left the Possessions as he found them. *Grotius*.

I know not where our Author found what he says of *Thrasylbulus*. That brave *Athenian* having driven out the thirty Tyrants, after a Reign of about two Years, procured a Law for a general Amnesty, which ordered, that no Man should be accused or punished for what had passed during the Troubles, and that all Spirit of Animosity should be laid aside. This is all that is reported by *Xenophon*, *Hist.*

Græc. Lib. II. in fine. Diodorus Siculus, Lib. XIV. Cap. XXXIV. Æschines, Orat. de falsa Legat. p. 271. Edit. Basil. 1572. Justin, Lib. V. Cap. X. Num. 10. Valerius Maximus, Lib. IV. Cap. I. Num. 4. extern. &c. I am much mistaken if our Author has not confounded what he had read in *Thucydides*, concerning the Peace of Sicily, with an Article of the Peace of Athens: By the former Treaty it was agreed, that Each of the Sicilians should remain in Possession of what he then enjoyed, *Lib. IV. Cap. LXV. Edit. Oxon.* What might have given Occasion to this Mistake, is, that *Bongras*, in a Note on the Place of *Justin*, which I have quoted, produces the Passage of *Thucydides*, as an Example like what *Thrasylbulus* did.

8 This Saying is recorded by *Macrobius*, with several others of the same Emperor, and the learned *Gronovius* has not failed of pointing out the Place. *Saturnal. Lib. II. Cap. IV. p. 334, 335. Edit. Jacob Gronov.*

9 *Thucydides, (Lib. VI. Cap. LXXIX. Ed. Oxon. Isocrates, Orat. in Callimach. Cicero, De Leg. Agrar. contra Rull. (Orat. III. Cap. II.) Livy, Lib. XXXV.* This last Passage does not contain exactly the Thought which our Author attributes to *Livy*. The Historian there relates historically, that while the *Etolians* were thinking of revolting from their Alliance with the Romans, and engaging the other States of Greece to do the same, it appeared that the honestest Part of the principal Men of each State were in the Interest of the Romans, and were pleased with the present State of Things. *Cap. XXXIV. Num. 3.*

IX. It appears, that without any Conjecture at all an Immemorial Possession transfers and constitutes a Property.

IX. And perhaps it may, with a great Deal of Probability, be said, that this is an Affair not founded on bare Presumption only, but on an ¹ arbitrary Law of Nations ², whereby it was established, that Possession, Time out of Mind, without Interruption or Appeal, should absolutely transfer a Property; for 'tis reasonable to suppose, that Men might agree to that, which would so much contribute to the common Peace of Mankind. It must be observed that I say, *A Possession*, ³ without Interruption; that is, as *Sulpitius* in *Livy* speaks, ⁴ *has been held by one and the same perpetual Tenour of Right, without any Intermission whatever*. Or, as the same Author in another Place calls it, *A continued Possession, that was never called in Question*. For a Possession by Intervals signifies nothing; and the *Numidians* justly alledged that Exception in Dispute which they had about some Lands with the *Carthaginians*, to whom they replied, ⁵ *That according to Times and Occasions, sometimes they, and sometimes the Kings of Numidia, appropriated to themselves those Lands; and that they had always been in the Hands of the stronger*.

X. Whether Persons not yet born, may not, in this Manner, be deprived of their Rights.

X. 1. But here another very intricate Question arises, ¹ Whether those who are not yet born, can by such a tacit Dereliction or Forsaking, lose their Right? If we say that they cannot, what has been already advanced will not much contribute to the quiet Enjoyment of Crowns and private Possessions, since most Kingdoms and private Estates are of such a Nature, that they ought to pass to Posterity. And if we affirm that they can, it looks a little strange, how Silence should prejudice those who were not capable of Speaking, because not yet in Being; or how what one does should be a Detriment and Disadvantage to another.

2. In Order to clear up this Difficulty, it must be observed, that he who is not yet born, can have no Right, as that Substance which is not yet in Being has no Accidents. Wherefore if the People (from whose Will the Right of Government is derived) should think fit to alter that Will, they cannot be conceived to injure those that are unborn, because they have not as yet obtained any Right. Now as this Change of Mind may be openly and expressly declared by the People, so may they also be supposed, in certain Cases ², to have tacitly changed it. If then it be granted, that the Will of the People is altered, whilst those who might be expected to come hereafter have no Right; ³ and the Parents too, from whom those may descend, who might have had a Right in their Time to the Succession, have renounced that Right; I see no Reason why another may not take Possession of it, as of a Thing relinquished and abandoned.

3. What we are talking of is from the Law of Nature; for in the Civil Law I am sensible, that as other Suppositions, so this also may be introduced and fancied, that *The Law personates* ⁴ *those who are not yet in Being*; and by this Means pre-

IX. (1) NICEPHORUS GREGORAS reports, that the Greek Emperors had given the City of *Phocæa* to the Ancestors of *Catanas*, on Condition that each Successor should give a Declaration in Writing, that he held that City only in Quality of Administrator, lest Length of Time should exclude the Imperial Right. GROTIUS.

2 This arbitrary Law of Nations, is as little necessary as hard to prove. The Whole comes to this: Prescription being authorized by the Opinion and Custom of the Generality of Nations, it is a favourable Prejudice, that gives Room to believe this Right is founded on some evident Principle of natural Laws.

3 See PUFENDORF, B. IV. Chap. XI. § 4.

4 Lib. XXXV. Cap. XVI. Num. 7, 8, 9.

5 Idem. Lib. XXXIV. Cap. LXII. Num. 13.

X. (1) See PUFENDORF, B. IV. Chap. XII. § 10.

2 When he who would have transmitted his Right to his Descendants, then unborn, renounces it either expressly or tacitly, and the People knowing and seeing this, do not oppose it, tho' in their Power; in that Case they are reasonably supposed to consent to the Renunciation, and consequently, to change their Mind.

3 History furnishes us with several Instances of such Renunciations. See a remarkable one in the Person of *Lewis IX.* King of *France*, who renounced for himself and his Children, all the Right he might have to the Kingdom of *Castile*, by his Mother *Blanche*. MARIANA, *Hist. Hispan.* Lib. XIII. Cap. XVIII. GROTIUS.

See also Fa. DANIEL's *History of France*, Tom. III. p. 149. Edit. *Amst.*

4 This is done by Civil Law, in Regard to an Inheritance, for which no one yet presents himself. GROTIUS.

According to the nice Principles of the *Roman* Law, an Inheritance of which no one has yet taken Possession, is supposed to represent the Deceased, and to continue his Right of Property, so that it passes from it to the Heir; for which Reason it is sometimes stiled the *Mistress* of the Estate, as if it was a real Person. DIGEST. Lib. XLI. Tit. 1. *De acquir. rerum Dominio*. Leg. XXXIV. and Lib. XLIII. Tit. XXIV. *Quod vi aut clam*. Leg. XIII. § 5. See ANTHONY FAURE, *Conject. Jur. Civ.* Lib. XIV. Cap. 20. and *De Errorib. pragmatic.* Dec. III. Err. 3.

vents any Seizure or Possession that may be made to their Prejudice : But this must not rashly be supposed to be the Intent of the Laws, because tho' it would be for the Interest of private Persons, yet it would be of vast Disadvantage to the ⁵ Publick. Therefore it is generally thought, that the Fiefs which are devolved, not by Succession to the Rights of the last Possessor, ⁶ but by Vertue of the primitive Investiture, may ⁷ be acquired after a sufficient Space of Time. And this that able Lawyer *Covarruvias*, supported by substantial Reasons, extends to the Rights of ⁸ *Majorazgo*, and to Things subject to a ⁹ Feoffment of Trust.

4. I cannot indeed see any Reason why the Civil Law may not introduce a Right which cannot be alienated by any one valid Act; and yet that Right, to avoid the Uncertainty of Possessions, may, if not challenged within a stated Time, be lost; but so, that those who shall hereafter be, and should have been entitled to it, may have a personal Action against them who lost it by their Neglect, or against their Heirs.

XI. It is plain from what has been said, that one King may acquire a Right of Sovereignty, to the Prejudice of another King; and one free People to the Prejudice of another free People, as by an express Consent, so also by a Dereliction, and that taking of Possession which follows it, or which receives some new Force and Virtue from it. For tho' it be an allowed Maxim, that *What is originally invalid, can never be made valid by a retroactive Effect*; yet does it admit of this Exception, *unless some new Cause, capable of itself to create a Right, shall intervene*. Thus the ² true and undoubted Sovereign of any People may lose the Sovereignty, and become dependent on the People; and on the contrary, he who was only chief of the State, ³ may become King, or true Sovereign; and that supreme Power which was lodged before entirely either in the People or the Prince, may be divided between them.

⁵ Which requires that Possessions should not be disturbed on slight Occasions.

⁶ That is, when the Succession has been regulated from the Beginning, so that every one of those, who succeed in their Order, holds his Right, not from his Predecessors, who could not bestow the Inheritance on whom he pleased, or otherwise dispose of the Fief, by any one valid Act; but from the Will of him who first established the Fief.

⁷ If any one to whom the Fief devolved, not having Children, yields his Right, in what Manner soever, to another, who ought not to succeed till after him and his; the Children who shall be born to the former, after the Time of the Prescription expires, are not admitted to demand the Succession. The Case is the same when the Children that are born before the Time of Prescription is expired, allow the finishing what was wanting, as soon as they come to the Age of Majority. Much more doth this take Place in Regard to Successors in the collateral Line. Besides, a Possessor, tho' a Foreigner, may acquire the Fief in this, or some other Manner, by a Prescription of thirty Years, termed *Præscriptio longissimi temporis*; for our Author means that, those whose Opinion he produces, owning, as well as others, that the ordinary Prescription of ten Years, in Regard to Persons present, and of twenty in Regard to the absent, is not sufficient in this Case. See *CUJAS*, on *FEUD*. Lib. IV. Tit. XIV. *Quando agnatus ad Feudum admittatur*, &c. (II. 26. § Edit. Vulg.) and Tit. XLIX. *De Capitulis Conradi Regis*, &c. (II. 40. Vulg.) as also *ANDREW GAILL. Observ. Practic.* Lib. II. Obf. 159.

⁸ *Majorazgo*. It is a Right established in *Spain*, by Vertue of which the eldest of the Family alone inherits Countships, Marquisates, Duchies, Fiefs, and other such like Estates, which are intailed from one to the other; so that, when the Eldest dies

without Children, he is succeeded by the next eldest. In the Case in Hand, which is easily conceived, after what has been said in the foregoing Note, we are also to distinguish the two Kinds of Prescription there specified. See *FERNANDO VASQUEZ*, a *Spanish* Writer, *De Successionib.* Lib. III. § 26.

⁹ Our Author here supposes a Feoffment of Trust established in such a Manner, that several Persons are called one after the other; that is, one on Default of another, to inherit an Estate. This being the Case, if the first resigns his Right to the next, the Children of the first, yet unborn, lose the Right which the Father would have transmitted to them, if the Possessor of the Estate subject to a Feoffment of Trust, continues in peaceable Possession of it to the Term of the Prescription. A Law of the *Code* is objected on this Occasion, *Lib. VI. Tit. XLIII. Communia de Legatis*, &c. Leg. II. § 3. from which it is inferred, that a Possessor, whether a Foreigner, or one whose Right to a Feoffment of Trust is yet to come, cannot prescribe to the Prejudice of the Feoffee, actually called to the Succession. But that Law speaks only of the ordinary Prescription of ten or twenty Years, not of that of thirty or forty. See *ANTHONY FAURE, De Errorib. Pragmat.* Decad. LXXXVIII. Err. 5, &c.

XI. (1) *DIGEST. Lib. L. Tit. XVII. De diversis Reg. Jur.* Leg. XXIX. See *JAMES GODEFROY's* Comment on that Law; and *PUFENDORF, B. III. Chap. VI. § 14.*

² Concerning all this see *HUBER, De Jure Civitatis*, Lib. I. Sect. III. Cap. IX.

³ See *VASQUEZ, Controv. illustr.* Lib. I. Cap. XXIII. § 3. Lib. II. Cap. LXXXII. § 8, 9, &c. as also *PANORMITAN, Lib. I. Conf. LXXXII.* and *PEREGRINUS, De Jure Fisci*, Lib. VI. Cap. VIII. § 10. *GROTIUS.*

C. Possessor. p. 3. § 3. Spec. tit. de feud. § Quoniam. ver. 3. queritur. See Chaff. de Conf. Barg. Des mains mortes. § 6. ver. par An & par Jour. Cravet. de Antiq. temp. p. 4. § Materia, n. 90.

XI. *That even the Right of Sovereign Power may be obtained either by a King or by a People by long Possession.*

XII. *Whether the Civil Laws of Usucaption and Prescription oblige him who has the Sovereign Power. This explained, with some Distinctions.*

Bart. in L. Hostes D. *De Capt. &* in l. 1. *De aqua pluvia arcend.* Jason. Con. 70. l. 3. *Aymon. de antiq. p. 4. versic. Materia ista, n. 62. Ant. Corset. de exc. reg. q. 104. Balb. de Præscrip. 2. p. 5. pr. q. 2. Castal. de Imp. q. 53. Covar. in C. peccatum, Dereg. Jur. in 6. p. 2. § 9. in fin.*

XII. 1. It is also worth our While to enquire, whether those Laws¹ which relate to Usucaption or Prescription, and are enacted by him who is invested with the sovereign Power, can affect the Right of Sovereignty itself, or its essential Parts, which we have pointed out in another Place. Those Lawyers who decide all Controversies about the supreme Power by the Civil Law in Use among the Romans, do generally hold it in the Affirmative. But we² are of a different Opinion; for in Order to make a Man subject to Laws, a Power, and a Will, at least a tacit one, are required in the Legislator. No Man can lay himself under the Obligation of a Law; that is, to which he may be subject, as coming from a Superior. Upon which Account it is, that Legislators have a Right to change their own Laws. A Man indeed may be subject to his own Laws, indirectly, and by Reflexion, as he is a Member of³ civil Society; natural Equity requiring that the Parts should conform to the Interests of the Whole: Thus *Saul* did in the Beginning of his Reign, as appears from the Sacred History, 1 *Sam. xiv. 40.* But this Distinction has nothing to do here, because we look upon the Legislator here, not as a Part, but as including the Power of the Whole; for we are speaking of the supreme Power, considered as such. Nor can we presume that there was any Concurrence of the Will; because it is not to be supposed, that Legislators are willing to include themselves, unless where both the Matter⁴ and the Reason of the Law are universal, as in the Determination of the Price of Things. But Sovereignty is not of the same Rank with other Things; it is of a much superior Excellence. Nor did I ever meet with any Civil Law, that treated of Prescription, which comprehended, or could with any Shew of Probability, be thought to design the Comprehension of the supreme Power.

2: Whence it follows, not only that the Term of Prescription regulated by the Law, is not sufficient to acquire the supreme Power, or any essential Part of it, if the above-mentioned natural Conjectures are wanting: But also that there is no Occasion for so long a Space of Time, provided that these Conjectures can be enough confirmed in less: Wherefore too, the Civil Law that does not authorise the Acquisitions made by a Space of Time, does no Ways regard the supreme Power. It is true indeed, the People, when they first invest a Person with this Power, may, if they please, declare the Manner and Time in which the Right of Sovereignty, if so long neglected, should be forfeited; which Determination of the People ought not to be violated, even by the Prince, tho' invested with the supreme Authority; because it does not respect the Sovereignty itself, but only the Manner of holding it: Which Distinction we have spoken of somewhere else.

XIII. But as for those Things that are neither essential to the supreme Power, nor natural Properties of it,¹ but may be naturally separated from it, or at least be communicated

XIII. *These Rights of Sovereignty that may be separated from it,*

XII. (1) That is, the Laws considered as to what they have in particular in Regard to the Time and Manner of Prescription. For as to those Parts of them that are founded on the Law of Nature and Nations, our Author is so far from securing the Supreme Power from Prescription, that he even maintains, that, as the Term of Prescription, regulated by the Laws, is not always sufficient for acquiring the supreme Authority, it may likewise happen, that so long a Space of Time is not necessary for it. He goes still farther, and holds, that even in those Countries, where Prescription is not authorized by the Civil Laws, it takes Place in Regard to Things relating to the Sovereignty. Thus the learned GRONOVIVS's Criticism on our Author's Opinion in this Place falls of itself, being founded only on a Misunderstanding, or a false Supposition. As to what he says against the Reason taken from a Legislator's not being able to impose on himself an Obligation, properly so called; see my Remarks on that Question, *Note 4. on PUFENDORF; B. VII. Chap. VI. § 3.*

2 In this I am supported by the Authority of DON GARZIAS MASTRILLAS, *De Magistratu*, Lib. III. Cap. II. Num. 26. JOHN OLDENDORP,

Consil. Marp. V. Num. 47. Tom. I. GROTIUS.

3 See *Chap. XX.* of this Book, § 24. SENECA observes, that *A Pilot may be considered under two distinct Characters, one of which he bears in common with the whole Ship's Crew; the other peculiar to himself, as guiding and governing the Ship.* Epist. LXXV. (p. 360.) On this Subject, see CLAUD DE SEYSSSEL, *Of the Monarchy of France*, B. I. (Chap. XII.) CHASSAGNE, *Of the Glory of the World*, Part II. Can. 5. GAILLIUS, *Lib. II. Observ. LV. Num. 7.* BODEN, *De Repub. Lib. I. Cap. 8.* And REINKING, *I. Cap. XII. GROTIUS.*

4 See *Chap. XIV.* of this Book, § 5.

XIII. (1) The Author here employs the Distinction made by the scholastic Lawyers, who call the Rights here specified, *Regalia minora*, in Opposition to the *Regalia majora*, or essential Parts of the Sovereignty. Among the *Regalia minora* are reckoned the Right of creating subaltern Magistrates, or conferring certain Dignities; the Right of erecting Fairs; the Right of legitimating Bastards, or granting the Privilege of Age; the Right of coining Money; the Right of confiscating a Criminal's

communicated to others, they entirely depend on the Civil Laws of every People that regulate Usucaption and Prescription. So we find some Subjects, who have obtained by Prescription, the Right of judging without Appeal; but yet in such a Manner, that something like an Appeal may be made either by Petition, or some other Method. For to judge absolutely without Appeal, is a Circumstance inconsistent with the Condition of a Subject, and therefore can belong only to the Sovereignty, or some one of its Parts: Nor can it be gained but by Vertue of a natural Right, to which Sovereignty is subject.

XIV. 1. From hence it appears how far that, which some advance, may be admitted, "*It is always allowable for Subjects to recover, if they can, their Liberty, that Liberty which is proper for a People*," because the Government that was got by Force, may by Force be dissolved. And if it was the Result of a free Act of the Will, Men may repent of it, and alter that Will." But tho' a Sovereignty may have been originally acquired by Force; yet it may become lawful by a tacit Will, which confirms the Enjoyment of it to the Possessor. And the Will of the People may be such, either at the Time when they established the Sovereignty, or afterwards, that they may confer a Right which does not for the future depend on their Will. King Agrippa in Josephus, in his Speech to the Jews, who for their preposterous Desire of recovering their Liberty, were stiled Zealots, tells them, *"It is now too late to aim at Liberty. It was formerly your Duty to have fought for the Defence of it. It is hard to expose one's Self to Slavery, and Resistance in Order to prevent it is lawful. But he who, once vanquished, revolts, is not to be called a Lover of Liberty, but an insolent rebellious Slave."* And Josephus himself, to the same Folks, *"It is glorious to engage and draw in the Cause of Liberty, but this should have been done long ago. For when People have been once over-powered, and have for a great While submitted, to shake off the Yoke then, is to act*

XIV. The Opinion that Subjects may at any Time assert their Liberty, refused. As Vasquez, Controv. illust. l. 11. c. 82. n. 3

minal's Estate and Goods; the Right of appropriating to himself vacant Estates; the Right of Hunting; the Right of levying certain Customs; and other Rights of the same Nature. Mr. THOMAS IUS rejects this Distinction, and at the same Time, the Consequence drawn from it by our Author in Relation to his Subject. The Division, says he, of the Regalia into *majora* and *minora*, is not founded on a Principle sufficiently clear; and hence arises the great Difficulty of settling the Difference of these two Sorts of Rights, on which the Lawyers are not agreed among themselves. This Division is borrowed from the Interpreters of the Feodal Law of the Lombards. There is a Title, viz. the LVI. of Book II. the Rubrick of which is, *Quæ sunt Regalia*, in which we have an Enumeration of several Sorts of Rights of Sovereignty annexed to the Royal Fiefs. As it makes no Mention of the legislative Power, of the Right of making Peace and War, and such like, the Interpreters to explain this Omission, have invented the Distinction of *Regalia majora* and *minora*, understanding by the latter, those specified in the Title; and by the former those there omitted. Now a Vassal being possessed of the *useful Domain* of the Fief, and it being in his Power to acquire the Fief itself by Prescription, to the Prejudice of his Lord; the Lawyers, who, almost till GROTIUS's Time, very often confounded Vassals with Subjects, said therefore, that the *Regalia minora* might be alienated, and acquired by Prescription. The old Kings of the *Franks*, from whom came the Laws or Customs of Feodal Right, attributed to the Lombards, found by Experience, tho' too late, how dangerous it is for a Sovereign to allow any one of his Subjects the *Regalia minora*, with Power to alienate them, or transmit them to their Successors; the *Regalia minora* in Process of Time drawing the *Regalia majora* after them; so that several Subjects have set up for real Sovereigns. See Mr. THOMAS IUS's Notes on HUBER, *De Jure*

Civitatis, Lib. I. Sect. III. Cap. VI. Num. 3. p. 91, 92. To which may be added, the Notes of Cujas on the Title of the Feodal Law, already quoted; where that great Lawyer shews, that it treats of the Rights restored by the Bishops, Princes, and Cities of Italy to the Emperor Frederick, who had been long deprived of them. To come now to the Question in Hand, I am entirely of the same Lawyer's Opinion, who maintains that a Subject, remaining such, cannot acquire by Prescription any Right of the Sovereignty, great or small. When a Subject continues a long Time in the Exercise of certain Rights belonging to the Sovereign, without the express Concession of the Sovereign, they are either such Rights as relate to the Exercise of some publick Office with which the Subject is invested; and in that Case, he doth not exercise them in his own Name, but in the Name of the Sovereign, of whom he holds that Employ; which leaves no more Room for Prescription in his Favour than a Farmer would have, under Pretence that he had farmed another Man's Lands a hundred Years: Or they are such Rights as are not exercised by the Person as holding a publick Office, and then they can be considered only as Privileges granted merely by Favour; so that their Duration depends on the Will of the Sovereign, as that even of Privileges granted expressly, but without any Clause of Irrevocability. See the same Author's Notes on the same Book, p. 111. and his Dissertation, *De Præscriptione Regalium ad Jura Subditorum non pertinente*. Printed at Hall in Saxony, 1696.

XIV. (1) That is, so long as the Person, on whom the Right is conferred, keeps within the Bounds prescribed either expressly or tacitly.

2 Bell. Jud. Lib. II. Cap. XXVI.

3 Ibid. Lib. VI. Cap. XXV. We find almost the same Words in the Count De Blanderate's Speech to the Milanese. RADEVIC, Lib. I. Cap. XL. GROTIUS.

I

like

like Madmen and Desperadoes, and not like Lovers of Liberty. And 'twas this very Answer that Cyrus⁴ made formerly to an Armenian King, who cloaked his Rebellion with a pretended Desire of regaining his ancient Freedom.

2. However, I see no Reason to doubt, but that a long Forbearance in the Prince, such as we have above described, will justify Subjects resuming the publick Liberty, upon a Presumption that he has quitted the Crown.

XV. As for those Rights, which are not daily exercised, but only once, and when it is convenient, as the Right of recovering a² Pledge by paying; as also those

XV. Those Rights which consist in a bare Power of doing such or such a Thing, are never lost by Time. This explained.

4 Cyroped. Lib. III. Cap. I. § 6, 7.

XV. (1) The late Mr. HUBER, in his *Prælectiones ad Pandectas*, Lib. XX. Tit. V. *Quibus modis Pignus vel Hypothec. solvit*. Num. II. censures this Definition of our Author. It is not complete, says he, for the Right which a Proprietor hath to claim his own Goods, possessed by another, and the Right which a Creditor hath to redeem Money lent to his Debtor, do not consist in a Series of repeated Acts; they are both exercised by a single Act, and when a Man has a convenient Opportunity of making the Claim or Demand; and yet neither of them relate to the *Res meræ facultatis*, in Question; since the Possessor and the Debtor incontestably prescribe against the Proprietor and the Creditor. But that Lawyer, and such as approve of his Criticism, have not observed that those Words contain only Part of the Definition, or rather of the Division, here proposed by our Author; for explaining the Nature of imprescriptible Rights, of which he treats in few Words. In the Summary of this Chapter, he calls them in general, *Quæ sunt meræ Facultatis*, or Rights which consist in a bare Power of doing such or such a Thing; but in the Paragraph itself, he plainly reduces them to two Classes, the latter of which is more extensive and considerable, inasmuch that what he says of that, ought rather to be considered as a Definition, than the Description he gives us of the other. According to him, there are some Rights which we use only by one single Act, which is limited to no Term, and which, consequently, we may exercise at any Time, and have the Liberty of deferring it. These are the Rights here first specified; and of which he gives, for Instance, the Right of redeeming a Pledge, by paying what was borrowed on it. See the following Note. There are others, which are the Result of every Man's natural Liberty to dispose of his Actions and Goods, and of all his Rights in general, of what Sort soever, so long as he has not either expressly or tacitly renounced any Part of that Liberty. These are what he immediately after terms *Jura Libertatis*: They are both called *Jura meræ Facultatis*, because no one has a Right directly or indirectly, to require we should make Use of them, before a certain Term, or during a certain Space of Time, and thus impose on us an Obligation to make Use of them, if we would not lose them. This Necessity may proceed either from our own Consent, as when we engage to redeem at a certain Time the Pledge delivered to a Creditor; or from some Law, whether natural or civil, as in the Case of Prescription, which in itself is founded on natural Law, and for the Term commonly regulated by the Civil Law of each Country; or lastly, from the Will of him who has permitted something which he might have hindered, or granted a Privilege which he might have refused, on Condition of using such Permission or Privilege from Time to Time, or within a certain Space of Time. These, I think, were our Author's Notions in this Affair; and when thus proposed, they are sufficient for distinguishing

the Rights which he has undertaken to explain, from such as in themselves are subject to Prescription. The Definition which the Lawyer, against whom I am defending him, has pretended to give in its Room, instead of being more clear and exact, is equally obscure and false, as Mr. THOMASIUS observes, in his Notes on this Place; and as is shewn also by Mr. DE TÖULLEU, my very much honoured Colleague, in a learned Dissertation, *De Luitio Pignoris, & Rebus meræ facultatis*. § 8. which is the third of his *Dissertationum Juridicarum trias*, printed at Utrecht in 1706. The Author last mentioned, who has treated the Subject much more exactly and clearly than it had been before handled, likewise confutes the Definitions which others have endeavoured to establish; and in Order to supply the Defect of them, he lays down one, which in Substance comes to what I have said. By *Res meræ Facultatis*, he understands, § 25. certain Powers, which a Man hath by the Law of Nature, or by the common Law of the State, of which he is a Member, in Regard to the Use and Disposal of what belongs to him, (that is, of his Rights and Goods) so long as we are in Possession of them. It is true, both he and Mr. THOMASIUS, (as above) excludes from the Number of those Rights, such as are originally derived from the Concession of a private Person, or from some Agreement and Obligation, which imply, on the Part of him on whom they are exercised, some Diminution of his Liberty. But I do not see why a Man might not grant any one a Permission or Privilege, in such a Manner that he should be entirely at Liberty to use it or not use it, and yet a Non-Usage of it, how long soever continued, should not deprive him of his Right. There is nothing in this repugnant to the Simplicity of the Law of Nature, which is the Thing in Question; and in that Case it will not be less a simple and imprescriptible Power, than that of Building on our own Land. See GAILLIUS, *Observat. Practic.* Lib. II. Cap. LX. Num. 9. To return to Mr. HUBER, one of the Instances by him alleged of Rights subject to Prescription, I mean that of obliging the Payment of Money lent, is not to the Purpose, but on the Principles of the Civil Law. For the Law of Nature rightly understood, secures to the Creditor, or his Heirs, while there are sufficient Proofs of the Debt, a full Power to demand the Payment of it, after the longest Term, which is otherwise sufficient for Prescription. See my first Note on PUFENDORF, B. IV. Chap. XII. § 2.

2 *Luitio Pignoris*. By these Words our Author understands the Right of recovering a Pledge by paying. Some Doctors maintain, that *Luitio pignoris* is barely paying the Debt, and thus redeeming the Thing pledged; which, according to them, may be always done; but they will have it, that the Right of redemanding the Pledge, by Vertue of Contract, is not included in it; and that it is subject to Prescription, notwithstanding the Payment, reserving to the Debtor a Right of claiming afterwards the Thing redeemed, as belonging to him.

If

those ³ Rights which consist in the exercise of our Liberty, so that what one does is not directly contrary to, but comprehended in it, as the Part in its Whole: Such as is the Case of a Person, who, for an hundred Years, has entered into Society with one Neighbour only, tho' he might have done the like with other Persons, had he had a Mind to it; those Rights, I say, are not lost, 'till being prohibited to exercise them, or obliged to forego them, we give sufficient Intimation of our willingly submitting to such Terms: Which being agreeable both to the ⁴ Civil Law, and to natural Reason, ought to take Place amongst Men of the highest Quality and Fortune,

See Parut. hist.
Venet. l. 7.

If this Distinction is well grounded, it is certainly only of Civil Law. As to the Question itself, we are likewise to distinguish between the Law of Nature, and the *Roman Law*. According to the Law of Nature, it is, in my Opinion, beyond Dispute, that so long as the Creditor, or his Heirs, are in Possession of the Pledge, held as such, as the Debt subsists eternally, in the Manner aforesaid, so the Right of redeeming the Pledge is never extinguished, if there be no commissory Clause, express or tacit, nor any Renunciation. See *B. III. Chap. XX. § 60.* In Regard to the *Roman Law*, the Question seems to me very problematical. There are specious Reasons on both Sides; and the ablest Doctors are divided on it. The Design of these Notes doth not require me to engage in examining where the greater Probability appears. Those, who are disposed to make that Enquiry, may consult, among others, the great *CUJAS*, on the *Digest. Lib. XIII. De Usurpation. & Usucaptionib. & Paratitl. Cod. De Præscript. 30. vel 40. Ann.* *BACHOVIVS, De Pignorib. & Hypoth. Lib. V. Cap. XX.* *VINIUS, Solest. Quæst. Lib. II. Cap. XXVI.* *JAC. GOTHOFRED, in Cod. THEODOS. Tom. I. p. 255.* *J. VOET, in Tit. D. De Pignoratitia Actione, Num. 7.* *HUBER, in Tit. D. Quibus modis Pignus vel Hypotheca solvitur, Num. II.* with the Notes of *Mr. THOMASIVS, &c.* but a-

bove all, *Mr. DE TOULLIEU's* curious Dissertation, quoted in the foregoing Note. It is in general very difficult to explain, according to the Principles of the Civil Law, the other Things ranked under the *Jura meræ Facultatis*; so that either the antient Lawyers must not have had very clear and well-connected Ideas on this Subject, or the Fragments of their Writings now in our Hands are obscure and imperfect on this Point, as on many others.

³ The learned *GRONOVIVS* on this Place alleges the Example of *C. Valerius Flaccus*, a Priest of *Jupiter (Flamen Dialis)* who, in Spight of all Opposition, entered the Senate of *Rome*; tho' from Time immemorial, his Predecessors had not appeared there, as they might have done by Vertue of their Office. *LIVY, Lib. XXVII. Cap. VIII.* But I doubt whether this Example is intirely to the Purpose. For the Privilege, there mentioned, is of such a Nature, that one would think a Man ought to use it, at least sometimes, to avoid giving Room at last to suppose he renounces it. Thus the Historian observes, that if the Priest obtained Permission to enter the Senate as he desired, *it was more in Consideration of the Sanctity of his Life, than of any Right annexed to the Priesthood.* *Ibid. Num. 10.*

⁴ See Note 2. on this Paragraph.

CH A P. V.

Of the Original Acquisition of a Right over Persons; where also is treated of the Right of Parents: Of Marriages: Of Societies: Of the Right over Subjects: Over Slaves.

I. **W**E have a Right, not only over Things, but over Persons too, and this Right is ¹ originally derived from Generation, from Consent, from some Crime. By Generation, ² Parents, both Father and Mother, acquire a Right over their Children; but if their Commands should ³ run counter, the Father's Authority is to be preferred in Regard to the Dignity of the Sex.

I. The Right of
Parents over
Children.

II. 1. And

I. (1) That is, so that the Person over whom a Right is acquired, was not before dependent on any one; for if he was, the Acquisition is then Derivative, as that made of Goods which before belonged to another. The Author treats of the latter Sort in the following Chapters, both in Regard to Things and Persons.

² See my first Note on *PUFENDORF, B. VI. Chap. II. § 4.*

³ *SENECA* maintains, that *the Father hath the first Right, over his Children, and the Mother the second.* *Controv. Lib. III. Controv. XIX. (p. 255. Edit. Elziv. 1672.)* *St. CHRYSOSTOM* likewise establishes this Inequality, when he says, *it is just and reasonable that the Wife should be subject to her Husband, because an Equality of Authority, over the same Persons, produces Strife and Contention.* In *I. ad Corinth. xi. 3.* He elsewhere allows the Wife

³ B

to

II. A Distinction of Seasons in Children; where too of Children's Property in Things.

II. I. And here in Children, three Seasons are to be carefully observed and distinguished. The first Season, that τῇ βεβουλευμένῃ ἀτελεῖς, of ¹ imperfect Judgment, as Aristotle speaks, when they have no προαίρεσιν, ² Discretion, as he elsewhere calls it. The second Season, that of ripe Judgment, whilst the Child is yet a Member of the Parent's Family, ἕως ἀν μὴ χωρεῖται, ³ as long as he is not separated or gone from it, as the same Aristotle expresses it. The third, when he has left that Family. In the first Season, ⁴ all the Actions of Children are under the Government and Direction of their Parents; for it is but reasonable, that he who cannot rule himself, should be ruled by some Body else. It is Æschylus's Opinion and Observation, *Ætas prima*, &c. ⁵ Children not having the Use of Reason, and being like the Brutes, need to be educated and conducted by the Reason of another. And none but Parents are naturally intrusted with this Charge.

2. Notwithstanding this, Children in their Infancy are, by the Law of Nations, capable of having a Property in Things, tho' by Reason of that Imperfection of Judgment we spoke of, they cannot exercise that Right. They have a Right, as ⁶ Plutarch speaks of Children, ἐν κλήσει, to the Possession, not ἐν χρήσει, to the Use of it. Wherefore it is not by the Law of Nature, that whatever comes to the Children is acquired to the Parents; but by Vertue of the Civil Laws of some particular Countries, which also in this Affair distinguish ⁷ the Father from the Mother; Children not emancipated, from those who are so, and natural ones from legitimate; Distinctions unknown to Nature, which establishes no other than the Prerogative of the Male Sex, in a Conflict of contrary Wills, as I have just now remarked.

III. Of the Season past Childhood, but continuing in the Family.

III. In the second Season, when Age has ripened their Judgment, no ¹ other Actions but such as are of some Moment and Consideration, and concern the State of the Father's or Mother's Family are subject to the Will of Parents; and this

to be the second Power in a Family; but neither allows her, on one Hand, to claim an Equality of Power, because she is subject to a Head; nor the Husband, on the other, to despise his Wife, as being subject to him, because she is one Body with him. In Ephes vi. To which he adds a little after, This (the Power of the Wife) is a second Power, attended with Authority, and a great Share of Honour; but still the Husband has somewhat more. St. AUGUSTIN, writing to Ecdicia, asks her this Question, *Who doth not know that your Son, because born of lawful and honest Wedlock, is more in the Power of his Father than in yours?* Epist. CXCIX. Edit. Basil. 1569. One of the Byzantine Historians, speaking of Andronicus Palæologus and Irene, observes that, among other Reasons, it was urged, that *A Father has more Power than a Mother, and that there was no Reason why the Father's Will, in Regard to his Child, should not take Place, even preferably to that of the Mother.* NICEPHORUS GREGORAS, Lib. VII. Concerning the Respect due to a Mother. See Code, Lib. VIII. Tit. XLVII. De Patriâ Potestate, Leg. IV. GROTIUS.

II. (1) Politic. Lib. I. Cap. XIII. p. 3111. Edit. Paris.

² Ethic. Nicom. Lib. III. Cap. IV.

³ The Philosopher considers a Son during that Time as a Part of his Father; whence he infers, that the Father is not allowed to commit any Injustice against him. Ibid. Lib. V. Cap. X.

⁴ At that Age Children belong to their Parents, in the same Manner as their other Possessions, says MAIMONIDES, *Can. Pœnitential.* Cap. VI. § 2. GROTIUS.

⁵ The Author quotes this Passage in Latin only, according to his own Version of it, in the *Excerpta ex Tragœd. & Comœd. Græcis*, p. 34. In the Original it stands thus,

— Τὸ μὴ φρονεῖν γὰρ, ὡς περὶ βόλον, τρέφειν ἀνάγκη (ὡς γὰρ ἔστι) τρώει φρένους.

Cæphor. (p. 275. Edit. H. Steph.) To which may be added, what is said in the *Institutes*, Lib. I. Tit. XX. De Atiliano Tutore, &c. § 6. viz. *It is consonant to the Law of Nature, that Children (impuberes) should be under Guardianship; that thus he who has not arrived to a perfect Age, may be governed by the Care of another.*

⁶ Jus ἐν κλήσει, non ἐν χρήσει. Thus our Author expresses himself. The whole Passage of PLUTARCH, from whence this Distinction is borrowed, runs thus, *Grandeur consists not in the bare Possession of Things, but in the Use of them; for even Infants inherit their Father's Kingdoms and Authority.* De Fortun. Alexandri. Orat. II. p. 337. Tom. II. Edit. Wech.

⁷ All those Distinctions took Place by the Roman Law; which expressly forbids Women having their Children in their Power. *Institut. Lib. I. Cap. XI. De Adoptionib. § 10.* See Mr. NOODT's *Observat.* Lib. II. Cap. XV. So that the Father alone acquired all the Goods or Estates of his Children, not emancipated, exclusive of some certain Sorts of Goods, which were excepted in Process of Time. See the Interpreters on the *Institutes*, Lib. II. Cap. IX. *Per quas personas nobis acquiritur.* Natural Children, or Bastards, were not under the Father's Power, *Such Children as we shall have born from lawful Wedlock, are in our Power.* *Institut. Lib. I. Tit. IX. De Patriâ potestate, init.* Therefore those who are born from a criminal Conterfation, are not in the Father's Power, &c. Ibid. Tit. X. De Nuptiis, § 12. Whence it follows, that the Father could not appropriate their Goods to himself, because he had that Right only by Vertue of the fatherly Power, established by the Laws.

III. (1) Thus MAIMONIDES explains the Law, which occurs in the Book of Numbers, Chap. xxx. ver. 6. GROTIUS.

only, because it is but just, that what makes a Part of the Whole, should conform itself to the Interest of the Whole. As for other Actions, Children then have ἐξουσίαν; that is, a moral Faculty of Acting as they think fit, tho' even in these they ought always to endeavour to behave themselves in a Manner agreeable to their Parents. But this Obligation, not being by Vertue of a moral Faculty, as those above are, but proceeding from natural Affection, Respect, and Gratitude, does not invalidate ² what is done contrary to the Will of Parents; no more than a Donation made by a lawful Proprietor, would be null and insignificant, because granted against the Rules of good Husbandry.

IV. During both these Seasons, the Right of Governing comprehends also the Right of Chastising, so far as Children are either to be forced to their Duty, or corrected and reformed. As to what regards more rigorous Punishments, we shall examine that in some other Place.

V. But, tho' the paternal Authority be so personal and annexed to the Relation of Father, that it can never be taken from him and transferred to another; yet may a Father naturally, and where the Civil Law does not obstruct it, pawn his Child, and 'sell him too, if there be a Necessity for it, and no other Way of maintaining him; as it was authorized ² by an antient Law of the *Thebans*, (which *Ælian* mentions in his second Book) who had borrowed it from the *Phœnicians*, and they from the ³ *Hebrews*; and which very Law, *Apollonius* tells us, in his Epistle to *Domitian*, obtained among the *Phrygians* too. Indeed Nature itself is supposed to grant a Right to every Thing, without which, what she commands, cannot be compassed and brought about.

VI. In the third and last Season, the Child is altogether ἀνέξουσιον, at his own Disposal, that Obligation, however, of Affection and Respect, remaining still in Force, because the Reason of it is perpetual, and never ceases. From whence it follows, that the Actions of Kings cannot, ¹ on the Account of their having their Parents living, be null and void.

VII. Whatever Authority Parents have beyond what we have now stated, ¹ proceeds from some voluntary Law, which varies according to the Difference of Places. So by the Law which GOD gave the *Hebrews*, a Father's Power over his Son or Daughter, to disannul their Vows, was not perpetual, but lasted only so long as they continued in their Father's House. Thus the *Roman* Citizens had a

IV. Of the Right of Chastising Children. Ch 20. § 7.

V. Of the Right of selling Children.

VI. Of the Season past Childhood, and when Children go out of the Family.

VII. A Distinction of the natural and civil Power of Parents. Numb. xxx. 2, &c.

² See § 10. of this Chapter; and B. III. Chap. XXXIII. § 3. As also what I have said at large on this Subject, Note 2. on PUFENDORF, B. III. Chap. VII. § 6. second Edition; and my two Letters against Mr. DU TREMELAI, inserted in the *Journal des Savans*, Ann. 1712, 1713.

V. (1) JORNANDES observes, that *Parents judge it better that Liberty should be lost than Life; when they sell their Children, in Order to have them mercifully provided for, rather than keep them to starve.* Hist. Goth. (Cap. XXVI. p. 75. Edit. Vulcan. 1597.) I find the *Mexicans* had a Law which allowed of this. GROTIUS.

In the *General History of the West-Indies*, written by FRANCIS LOPEZ DE GOMARA, B. II. Chap. LXXXVI. we read that in *Mexico*, the Fathers might sell their Children for Slaves, without any Distinction or Exception of Cases; as all their Men and Women might also sell themselves. On that Foot the Example would not be to the Purpose.

² That Law requires the Thing should be done by the Authority of the Magistrates, who should oblige the Purchaser of the Child to make a solemn Promise to keep the Child well, till it was in a Condition of doing him Service. *ÆLIAN*, Var. Hist. Lib. II. Cap. VII.

The Writer here quoted doth not speak precisely of Children. *APOLLONIUS* only says, *It is common among the Phrygians to sell their People; and if any of them are made Slaves by Force, they give themselves no Concern about redeeming them.* Vit.

Apoll. Tyan. Lib. VIII. Cap. VII. § 12. p. 346. Edit. Olear.

³ See *Exod. xxi. 7. Levit. xxv. 39. and Deut. xv. 12.*

VI. (1) Either they are private Matters, in which the King doth not act as King; and in that Case he doth not depend on the Will of his Parents, as being no longer a Member of the Family; or they are of a publick Nature; and then he is much less obliged to consult his Parents on them; since even a Subject, employed in a publick Office, is independent of his Father in what relates to the Execution of that Office, tho' in other Respects he is under the paternal Power. This is a Decision of the *Roman* Law, which, notwithstanding the excessive Power it gives Fathers over their Children in other Cases, considers a Son as *Master of a Family, when he is made a Magistrate or Guardian.* DIGEST. Lib. I. Tit. VI. *De his, qui sui vel alieni Juris sunt*, Leg. IX. By the same Law, a Son, as a Magistrate, may even force his Father to such Things as belong to his Jurisdiction. Lib. XXXVI. Tit. I. *Ad Senatus consult. Tertull.* Leg. XIII. § 5. and Leg. XIV. In like Manner, tho' a Son always owes his Father Respect, the Father is obliged to submit to him, in what regards the Honour due to his Post. See PUFENDORF, B. VI. Chap. II. § 12.

VII. (1) *SENECA* says, that *As it is advantageous for young People to be governed, the Law has put over them a Sort of domestick Magistrates, for directing their Conduct.* De Benefic. Lib. III. Cap. IX. GROTIUS.

Lib. De Præ-
ceptis Regis,
Præcept. ve-
tante 242.

Sort of paternal Power over their Children ² peculiar to themselves, as long as they were not ³ emancipated, tho' they were Heads of Families of their own. And this was such a Power, as the Romans confessed that other People had not over their Children. *Sextus Empiricus*, *Pyrrhon*. B. III. οἱ Ῥωμαίων νομοθέται, &c. ⁴ The Roman Legislature has enjoined Children to be their Fathers mere Slaves; and that the Children's Goods should not be at the Disposal and Direction of the Children, but their Father, till they obtain their Freedom, as Slaves do. But this is rejected by others, as barbarous and tyrannical. And *Simplicius* in *Epietetus's* Manual, οἱ δὲ παλαιὸι τῶν Ῥωμαίων, &c. ⁵ The antient Roman Laws having a Regard both to that Superiority which Nature gives to Parents, and to the Pains and Labour their Children cost them, and also willing that Children should be altogether subject to them; at the same Time, I presume, depending upon that Affection which Nature inspires Parents with, have indulged to Parents the Liberty, if they please, either of selling or killing their Children with Impunity. Such another paternal Right in Use among the Persians, is condemned by *Aristotle* ⁶ as a Piece of Tyranny. I was willing to mention this, for the more accurate Distinction of Things that are permitted by the Civil Law from those that are authorised by the Law of Nature.

VIII. Of the
Husband's
Right over his
Wife.
Eph. v. 23.

VIII. 1. That Right over Persons which arises from Consent, is derived either from Association or Subjection. The most natural Association is that of Marriage; but because of the ¹ Difference of Sex, the Authority is not equal; the Husband is the Head of the Wife in all conjugal and family Affairs; for the Wife becomes a Part of the Husband's Family, and it is but reasonable, that the Husband should have the Rule and Disposal of his own House. If there be any other Prerogative of Husbands, as the Privilege allowed them by the Jewish Law of invalidating every Vow the Wife made; and among some People, that of selling their Wives Goods: This is not founded on Nature, but on an arbitrary Establishment. Let us now see in what the Nature of Marriage consists.

Numb. xxx.
7, &c.

2. Marriage then we look upon to be in its natural State, the Cohabitation of a Man with a Woman, which puts the Woman, as it were, under the immediate Inspection and Guard of the Man: For we see, even among some Beasts, such a Sort of Society between the Male and Female. But Man being a rational Creature, Marriage, in Regard to him, includes moreover, an Engagement of the Wife to her Husband.

IX. Whether
an Incapacity
of parting with
a Wife or a
Confinement to
one, are Essen-
tial to Mar-
riage from the
Law of Nature
or only from
that of the
Gospel.
Deut. xxi. 15.
—xvii. 16, 17.

IX. 1. Nor does Nature seem to require any Thing more to constitute a Marriage, nor even the Law of GOD, before the Propagation of the Gospel. For before the Law of Moses, Persons even of the greatest ¹ Holiness had several Wives at once, and in ² that Law too there are some Precepts directed to those who have several Wives at one and the same Time; and the King is ordered *not to multiply to himself too many Wives and Horses*; where the Hebrew Interpreters remark, ³ that the King was allowed eighteen Wives or Concubines; and GOD

² The Roman Lawyers themselves acknowledge, as our Author observes, *that this Right of Power over Children is peculiar to the Romans*; and that no other Nation has such a Power over them. *Instit. Lib. I. Tit. IX. De Patriâ Potestate*, § 2. All the Subjects of the Roman Empire had not this Right till after the Constitution of *Antoninus Caracalla*. See *SPANHEIM's Orbis Romanus*, Exercit. II. Cap. XXIII.

³ See Note 5. on *PUFENDORF*, B. V. Chap. X. §. 8.

⁴ *Pyrrhonic. Hypotypos*. Lib. III. (Cap. XXIV. § 211. Edit. Fabric.) *PHILO* observes, that according to the Roman Laws, a Father was invested with a full Power over his Son. *De Legat. ad Caium*. (p. 996.) *GROTIUS*.

⁵ On Cap. XXXVII. p. 199. Edit. Heins.

⁶ *Ethic. Nicom.* Lib. VIII. Cap. XII.

VIII. (1) Concerning this whole Matter, consult *PUFENDORF*, who treats of it at large, B. VI. Chap. I. whereas our Author only slightly touches the principal Questions.

IX. (1) *St. CHRYSOSTOM*, speaking of *Sarah*, says, *She endeavoured to comfort her Husband under her Barrenness, with Children by her Handmaid; for such Things were not then forbidden.* (Hom. in Genes.) See the same Father on *1 TIMOTHY*, III. [and another Passage in his Treatise *On Virginity*, already quoted, B. I. Chap. II. § 6. Note 5.] *St. AUGUSTIN* speaks of the Custom of having several Wives at the same Time as an innocent Thing, *inculpabilis consuetudo*. *De Doctr. Christ.* Lib. III. Cap. XII. and observes, that it was prohibited by no Law. *De Civit. Dei*, Lib. XVI. Cap. XXXVIII. See also *De Doctr. Christ.* Lib. III. Cap. XVIII. He elsewhere says, in Cap. XXII. of the same Work, *Several Things were then done lawfully which cannot now be done without a Crime.* *GROTIUS*.

² *JOSEPHUS* says. *It was the Custom of his Country to have several Wives at the same Time.* *Antiq. Jud. Lib. XVII. Cap. I.* *GROTIUS*.

³ See *SELDEN*, *De Uxore Hebraicâ*, Lib. I. Cap. VIII.

observes

observes to *David*, that he had given him ⁴ several Wives, and those too Women ^{2 Sam. xii. 8.} of Note and Quality. ^{Deut. xxiv. 4.}

2. So likewise is there a Manner and Method prescribed to him, who had a Mind to part with his Wife, nor is any Body prohibited Marriage with the Woman so divorced, except he who did divorce her, and the ⁵ Priest. But this Liberty of passing to another Husband, is even by the Law of Nature so far to be restrained, as that no Confusion of Issue may thence arise. And from this came that Question which, as ⁶ *Tacitus* relates, was formerly proposed to the Priests, *Whether she who had conceived, and was not yet delivered, might lawfully marry?* Among the *Jews* the Intervention of three Months was enjoined. But our Lord JESUS CHRIST has prescribed in this, as well as in many other Things, a more perfect Rule; according to which he declares ⁷ both him who parts with his Wife, — ^{Matt. v. 32.} except — ^{— xix. 9.}

⁴ JOSEPHUS relating this, makes *Nathan* say, that GOD had given *David* Wives, whom he might justly and lawfully have. (*Antiq. Jud. Lib. VII. Cap. VII. p. 227. Edit. Lips.*) The Author of the *Pesichta Zotertha*, says, on *Leviticus* xviii. it is very well known, that those who pretend a Plurality of Wives was prohibited, do not understand what the Law is. (*Fol. 24. Col. 1.*) GROTIUS.

See also SELDEN, *De Jure Nat. & Gent. juxta Discipl. Ebræorum. Lib. V. Cap. VI.*

⁵ *Leviticus* xxi. 7. Nor was a Priest allowed to marry a Widow, as appears from Verse 14. of the same Chapter. PHILO the Jew, (*De Monarchiâ, p. 827. Edit. Paris.*) And most of the modern Interpreters understand this of the High-Priest, on Account of what goes before, *Ver. 10, &c.* But that it is spoken of all Priests without Exception, appears both from a Passage in *Ezekiel* xlv. 22. and from JOSEPHUS, both in his Explication of that Law, and in his first Book against *Apion*. The Law in Question therefore must be connected with the Beginning of the Chapter; so that what is said of the High-Priest, *Ver. 10, 11, 12, 13.* is to be considered as in a Parenthesis. GROTIUS.

The Jewish Historian's Authority, urged by our Author, makes directly against him; for having spoken of such Women as the Priests in general were not to marry, he adds, that *MOSES* doth not allow the High-Priest to marry a Widow, tho' he permits the other Priests to do it. *Antiq. Jud. Lib. III. Cap. X. p. 95.* As to the other Passage, quoted as from the first Book against *Apion*, there is indeed a Place where JOSEPHUS speaks of the Marriage of Priests, *p. 1036.* but not one Word about Widows. Nor doth our Author quote JOSEPHUS at all in his Note on the Passage of *Leviticus*, where he makes the same Remark. As to the Passage of *Ezekiel*, Mr. LE CLERC, who with good Reason thinks there is somewhat harsh and forced in the Parenthesis here supposed, promises to explain the Words of the Prophet so as to reconcile the seeming Contradiction. See SELDEN, *De Uxore Hebr. Lib. I. Cap. VII.* and *De Successione, in Pontificat. Lib. II. Cap. II.*

⁶ Speaking of *Augustus*, who, having taken *Livia* from her Husband, consulted the Priests by Way of Banter, on this Question. *Annal. Lib. I. Cap. X. Num. 7.*

⁷ In Order to clear up this Matter, and at the same Time know what was our Author's Opinion, after the first Edition of this Work, tho' he has made no Alteration in this Place, it will be proper to add here some of the Reflections, which appear in his Commentary on the New Testament, MATTHEW v. 32. First then, he observes, that our Lord JESUS CHRIST doth not design, either in

this Passage, or in the Rest of his Discourse on the Mount, to abolish any Part of the *Mosaic Law*; his Intention is only to shew us in what Manner, and in what Case, a good Man may make his Advantage of the Allowance of Divorce, granted by one of the political Regulations of that Law, which was still in Force, at the Time of his Speaking. Consequently, the Question doth not turn on a Cause of Divorce brought before the Judges; for, beside that a Husband, who had a Mind to put away his Wife, was not obliged, according to the Law, to do it in a judiciary Manner; when he accused his Wife of Adultery before the Judges, that was done with a View of having her punished with Death, not of obtaining a Dissolution of Marriage. Thus, when our Lord speaks of Adultery, as a just Cause of Divorce, he supposes either a mild and merciful Husband, who is not disposed to bring his Wife to Punishment, how culpable soever she may be, as was the Case of *Joseph* in Regard to *Mary*, before he was able to conceive the miraculous Cause of her Pregnancy: Or, a Husband, who had not sufficient Proofs of his Wife's Crime to alledge in Court, tho' he himself was persuaded of her Guilt, or had such Assurance of it as placed it beyond Doubt in his Opinion. On which St. JEROME says, that *Whenever there is Adultery, or Suspicion of Adultery, the Wife may be divorced without Scruple.* On MATTHEW XIX. p. 56. Tom. IX. *Edit. Basil. 1537.* Not that every Imagination of a suspicious Mind doth authorize a Man in Conscience to make Use of this Right; but he is not obliged to stay till he is furnished with all the Proofs necessary in a Court of Justice, and according to the Rigour of the Laws. It is sufficient in this Case, that a just Medium be observed between too credulous Jealousy and stupid Indolence. THEODOSIUS the younger, a Christian Emperor, who frequently consulted the Bishops, fixing the Conjectures of a Wife's Guilt, according to the Manners of the Age in which he lived, thought it sufficient for authorizing a Divorce, that the Wife went to eat with other Men against her Husband's Prohibition, or without his Knowledge; that she lay abroad without good Reasons, except at a Father's or Mother's House; or appeared at the publick Shows against her Husband's Will. JUSTINIAN added the following Cases, if a Woman designedly caused herself to miscarry; if she bathed with other Men, or talked of Marriage with another Man. See *Code, Lib. V. Tit. XVII. De Repudiis, &c. Leg. VIII. and XI.* But ought our Saviour's Words, *Saving for the Cause of Adultery*, to be taken so rigorously, that this should be the only Reason capable of quieting the Conscience of a Man who puts away his Wife? Those who acknowledge no other, urge the Terms of the Original, employed here, or in the other Evangelists,

except for Adultery, and him who marries her, guilty of Adultery. And his Apostle and Interpreter, St. Paul, not only gives the Husband Power over the Wife's Body, which in the State of Nature also was allowed him, (*ὁ γὰρ μὲν ὁμοῦ, &c.* For he who is joined to a Woman, is, by the Laws of Marriage, Master

Παρακλὸς λόγος πορνείας, ἐκλός, εἰ μὴ, &c. But we may understand this Exception, as ORIGEN doth, (*Hom. in MATTHEW VII.*) so as to make it contain but one Example of the Cases in which a Divorce is allowed. It is not uncommon, both in human and divine Laws, to specify only the most common Cases, from which we ought to infer others not expressed. See *Exod.* xxi. 18, 19, 20, 26. *Deut.* xix. 5. The Matter will be still more plausible, if, as may be done, we explain the Words in St. MATTHEW v. 32. Παρακλὸς λόγος πορνείας, *Whoever shall put away his Wife, when there is no Cause of Adultery, &c.* and if in *Chap.* xix. 9. instead of εἰ μὴ ὅτι πορνεία, as it is in the common Editions, we read μὴ ὅτι πορνεία, as it is in that of *Complutum*, and several Manuscripts used by Dr. MILLS; that is, *not for Cause of Adultery*. For such Sort of Expressions, which the *Syriack* Version seems to have imitated in the two Passages quoted, rather imply an Example than a Restriction, which still leaves the Terms intirely general. But supposing a real Exception here, the Sense will be still the same: For in all Laws, not excepting the most odious, such as penal Laws, what is established by the Legislator takes Place in all Cases, where the Reason is the same; and favourable Laws are applied to like Cases. If we rightly consider the Nature of all the Precepts of JESUS CHRIST, we shall find that Charity is their Principle and Perfection: Now Charity requires we should procure the Advantage of others, but so as to think of our own, and not be cruel to ourselves, as St. PAUL teaches, *2 Cor.* viii. 13. It would be barbarous and inhuman to put away a Wife for all Sorts of Reasons; as the Pagans themselves have acknowledged. See AULUS GELLIVS, *Noct. Attic.* Lib. I. Cap. XVII. How much more is it the Duty of a Christian, who makes Profession of Patience, and who is commanded to love his greatest Enemies, not rashly to conceive an implacable Resentment against his Wife? But then, on the other Hand, when, for Example, she becomes guilty of Adultery, it would not be just that he should be reduced to the hard Necessity of keeping such a Wife. The Thing speaks for itself; and this perhaps is the Reason why St. MARK, *Chap.* x. 11. and St. PAUL, *1 Cor.* vii. 10. repeating the Precept under Consideration, express it in a general Manner, without adding any Exception; supposing, in my Opinion, that such Restrictions are tacitly included in the most general Laws, by Vertue of natural Equity. And may not the same Equity authorize a Divorce in other less frequent Cases, and which, therefore, it was not so necessary to mention? Let us suppose that a Woman has attempted to poison her Husband, or killed the Children she had by him; will any Man say, that Crimes of this Nature are not as contrary to the End of Matrimony as Adultery? But Matrimony was not instituted only for the Propagation of Mankind; the mutual Assistance which is expected from that Union, is certainly to be considered as something in that State; and nothing can be more contrary to the Engagements of so close a Society, than an Attempt on the Life of one of the married Persons. In the Affair of a Divorce, the Romans considered whether the Conduct of a Wife was supportable, or

not. Perhaps our Saviour had this Distinction in View; and therefore expressed the insupportable Behaviour by the Example of the most common and best known Case. The Christian Emperors, of whom we have spoken, add to Adultery, and such Actions as give just Suspicions of that Crime, some others, which, being proved, authorize a Husband to put away his Wife with Impunity: Even tho' he had not sufficient Proof, he was not absolutely forbid to put her away; but it was left to his Choice, either to keep her, or restore her Portion, or lose what he had settled on her at Marriage. The Jewish Wives were not allowed to separate from their Husbands, without the Husband's Consent: Our Saviour therefore says nothing tending toward giving them that Permission, even tho' the Husband had committed Adultery. But; by the Roman Laws, the Husband and Wife had an equal Right in this Case; for which Reason St. PAUL allows it, *1 Cor.* vii. 15. JUSTIN MARTYR, who lived near the Times of the Apostles, speaking to the Roman Senate, commends a Christian Woman, who taking the Benefit of the Roman Laws, left her Husband on the Account of his Debaucheries, *That she might not partake of his Crimes by remaining and cohabiting with him.* Apol. II. § 3. Edit. Oxon. But the same Father adds, that she did not proceed to this Extremity, till she had in vain done all in her Power for reclaiming her Husband. And if we thoroughly examine what St. PAUL says in the Chapter last quoted, we shall be convinced that our Saviour's Words are to be understood only of the Marriage of two Christians; for it is in Regard to such that the Apostle says he hath a Command from the LORD: As to others, he expressly declares, that the LORD had given no Orders about them; as St. AUGUSTIN observes, *Epist.* LXXXIX. In Reality, among Christians, even tho' one of the married Persons has committed a great Fault, the other ought not easily to despair of a Reformation, while the criminal Person remains in the Profession of Christianity. As to what our Saviour says, that he who puts away his Wife for some slight Reason, causeth her to commit Adultery; the Term *μειχᾶσαι* in the Original, does not properly signify Adultery; it stands for all Sort of Immodesty in general, and most commonly for simple Fornication; so that, if it is rightly translated Adultery, where the Scripture speaks of a married Woman, it does not thence follow, that it is to be so understood in this Place, where our Saviour speaks of a Woman divorced, who, consequently, was no longer tied to her Husband, according to the Law of MOSES: His Meaning therefore is, that a Man who puts away his Wife for slight Reasons, thereby exposes her, as much as in him lies, to the Danger of leading an abandoned Life, because divorced Wives seldom find other Husbands. St. AMBROSE had this Thought, when he said, *How dangerous is it to expose the frail Age of a young Woman to the World!* On LUKE XVI. Lib. VIII. p. 1754. Edit. Paris. 1569. In the following Words, *And he who shall marry the divorced Woman, committeth Adultery*, our Saviour still speaks of a Woman divorced by her Husband, remaining a Christian, and consequently, whose Reformation may be hoped; for the Law of MOSES being then in Force, as has been observed, it would have been too severe to treat all who should marry

Master of her Body, says ⁸ *Artemidorus*) but also grants the Wife reciprocally a Power over the Husband's Body, *Thus establishing*, as *Lactantius* observes, ⁹ *an Equality of Rights between two Persons that make but one Body*.

3. I know very well, that many are of Opinion, that in both those Points (of Polygamy and Divorce) CHRIST did not make any new Law, but only re-established that which GOD the Father at the very Creation had given; our Saviour's Words, which remind us of that Beginning, seem to have given Occasion to this Opinion. But here we may answer, that from that first Institution indeed, wherein GOD gave to one Man one Woman only, it sufficiently appears ¹⁰ what

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marry a divorced Wife as Adulterers; supposing, for Example, such a Woman's Virtue being in Danger, a Man married her out of Compassion, would not this rather have been a commendable Action? We are therefore to understand the Words of JESUS CHRIST, as spoken of him, who marries a divorced Woman, before all Means are tried for reconciling her with her Husband, as the Apostle St. PAUL directs, *1 Cor. vii. 11.* or, which is still worse, of those who falling in Love with other Men's Wives, endeavoured to get them into their Hands by a Divorce. To this relates what our Saviour says, *MATT. xix. 9.* where he explains himself more at large, *He who shall put away his Wife, and marry another, &c.* For both he who marries a divorced Woman, thereby hinders her from returning to her Husband, who cannot after that take her again if he would; and the Husband of the divorced Woman, as soon as he marries another, gives Reason to believe he was not disposed to receive the former again, and thus gives her an Occasion, as far as in him lies, to abandon herself to an immodest Life, or engage with another Husband; for thus we are to understand the Word *μοιχεύει*, which is rendered *committeth Adultery*; but which ought to signify the same as *ἀποστέλλει μοιχεύσαι*, *maketh her commit Adultery* in the parallel Text of the same Evangelist, according to the Style of the *Hebrews*, who directly attribute to any one what he gives Occasion to, by some Action of his own. See *Rom. viii. 26. Galat. iv. 6.* Besides, when St. PAUL says, *1 Cor. vii. 39.* that *The Wife is bound by the Law as long as her Husband liveth*, he doth not there speak of a Divorce. The Apostle designs only to prove, that the Tie of Marriage doth not subsist after the Husband's Death; and therefore the Woman may then marry again. The same Apostle saying the same Thing, *Rom. vii. 1, 2.* tho' with a different View, speaks of the Law of MOSES: Now it is certain, that, according to the Law of MOSES, a Woman was at Liberty to marry again when she had been divorced, and consequently, before the Death of her Husband. This is the Substance of what our Author says, in his *Notes on the New Testament*. Whence it appears, that his Notions were not entirely the same, as when he wrote the Work before us, tho' he since made no Alteration in this Place. From all we have seen it follows, that in the Passages of the Gospel which he quotes in his Margin, to shew that our Saviour JESUS CHRIST prohibited Polygamy by one of his Laws, he speaks only of a Divorce; and that in Opposition to the false Notions of the *Jews*, who thought it allowable in Conscience for every Cause. *MATT. xix. 3.* Thus we find that our Author, in his Treatise of *The Truth of the Christian Religion*, first published in 1639; that is, about two Years before his *Notes on the New Testament*, when he speaks of the Marriage of one Man and one Woman, having observed, that *There were but few Nations among the Pagans where Men were contented with one Wife,*

like the Germans and Romans; adds only, that *the Christians observe this Manner of Marrying*, *Lib. II. § 13.* And in the Notes he quotes no one Passage of the Gospel, but only those Words of Saint PAUL, *1 Cor. vii. 4.* *The Wife hath not Power of her own Body, but the Husband; and likewise the Husband hath not the Power of his own Body, but the Wife.* In his posthumous Notes on the Epistles, he explains those Words agreeably to the Sequel of the Discourse, as implying only the Right which a Wife has to require that her Husband refuse her not the conjugal Duty; because by Vertue of Marriage she enters into a Society with him, which demands the reciprocal Use of their Bodies: But it doth not thence follow, that a Husband may not have more than one Wife; for Societies are not always formed on an equal Foot. So that our Author here applies the Words of St. PAUL, by Way of Accommodation only, and to shew that Christians have renounced Polygamy, rather with a View of following the Spirit and Genius of the Gospel, which directs us to avoid what may easily be abused, than that of obeying any express Law of our Saviour or his Apostles. See Mr. LE CLERC, *Hist. Eccles. Prolegom. Sect. III. Cap. IV. § 5. Num. 9. p. 162.* It is not at all probable, that JESUS CHRIST designed to oblige such as had several Wives before they became his Disciples, to dismiss them all but one. And when the political Laws of MOSES were tacitly abrogated by the Destruction of Jerusalem, and the Jewish Government; as the *Jews* and *Christians* were dispersed through the Roman Empire, where a Plurality of Wives was not allowed; it was not to be apprehended that the Christians would revive the Practice of the Jewish Nation, which is yet less to be feared at present, since all the Laws both Civil and Ecclesiastical have so long prohibited Polygamy.

8 *Oνειροcrit.*

9 *Institut. Divin. Lib. VI. Cap. XXIII.* That Father adds in the same Chapter, that *A mutual Fidelity is to be observed*; and that *the Wife is to be taught Chastity, by (her Husband's) Example, it being unjust to require that of her, which he himself cannot perform.* We have the same Thought in GREGORY NAZIANZEN, *How do you demand, and make no Return?* [*Orat. XXXI. p. 500. Edit. Colon. seu Lips.*] St. JEROME observes, that *The Laws of CHRIST differ from the Laws of the Emperors; and the Precepts of St. PAUL from those of PAPINIANUS. The latter give a Loofe to the Debaucheries of Men, and condemning only Fornication with free Women, and Adultery, allow of carnal Conversation with Slaves in publick Brothels; as if the Quality of the Person, not the Will made the Crime. Among us Men have no more Liberty than Women; but both are subject to the same Laws.* Ad Ocean. (*Tom. I. p. 198. Edit. Basl.*) GROTIIUS.

10 Several wise Men of Antiquity have likewise preferred the Marriage of one Man to one Woman to Polygamy. EURIPIDES maintains, that *It*

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Gen. ii. 24.

is best, and most grateful to GOD; and consequently, what has always been excellent and commendable; but not, that it is any Crime to do otherwise; because where there is no Law, there can be no Transgression; and 'tis certain, that in those Times there was no Law about that Matter. So also when GOD declared, whether by *Adam* or *Moses*, that the Marriage Union was so great, that a Man should leave his Father's Family to form a new one with his Wife; 'tis the same Thing that is said to *Pharaoh's* Daughter, *Psal.* xlv. 10. *Forget thine own People and Father's House.* And tho' from the Injunction of so strict a Friendship, it is plain enough, that 'tis very agreeable to GOD, that this Union should be perpetual; yet can it not be proved from hence, that GOD did even then ¹¹ command that this Engagement should not, upon any Account whatever, be broke and dispensed with. But it is CHRIST who has forbid Man to put asunder that which GOD in the first Institution of Marriage had joined together; taking for the worthy Subject of a new Law, what was most eligible in itself, and most acceptable to GOD.

4. It is certain, that in former Ages most Nations had the Liberty, not only of Divorces, but also of marrying several Wives. *Tacitus* ¹² observes, that the *Germans* were almost the only Barbarians, in his Time, who were contented with one Wife a-piece; and History furnishes us with an infinite Number of Examples of the contrary Practice, amongst the ¹³ *Persians*, and the ¹⁴ *Indians* ¹⁵. Among the ¹⁶ *Egyptians*, the Priests alone took up with one Wife. And among the *Greeks*,

is not decent for one Man to command two Wives; and that, Whosoever would have his Family well governed, ought to be content with one Partner of his Bed. *Andromach.* (ver. 177, &c.) And in the same Tragedy, the Chorus says, *I shall never approve of two Beds at the same Time, or the Offspring of two Mothers, both living, which occasion Contention and dreadful Discontents in a Family. Let a Man be content with one chaste Partner of his Bed. In States Men are not better governed by two than by one: The Multiplicity of Masters make the Yoke heavier, and causes Seditions among the Citizens. The Muses themselves take a Pleasure in raising Quarrels between two Poets. At Sea it is better that one Pilot, tho' less skillful, should steer the Ship, than that it should be conducted by two, or a Company of able Hands. Let one Power govern the House and the State, if you would enjoy Tranquillity and Happiness.* Ver. 464, &c. In *PLAUTUS's Mercator*, one of the Actresses reasons thus, *A Wife, if she is honest, is content with one Husband; why then should not a Husband be satisfied with one Wife?* (Act. IV. Scen. VI. ver. 8.) *GROTIUS.*

If we judge of this Question independently of the Civil Laws, it is certain it will frequently happen that a Man that cannot use the Liberty of Polygamy and Divorce, without sinning against some Virtue, and engaging himself in great Inconveniences; in Consideration of which the Prudence of Legislators has required an intire Prohibition of a Plurality of Wives, and Divorces, except in certain Cases, and for certain Reasons. But it cannot thence be inferred, that the Thing is evil in itself, according to the Law of Nature. All that can be said is, that it is one of those Things indifferent in their own Nature, which may be easily abused, like Play, and several other Diversions, from which it is safest to abstain, how little soever we find ourselves inclined to make a bad Use of them. See what I have said farther on this Subject, in my third Note on *Book I. Chap. I. § 15.* and Note 3. on § 17.

¹¹ Thus *St. AMBROSE*, speaking of Polygamy, says, that GOD, in the terrestrial Paradise approved of the Marriage of one with one, but without condemning the contrary Practice; because *Sarah* said to *Abraham*, *Behold now the LORD hath restrained me from Bearing: I pray thee go in unto*

my Maid; it may be that I may obtain Children from her. And *Abraham* hearkened to the Voice of *Sarah*, &c. *Lib. I. De Abraham. Cap. IV.* *GRATIUS* has inserted this Passage, and another to the same Purpose, in the *Canon Law*, *Caus. XXXII. Quest. IV. (C. III.) Cujus arbitrium aliqua sequatur*, &c. *GROTIUS.*

That Father had good Reason for saying Polygamy was not prohibited in *Abraham's* Time; but then he ought not to call it Adultery (*Adulterium*) as he doth, in Regard to that Time; much less advance, that Adultery was then allowed. Here is at least a great Confusion of Ideas, and such a Want of Exactness in the Expression, as may lead an ignorant Reader into an Error.

¹² *De morib. German. Cap. XVIII.* The Historian adds, *Except a small Number, who marry several Wives, not out of Lust, but for State.* From which Words it appears, that tho' this Practice was uncommon among the *Germans*, there were yet some Examples of it; so that it was rather a Fashion, than a Thing looked on as unlawful.

¹³ See *BRISSEAU, De Regno Persarum, Lib. III. p. 229, &c. Edit. Sylburg. 1595.*

¹⁴ *STRABO, Geogr. Lib. XV. p. 1041. Edit. Amst. (714. Paris.)*

¹⁵ To these add the *Thracians*, concerning whom we have some Verses of *MENANDER*. [In *STRABO, Lib. VII. p. 455, 456. Edit. Amst. 297 Paris.*] and of *EURIPIDES*, in his *Andromache*, (v. 214, &c.) *GROTIUS.*

¹⁶ Among the *Egyptians* the Priests marry but one Wife; but other Men as many as they please. *DIODORUS SICULUS, Lib. I. Cap. LXXXI. p. 51: Edit. H. Steph.* Our Author, who quotes this Passage in his Margin, refers likewise, in a little Note, to *HERODIAN, Lib. II.* He certainly means *HERODOTUS*; for the former Historian says nothing on this Subject; and the latter treats at large of the Manners of the *Egyptians*, in his second Book. But then he tells us the direct contrary; for, having spoken of the *Egyptians*, who live beyond the Marshes, he remarks, that *Those who lived in the Marshes observe the same Customs as the other Egyptians; and among others, that of each having but one Wife, like the Grecians. Cap. XCII.* Let the Learned consider how to reconcile these two Historians, or which of them is to be credited.

Cecrops

Cecrops was the first, as *Athenæus* testifies, who *μίαν ἐνὶ ἑξέσει*, ¹⁷ *coupled one Woman with one Man*; which tho', by the By, was not long observed, even at *Athens*, as the Example of ¹⁸ *Socrates* and others ¹⁹ inform us. And if there were some People who lived with greater Continency, as the *Romans*, who never had two Wives at the same Time, and a long While refrained ²⁰ from a Divorce, they are indeed to be commended for it, as having come up very near to that State, which is best, and most eligible: And the Marriage of a Priestess of ²¹ *Jupiter*, among these *Romans*, was never dissolved but by Death: However, it does not follow from all this, that they who did otherwise, before the publishing of the Gospel, were guilty of a Crime in so doing.

X. 1. Let us now enquire, what Marriages are valid by the Law of Nature: To form a right Judgment in which Affair we should remember, that ¹ *Not all Things which are contrary to the Law of Nature, are, by the Law of Nature, null and void*; as is evident in the Case of a prodigal Deed of Gift; but only those Things which want the Principle that makes an Act valid, or ² which are attended with some lasting Effect, whereby the Turpitude of the Act is perpetuated. The Principle necessary to render an Act valid, is here, as in other human Acts, capable of producing a Right, *a moral Faculty, joined with a sufficient Will*. What Will is sufficient to constitute a Right, will be better enquired into, when we come to treat of Promises in general. As to the moral Faculty, there arises a Question about the Consent of Parents, whether that, as some People contend for, is in some Sort necessary by the Law of Nature to the Validity of a Marriage; but they quite mistake the Matter, for all the Arguments they bring for it, prove no more than that it is the Duty of Children to endeavour to obtain their Parent's Consent; which we readily grant too, with this Proviso, that the Will of the Father and Mother is not visibly unjust. In Truth, if Children owe their Parents a Respect in all Things, certainly then ought they more particularly to pay it in an Affair, such as Marriage is, that concerns the whole Family. But from hence it does not follow, that a Son is not Master of himself, and that he has no Right to marry without the Consent of his Parents. For when a Man marries, he is supposed to be of a competent Age, and Years of Discretion, and to leave the Family; so that in this Respect he is not under the Direction of the Head of that Family. But if he offends against the Reverence he owes him, such a Failure is not sufficient to annul the Act.

2. The Laws of ³ the *Romans* and other Nations, which declare some Marriages to be void, where the Father's Consent was wanting, are not then founded on the Law

X. By the Law of Nature only, Marriages are not void for want of the Consent of Parents.

Ch. 11. of this Book.

¹⁷ *ATHENÆUS*, *Lib. XIII. Cap. I.*

¹⁸ See his Life in *DIOGENES LAERTIUS*, *Lib. II. § 26. Edit. Amst.*

¹⁹ As *EURIPIDES*, quoted by *AULUS GELLIUS*, *Noët. Attic. Lib. XV. Cap. XX.*

²⁰ Above five hundred Years. *Spurius Carvilius Ruga* was the first who divorced his Wife on the Account of Barrenness. See *DIONYSIUS HALICARNASSENSIS*, *Antiq. Rom. Lib. II. Cap. XXV. p. 93. Edit. Oxon. (96. Sylburg.) VALERIUS MAXIMUS*, *Lib. II. Cap. I. Num. 4. AULUS GELLIUS*, *Noët. Attic. Lib. IV. Cap. III. and Lib. XVII. Cap. XXI. and their Commentators.*

²¹ *AULUS GELLIUS*, *Noët. Attic. Lib. X. Cap. XV.*

²² *St. AUGUSTIN* says, *It is objected against Jacob, that he had four Wives*; to which he answers, *which, when a Custom, was not a Crime.* *Lib. XXII. contra Faustum. Cap. XLVII.* *GRATIAN* has inserted this Passage in the *Canon Law*, (*Caus. XXXII. Quæst. IV. Can. VII.*) but has put the Name of *St. AMBROSE* instead of that of the true Author. *GROTIUS.*

In the Edition published by the *PIRHOU*, this Passage is restored to its true Author, from the ancient Manuscripts. *THEODORET* also is quoted, who says, that in *Abraham's Time*, *Polygamy* was

forbidden, neither by the Law of Nature, nor by any written Law, Quæst. XLVII. in Genes.

X. (1) See § 3. of this Chapter, Note 2.

2 *Ea, in quibus vitium durat in effectu.* Our Author, in his Note on *MATTHEW xxii. 30.* where he likewise treats of this Subject, expresses himself thus, *Ubi nulla turpitudine est permanens.* We shall explain his Thought by a familiar Example. He who possesses another Man's Goods, which he has acquired unjustly, doth ill, not only in stealing, or otherwise seizing them, but also in keeping them; so that, every Time he makes Use of such Goods which do not lawfully belong to him, he commits an Act of Injustice. The Turpitude is in this Case fixed, as I may say, to the Thing itself, and every Act of the unjust Possessor in Regard to it. But it is not the same in Relation to a Son, who being of sufficient Age for regulating his own Conduct, marries without the Consent of his Parents. He may have done ill in taking this Step, but the Moment the Marriage is concluded and agreed, the Evil that there may have been in the Engagement ceases, if there be nothing else that renders it criminal or dishonest. The Consent of Parents is an exterior Thing, which doth not enter into the Essence of the Contract of Marriage, except some Civil Law gives it that Force.

3 The *Roman Law* speaks thus on this Occasion,

Law of Nature, but the mere Will of the Legislators. For by the same Laws ⁴ the Mother, to whom however the Children do naturally owe a Respect and Veneration, does not, by her not consenting, disannul the Marriage; nor even the Father, if the ⁵ Son was emancipated; and if the Father himself be under the Power of his Father, then both Grandfather and Father must give their Consent to the Son's Marriage; ⁶ but for a Daughter, the Consent of the Grandfather alone is sufficient; which Distinctions being utterly unknown to the Law of Nature, are Demonstration enough, that it is the Civil Law has introduced them.

Cod. l. 5. tit. 4.
De Nuptiis,
Leg. 20.

vii. 36.

Gen. xxix. 7, 8.
— xxxvi.

XI. By the
Evangelical
Law, Marriages
with another Woman's
Husband, or another Man's
Wife, are null
and void.

XII. By the
Law of Nature
the Marriages
of Parents with
their Children
are unwarrantable and
void.

3. We find indeed in the Scriptures several pious Men, and especially Women, (to whose Modesty it was most agreeable, in an Affair of this Kind, to be determined by the Judgment and Will of ⁷ others: Pertinent to this is what we read in the first Epistle to the *Corinthians*, of the disposing of a Virgin) in contracting Marriages wholly directed and advised by their Parents: But yet neither is *Eſau's* Marriage pronounced void, nor his Children declared illegitimate, for being married without such Consent and Direction. *Quintilian*, with a Regard to what is strictly and naturally right, expresses himself thus, ⁸ *If it be allowable for a Son to do sometimes even against the Father's Will, what would otherwise deserve no Blame at all, certainly that Liberty is never more necessary than in Matrimony* ⁹.

XI. A Marriage, no Doubt of it, contracted with a Woman, who has already an Husband, is void by the Law of Nature, unless her first Husband has divorced her; for till then his Property in her continues: But by the Christian Law, ¹ till Death breaks off the Engagement. And such a Marriage is therefore void, as well because the moral Faculty is removed by the former Marriage, as because all the Effects of it are criminal; every Act of the second Marriage being an Usurpation of that which belongs to another. So on the other Hand a Marriage contracted ² with him who has a Wife already, is void, by Reason of that Right which CHRIST has allowed the virtuous Woman over her Husband.

XII. 1. The Question about the Marriages of those who by Blood or Affinity are related, is a nice and difficult Point, and which has frequently been managed *pro* and *con*, with no little Heat and Commotion. For whoever attempts to assign certain and natural Reasons why such Marriages are unwarrantable, in the Manner

Yet so that, if they are under the Power of Parents, they gain their Consent. For both civil and natural Reason speak the Necessity of so doing. Institut. Lib. I. Tit. X. De Nuptiis.

⁴ Nay, farther, the Will of the Grandfather, if he be free, has in this Case more Force than the Will of the Father who is a Slave. This is determined by the Canon Law, Caus. XXXII. Quæst. III. Canon unic. GROTIUS.

⁵ An emancipated Son may marry, even without his Father's Consent, and his Son shall inherit his Estate. DIGEST. Lib. XXIII. Tit. II. De ritu nuptiarum, Leg. XXV.

⁶ If a Grandson marries, the Consent of his Father is also requisite; but the Will and Authority of the Grandfather alone is sufficient for the Marriage of a Grand-Daughter. Ibid. Leg. XVI. § 1. See CUVAS, Recit. in Jul. Paul. Tom. V. Opp. Edit. Fabrott. and ANTONIUS FABRIUS. Jurisprud. Papinian, Tit. IX. Princip. IV. Illat. 2, & 4.

⁷ For it is not suitable to the Modesty of a Virgin to chuse a Husband, says St. AMBROSE, De Abraham. Lib. I. Cap. ult. This Sentence is by GRATIAN inserted in the Canon Law, Caus. XXXII. Quæst. II. (Can. XIII.) DONATUS, in his Commentary on TERENCE's *Andria*, (Act. IV. Scen. IV. ver. 2.) observes, that the Word *Jubeam* is properly used in that Place, because the chief Power, in Regard to the Marriage of a young Woman, is in her Father. EURIPIDES makes *Hermione* say, Her Father shall have the Care of her Marriage, and that, it is not her Business to make a Choice. (*Androm.* ver. 987.) *Hero* tells *Leander*, that She could not marry him, because her Parents were unwilling. MUSÆUS, (ver. 179, 180.) GROTIUS.

⁸ Declam. CCLVII. p. 470. Edit. Burman. Our Author, in a Note on the Gospels, which I have already quoted, says, that in Reality Children are in nothing obliged to shew more Deference to the Will of their Parents, than when their Marriage is concerned; as ARISTOTLE somewhere observes. But adds, that there are some Circumstances, which form a reasonable Exception in this Case. If Parents, out of a Principle of Hatred, Covetousness, or influenced by some other Passion, are wanting in their Duty to their Children, would it be just that they should therefore be deprived of their natural Liberty? By the Roman Law, if a Daughter, twenty-five Years old, married without the Consent of her Parents, who delayed to provide her with a Husband, or even sinned against her own Body, she was reckoned innocent in Regard to them, who were not allowed to disinherit her on that Account. NOVELL. CXV. Cap. III. § 11. We know likewise what Care St. PAUL would have taken for avoiding the Inconveniences of Incontinence, 1 Cor. vii. 9. See PUFENDORF, B. VI. Chap. II. Paragr. last.

⁹ ENGRAPHIUS, in his Comment on the *Andria*, Act. I. Scen. V. says, *It is evident, that Children may follow their own Will in disposing of themselves in Marriage.* And CASSIODORE thinks it hard to lay a Restraint in the Affair of Matrimony, from which Children are to be born. Variar. Lib. VII. Cap. XL. GROTIUS.

XI. (1) See Note 7. on Paragraph 9. of this Chapter.

² Consult the Note last referred to:

they are prohibited by the Laws and Customs of Nations, ¹ will by Experience find it a Task not only difficult but impracticable. For as to that Reason which *Plutarch* ² in his *Roman Questions* offers, and *St. Austin* ³ after him, in his *City of GOD*, B. xv. C. 16. of extending Friendships by extending Alliances, is not of so much Weight and Consideration as to make one believe that Marriages contrary to such an End are to be reputed void or unlawful. For that which is less useful is not merely upon that Account unlawful. Add to this, that it may possibly so happen, that some greater Advantage, however great this may be, may interfere with and oppose it, and this too, not only in the Case which *GOD* in the *Jewish* Law has excepted, when ⁴ a *Man dies without Issue*, in Order to keep the Estate of their Ancestors still in the Family; on which Reason is founded another Regulation, wherein the ⁵ *Attick* Law was conform to that of the *Hebrews*, ⁶ I mean, in reference to Virgins, who are ⁷ sole Heiresses, called by them *Παύλαροι*, but also in many other Cases that we frequently meet with, or may imagine ourselves.

2. When I speak of the Difficulty and Impossibility of shewing by convincing Reasons, that Marriage between such as are related by Blood or Affinity are criminal and void by the Law of Nature, I except the Marriages of Fathers and Mothers with their Children of any Degree or Remove; the Reason why such Marriages are unlawful, being, if I am not mistaken, sufficiently evident. ⁸ For neither can the Husband, who by the Law of Marriage is the superior, pay to his Mother (if his Spouse) that respect which Nature requires: Nor a Daughter to her Father, because tho' she be his inferior, even in Marriage, yet that Union introduces such a Familiarity as is incompatible with such a Respect. Very well has *Paulus* the Civilian, when he had said before, ⁹ that *In contracting Marriages we ought to consult the Right of Nature, and the Decency of the Thing*, subjoined, that *it was a Breach of that Decency to marry one's own Daughter*. Such Marriages

XII. (1) We may be convinced of this, on reading the subtle Reasons offered for it by two Authors, who have taken great Pains to establish Principles drawn from the Law of Nature, for the Solution of this Question. The first is *MOSES AMYRAUT*, in a *French Treatise*, entitled, *Considerations on the Laws by which Nature has regulated Marriages*, printed at *Saumur*, Anno 1648. The other is *LAMBERT VELTHUYSEN*, in his *Traſſatus Moralis de naturali Pudore, & dignitate Hominis; in quo agitur de Incestu, Scortatione, Voto cœlibatus, Conjugio, Adulterio, Poligamia, & Divortio*, &c. Tom. I. of his Works, printed at *Rotterdam* in 1680. See also a Dissertation by Mr. *THOMAS*, *De fundamentorum definiendi causas matrimoniales hæcenus receptorum insufficientia*; printed at *Hall in Saxony*, 1698.

2 But why do not near Relations marry? Is it with a View of multiplying Alliances by Inter-marriages? *Quæst. Rom. Quæst. CVIII. p. 289. Tom. II. Edit. Wech.*

3 For a strict Regard has been had for Charity, that Men, to whom Concord is both useful and honourable, might be united by the Tie of a Variety of Friendships; and not that one Man should have several Wives in one Family, but that the Women should be dispersed among several Families for the improvement and strengthening of a social Life. *De Civit. Dei. Lib. XV. Cap. XVI.* This Passage is inserted in the *Canon Law*, *Caus. XXXV. Quæst. I. Can. I.*

PHILO the Jew employs the same Reason, where he speaks of the Marriage of Brothers and Sisters. *Where is the Necessity*, says he, *of restraining mutual Friendships and Intermixtures of People, and confining to the narrow Bounds of one Family a Communication so considerable and beneficial, which is capable of being extended and diffused to Continents, Islands; and even through the whole World?*

For Affinities contracted with Strangers produce new Conjunctions, not inferior to those contracted by Blood. For which Reasons he (MOSES) prohibited many other Marriages between Relations. *De Legib. Specialib. p. 780.* *St. CHRYSOSTOM* reasons in the same Manner, *Why do you streighten the Extent of Love? Why do you uselessly destroy the Foundation of Friendship, from which you might have Occasion to make another Friendship, by marrying a Wife out of another Family?* On *1 Cor. xiii. 13.* *GROTIUS.*

4 If the Deceased left a Brother, he was obliged to marry the Widow. *Deut. xxv. 5.* But in other Cases the Law forbids marrying a Brother-in-Law. *Levit. xviii. 16.*

5 See *DEMOSTHENES'S Orat. ad Leochar.* as also the Rhetorician *CURIUS FORTUNATIUS*, (*Art. Rhet. Schol. Lib. I. p. 49. inter Antiq. Rhet. Latin. Edit. Paris. 1599.*) and *DONATUS*, on *TERENCE, Phormio, Act. I. Scen. II. (v. 75. and Adelp. Act. IV. Scen. V. ver. 17, 18.) GROTIUS.*

6 See our Author's Note on *MATT. i. 16.* and *SAMUEL PETIT. Leg. Attic. Lib. VI. Tit. I.*

7 The Question turns on Inheritance of Lands, and the nearest Relation was obliged to marry such Heiresses. See *Numb. xxxvi. 8.*

8 See *PUFENDORF, B. VI. Chap. I. § 32. Note 2.*

9 *DIGEST. Lib. XXIII. Tit. II. De Ritu Nuptiarum, Leg. XIV. § 3.* *PHILO* the Jew reasons very well on this Subject, when he says, *It is a most enormous Crime to defile a deceased Father's Bed, which ought to be kept untouched, as a Thing sacred: To pay no Respect to the Age and Name of a Mother: To be the Son and Husband of the same Woman, and the Father and Brother of her Children.* *De specialibus Legib. (p. 778.) GROTIUS.*

therefore,

therefore, there is no Room to doubt, are unwarrantable, and *ipſo Faſto* void, be-
 cauſe the Effect of them is attended with a perpetual Crime.

B. I. Ch. I.
 § 10, 11.

3. Nor ought we to be any ways influenced by *Diogenes's* ¹⁰ and *Cryſippus's* Ar-
 gument, which they fetch from Cocks, and other brute Creatures, to prove that
 ſuch Conjunctions are not againſt the Law of Nature. For as we ſaid in the Be-
 ginning of this Work, it is enough to repute a Thing unwarrantable, if it be re-
 pugnant to human Nature. And ſuch is the Conjunction of Parents with Chil-
 dren, which *Paulus* the Lawyer calls ¹¹ *An Inceſt, according to the Law of Na-*
tions: And *Xenophon*, ¹² a Law, which is no leſs a Law, tho' the ¹³ *Persians*
 deſpised it. For that is juſtly termed *Natural*, which, as ¹⁴ *Michael Ephesius* very
 well obſerves, is, τὸ πρὸς πῶς πλείστοις ἢ ἀλλοτρίοις ἢ μετὰ φύσιν ἔχειν, *prac-*
tised by the Generality of ſuch People as are uncorrupted, and live according to
Nature. *Hippodamus* ¹⁵ the *Pythagorean*, called the carnal Conjunctions of a
 Father with his Daughter, or of a Son with his Mother, παρὰ φύσιν ἀμέτρος ὁρ-
 θούρας, ἀναλαχρῆς ὁρμας, ἀνοσιώδους ἡδονάς, *unnatural and immoderate Luſts, un-*
bridled Paſſions, moſt impious Pleaſures. *Lucan* ſpeaking of the *Parthians*, ſays,
 that amongſt them, ¹⁶ *The King, when drunk, does not dread any Sort of Inceſt*
prohibited by the Laws. And preſently after, ¹⁷ *What can we ſuppoſe a Man not*
capable of, who thinks he may lawfully lie with his own Mother? *Dion Pruſeenſis*
 very judiciously aſcribes this Cuſtom of the *Persians* in particular, to their bad Edu-
 cation.

Orat. 20.

4. And here one would be amazed at *Socrates's* ¹⁸ Fancy in *Xenophon*, who in
 ſuch Sort of Marriages can find nothing amiſs but the Inequality of Years; from
 whence, ſays he, will enſue Barrenneſs, or the Children will be ill formed. But if
 this were the only Objection to ſuch a Marriage, it would certainly be neither null
 nor unlawful, no more than between other Perſons whoſe Ages are often as diſpro-
 portionate, as that of a Father and Mother is uſually in Reſpect of their Children,
 when marriageable.

5. But to dwell no longer upon this, let us rather enquire, whether, beſides that
 which we ſaid might be conceived by the Light of Reaſon, there be not in Men,
 whom a bad Education has not ſpoiled, a certain Averſion grafted in their very
 Tempers, ſomething ſhocking, and that makes Nature recoil at the Thoughts of
 mingling with their Parents, or their own Progeny, ſince even ſome Beaſts natu-
 rally ſhew ſuch an Abhorrence. For many have been of this Opinion; and *Arno-*
bius, in his fifth Book againſt the Gentiles, ¹⁹ *What! could Jupiter conceive an*
infamous Paſſion even for his own Mother, and could he not be diverted from ſuch a
criminal Deſire by the Horror which Nature has inſpired not only into Men, but alſo
into ſome Beaſts? There is a notable Story upon this Subject, in *Ariſtotle's Hiſtory*
of Animals, Lib. 9. C. 49. of a Camel and a *Scythian Horſe* ²⁰; and another not
 unlike

¹⁰ See PLUTARCH, *De Stoicorum repugantiis*,
 p. 1044, 1045. Tom. II. Edit. Wech.

¹¹ DIGEST. Lib. XXIII. Tit. II. *De ritu Nup-*
tiarum, Leg. LXVIII. See likewise Lib. XLVIII.
 Tit. V. *Ad Leg. Jul. de Adult. &c.* Leg. XXXVIII.
 § 2.

¹² The Philoſopher ſays he is ſenſible, that *Thoſe*
who offend againſt this Law, violate many others.
Memorabil. Socrat. Lib. IV. Cap. IV. § 20.

¹³ PHILO obſerves, that GOD puniſhed them
 for this Crime with perpetual Wars, and the horri-
 ble Spectacle of Brothers killing one another. (*De*
ſpecial. Leg. p. 779. Edit. Pariſ.) St. JEROME
 attributes the ſame Crime to the *Medes, Indians,*
and Ethiopians. Lib. II. adverſ. Jovinian. (p. 75.
Tom. II. Edit. Baſil.) In the *Andromache* of EU-
 RIPIDES, *Hermione* ſpeaks of this Cuſtom as gene-
 rally eſtabliſhed among the Barbarians; and adds,
 that *They ſpare not the Blood of Perſons the moſt*
dear to them, no Law prohibiting any of thoſe Acts,
 (ver. 173, &c.) GROTIUS.

As to the *Persians*, among whom the *Magi*, in
 particular, approved of and practiſed this Kind of
 Inceſt, See DIOGENES LAERTIUS, *Proœmium*,

§ 7. Edit. Amſt. with the Notes of his Interpre-
 ters: As alſo QUINTUS CURTIUS, Lib. VIII.
 Cap. II. Num. 19. and the Note of PITISCUS on
 that Place; who mentions a great Number of Au-
 thors ſpeaking on the ſame Subject.

¹⁴ MICHAEL EPHEſ, in *Ethic. Nicom. V.*
 10.

¹⁵ Here our Author miſtakes one *Pythagorean*
 for another. This was the Saying of *Hipparchus*,
 as recorded by STOBÆUS, in his *Opuscul. Mytholog.*
Phyſic. Ethic. Amſtel. 1688. p. 670.

¹⁶ *Pharſal. Lib. VIII. ver. 402, &c.*

¹⁷ *Ibid. ver. 409, 410.*

¹⁸ *Memorab. Socrat. Lib. IV. Cap. IV. § 22.*

¹⁹ After having debauched innumerable *Virgins,*
and abuſed Matrons, has Jupiter conceived an infamous
Paſſion, even for his own Mother? &c. Adv. Gen-
 tes, Lib. V. p. 161, 162. Edit. Salmaſ. 1651.

²⁰ PLINY ſpeaks of a Horſe, which, being
 made to leap its Mother, ran away affrighted as
 ſoon as he knew what he had done; and of another
 which in the ſame Caſe fell on the Groom; from
 which the Hiſtorian concludes, that *Even Beaſts*
*have ſome Knowledge of the Degrees of Kind-
 ed.* Hiſt.

unlike it in *Oppianus, Of Hunting, B. 1.* And *Seneca, in his Hippolytus, 21 The very Beasts shun incestuous Commerce, and without knowing the Rules of Duty, by their natural Modesty observe the Laws of Proximity of Blood.*

XIII. 1. The next Question is about all the Degrees of Affinity, and the Degrees of Consanguinity in the Collateral Line, those especially which are particularly mentioned in the xviiith of *Leviticus*. For granting, that these Prohibitions are not derived from the mere Law of Nature, yet do they plainly appear to have their Sanction from an express Order of the Divine Will: Nor is this such an Order as obliges the *Jews* only, but all Mankind, as seems to be very fairly collected from those Words of GOD to *Moses, Defile not yourselves in any of these Things; for in all these the Nations are defiled which I cast out before you. Again, You shall not commit any of these Abominations: For all these Abominations have the Men of the Land done which were before you, and the Land is defiled.*

2. For if the *Canaanites*, and the People about them offended by such Actions, there must have been some Law that prohibited them, ¹ which Law not being purely natural, must needs have been given by GOD, either to them in particular, (which indeed is not very likely, nor do the Words import so much) or to all Mankind; either at the Creation or after the Flood. But now such Laws as were enjoined all Mankind, seem no Ways abolished by CHRIST, but only those, which, like a Partition-Wall, separated the *Jews* from all other People. To which we may add, that *St. Paul* does in very severe Terms express his Abhorrence of the Marriage of the Son-in-Law with his Mother-in-Law, tho' there is no Command of CHRIST relating to that Affair; nor does he himself urge any other Reason, than that such a Mixture was even by Pagans reckoned impure, *It was a Fornication not so much as named amongst the Gentiles.* The Truth of which Assertion, among ² several other Proofs, appears from *Charondas's* Laws, which

XIII. The Marriages of Brothers with Sisters, of a Mother-in-Law with her Son-in-Law, of a Father-in-Law with his Daughter-in-Law, and such other Matches as these, are unwarrantable and void by the positive Law of GOD. Lev. xviii. 24, 26, 27.

Eph. ii. 14.

1 Cor. v. 1.

Hist. Nat. Lib. VIII. Cap. XLII. We find something of the same Nature in *VARRO, De Re Rust. Lib. II. Cap. VII.* in *ANTIGONUS CARYSTIUS, De mirabil. (Cap. LIX.)* and in *ARISTOTLE's* Treatise, which bears the same Title, (p. 1150. *Tom. I. Edit. Paris.*) *GROTIUS*.

But see *SELDEN* on this Question, *De Jure Nat. & Gent. juxta discipl. Ebraeorum, Lib. I. Cap. V. p. 68. Edit. Argentor.*

21 Ver. 914, 915.

XIII. (1) But the critical and well grounded Remark, made by our Author in the following Paragraph, destroys the whole Force of the Consequence here drawn. For if it be once acknowledged, that some of the Things prohibited in this Chapter of *Leviticus*, were not Sins in the *Canaanites*, tho' the general Term *all* is used, when the Question turns on such or such a Degree of Consanguinity or Affinity, if we see nothing in it that renders it unlawful by the Law of Nature, we may reasonably doubt whether it be not one of those which ought to be excepted; so that it cannot thence be inferred, that it was forbidden by a divine, positive, and universal Law; the Publication of such a Law is in itself very difficult, not to say impossible to prove. For an uncertain Tradition doth not to me seem sufficient for obliging Men to receive a Thing, as having the Force of Law. I should rather say, that the Vices of the *Canaanites*, for which *MOSES* declares GOD would punish them, did not consist so much in incestuous Marriages, as in an unbridled Debauchery, which made them transgress almost every Law of Marriage, and put them on satisfying their carnal Desires with the first Persons they met, such as commonly are those with whom one has some Relation or Affinity, and with whom, on that Account, one converses most. Thus the incestuous *Corinthian* had his Father's Wife, 1 Cor. v. 1. not that he was married to his Mother-in-Law, which the

Laws probably did not allow, but because he lived with her as if she had been his Wife, either after his Father's Death, or after she had been divorced. Besides, it is possible that the *Canaanites* might think, no Matter on what Grounds, that Marriage, in most of the Degrees here mentioned, was unlawful, or even prohibited by their Laws; and this was sufficient to render them culpable, and deserving of the Chastisements of the Divine Vengeance, even tho' it be supposed, that some of those Degrees have nothing in themselves which makes Marriage unlawful according to the Law of Nature alone.

2 *TERTULLIAN* supposes it, when he says, *I do not maintain, that, according to the Law of the Creator, a Man is not allowed to have his Father's Wife. Let him in this Case follow the religious Discipline of all Nations.* Adv. Marcion. Lib. V. (Cap. VII.) *GROTIUS*.

The Law of *Charondas*, here mentioned, as the learned *GRONOVIVS* justly observes, did not forbid a Man to marry his Mother-in-Law; but second Marriages, as appears from *DIODORUS SICULUS, Lib. XII. Cap. XII. p. 296. Edit. H. Steph.* It may be added, that our Author himself, in his *Excerpta ex Tragœd. & Comœd. Græcis. p. 918*, has given a good Version of the Law in Question, expressed in Verse by an ancient Poet unknown,

Ὁ πατρὶν ἀνὴρ μητρὶν ἐπεισάγων,
Μὴ ἐνδοκίμεσθω, μήτε μέγχιω λόγῳ
Παρὰ τοῖς πολίταις——

Natis Novercam si quis induxit suis,
Expers honorum vivat atque inglorius
In Civitate——

Let the Man who sets a Mother-in-Law over his
3 E Children,

Orat. pro Clu-
entio. (c. 6.)

Vit. Demetr.
Appian, De
Bello Syriac.

which put a Mark of Infamy upon such a Marriage; and from that Passage in *Lysias's* Oration, *Σωφρονὶς ὁ πάντων ἑχελιώτατος ἀνθρώπων τῇ μητρὶ καὶ τῇ θυγατρὶ*, *That most profligate Wretch lived as Man and Wife with the Mother and her Daughter.* And that of *Cicero*, in a Case not unlike this, is not foreign to the Matter in Hand: For when he had declared how the Mother-in-Law had married her Son-in-Law, he subjoins, *Oh, the incredible Wickedness of the Woman! a Wickedness that no other was ever known to be guilty of.* When King *Seleucas* would fain have given his Wife *Stratonice* to his Son *Antiochus*, he was afraid, as *Plutarch* relates it, lest she should be shocked, *τῷ μὴ νενομισμένῳ*, as at an unlawful Thing. And in *Virgil* we have,

Thalamos ausum incestare Novercæ,

Who stain'd his Step-dame's Bed with impious Lust. Dryden.

Which general Opinion, if not derived from an invincible Impression of the Light of Nature, must needs proceed from an antient Tradition, founded upon some express Command of GOD.

More Nebuchim
l. 3. c. 49.

3. The antient *Hebrews*, who in this Matter are no contemptible Expositors of the Divine Law, and after them *Moses Mainionides*, who has read, and with great Judgment digested all their Writings, say, that there are two Reasons assignable for those Laws, mentioned in the xviiith Chapter of *Leviticus*, about Marriages: The first, A certain natural Modesty, which will not suffer Parents to mingle with their Issue, either in their own Persons, or ³ the Persons of them to whom they are by Blood or Marriage nearly related. And the Second, That the Familiarity and Freedom with which some Persons daily converse together, would give Occasion to Fornications and Adulteries, if such Amours might terminate in a lawful Marriage. If we rightly apply these two Reasons to those Divine Laws in *Leviticus*, which I have mentioned, it will easily appear, that without speaking here of Parents and Children, between whom Marriage is prohibited, in my Opinion, by natural Reason, tho' there were no express Law about it; I say, it will appear, that those who are related by Affinity in the direct Line; ⁴ and also, those who are related by Consanguinity in the first Degree of the collateral Line, which in Reference to the common Stock is usually called the Second, cannot marry together for the first Reason, because of the too lively Image of their common Parent, whom

Children, live without Honour and inglorious among his fellow Citizens. The following Lines contain the Reason of this Censure; on which see PUFENDORF's Reflection, *B. VI. Chap. I. § 7.* as also, for the Manner of reading the Passage, Dr. BENTLEY's Dissertation on PHALARIS's *Epistles*, p. 374, 375. I have found what gave Occasion to this Mistake, STOBÆUS thus expresses the Law of *Charondas*, in Prose, *Ὁ μητρυιάν θησαυμῶν, μὴ ἐνδοξείτω· ἀλλ' ἐνειδιζέσθω. ὥσπερ αἱ καὶ ὦν οὐκ εἰς ἀξιάτης.* *Serm. XLIV.* The first Words literally signify, *A Man who marries a Mother-in-Law.* Whereupon our Author, probably deceived by his Memory, which did not retain the Sequel of the Discourse, imagined the Greek Writer was speaking of a Man who marries his Mother-in-Law; whereas the Sense is, *He who marries a Woman, who thus becomes a Mother-in-Law to his Children by his first Wife;* as *Alester* expresses himself in EURIPIDES,

Καὶ μὴ πατήρης τοῖς δὲ μητρυιάν τέκνοις.

Alester. ver. 305.

Our Author here quotes *LYSIAS* instead of *ANDOCIDES*, who has those very Words, in *Orat. I. p. 235. Edit. Wech. 1619.*

3 *PHILO* the Jew says on this Occasion, *Tho' the Parts are divided, they retain the Right of Fra-*

ternity, and are joined by Relation as a natural Tie. GROTIUS.

The Passage stands thus in the Original, *Ἀδελφὰ δὲ, εἰ καὶ ἀχρεῖα τὰ μέλη γεγονασιν, ἀλλ' οὐν ἀρμόζον τῇ φύσει καὶ συγγενείᾳ μιᾷ.* (*De special. Legib. p. 780.*) I have translated it Word for Word after our Author; but it is easy to perceive that his Version is not exact. Nor do I think *GELENIUS* had rendered it justly, *Germani autem, quamvis Membra disjuncta sunt, natura tamen ac cognatione coaptantur.* *PHILO* is there speaking of the Prohibition of marrying two Sisters, either at the same Time or successively, but both alive together. On which Occasion that Author sets forth the Inconveniencies of the Jealousy and Enmity such a Marriage would occasion between the two Sisters. *It would be,* says he, *as if the Limbs of our Body were torn off and divided; for,* adds he, *tho' the Persons who have a Relation of Brotherhood subsisting between them, are really separated Limbs, they are still united by Nature and Kindred.* This I take to be the Sense of the Passage; which, when thus explained, is not much to the Purpose.

4 The People of *Peru* and *Mexico* abstained from the Marriage of Relations thus far. GROTIUS.

Our Author probably had read this in the Travels of *JOHN DE LERY, Chap. XVII.*

every Child immediately represents. And this is founded on that which if not prescribed by Nature, is at least pointed out to us by the Light of Nature, as more decent than its contrary; as many other Things which make the Subject of Laws both Divine and Human.

4. On this Principle the Rabbins say, that in the Degrees forbidden in the direct Line, some are comprehended that are not mentioned in the Law, but in Regard to which the same Reason manifestly takes Place. The Names of which Relations with them are these, *The Mother's Mother, the Mother's Father's Mother, the Father's Mother, the Father's Father's Mother, the Father's Father's Wife, the Mother's Father's Wife, the Son's Daughter-in-Law, the Son's Son's Daughter-in-Law, the Daughter's Daughter-in-Law, the Son's Daughter's Daughter, the Son's Son's Daughter, the Daughter's Daughter's Daughter, the Daughter's Son's Daughter, the Wife's Son's Daughter's Daughter, the Wife's Daughter's Daughter's Daughter, the Wife's Father's Mother's Mother, the Wife's Mother's Father's Mother*; that is, to speak after the Roman Fashion, all Grandmothers and Great Grandmothers, Mother-in-Law's Mothers, Great Grand-daughters, Son-in-Law's Daughters, Daughter-in-Law's Daughters, Grandsons Wives, Wives Grandmothers; because, under the Title of Relation by the Father's Side is comprized also that by the Mother's, and the second Degree under the first, and the third under the second; beyond which it is scarce possible that any Controversy can arise, for if the Thing were possible, all the following Degrees would be comprehended *in infinitum*.

5. Now the *Hebrews* think that these Laws, and those that prohibit the Marriages of Brothers with Sisters, were given to *Adam*⁵ at the same Time as that Injunction of serving GOD, of administering Justice, of not shedding Blood, of not worshipping false Deities, of not Robbing; but so that these matrimonial Laws should not be in Force 'till Mankind was sufficiently multiplied, which could never have been if, in the Beginning of the World, Brothers had not married their Sisters. Nor do they look upon it at all material, that *Moses*⁶ has said nothing of it in its proper Place; because it was enough that he had tacitly signified it in the Law itself, by condemning foreign Nations upon that very Account; for there are several such Things in the Law, which are not taken Notice of in Order of Time, but as Occasion requires: From whence arises that celebrated Maxim among the Rabbins, that *In the Law there is no such Thing as first or last*; that is, many Things are set down there before or after their Time.

6. *Michael Epheusus*, at the fifth Book⁷ of the *Nicomachia*, has these Words, concerning the Marriage of Brothers and Sisters, τὸν ἀδελφὸν μίσησθαι τῇ ἀδελφῇ, &c. *For a Brother to lie with a Sister, was at the Beginning indeed a Thing altogether indifferent; but now there being an established Law against such Conversations, it is far from being indifferent.* *Diodorus Siculus* calls the forbidding of Brothers and Sisters matching, κοινὸν ἔθος τῶν ἀνθρώπων,⁸ *The common Custom of all Men*: From which Custom however he excepts the *Ægyptians*; and *Dion Prusæensis*, all Barbarians. *Seneca* has written,⁹ *We represent the Gods, as marrying one with another, and that in a criminal Manner, since Brothers amongst them marry their Sisters.* *Plato*, in his eighth Book *De Legibus*, calls such Matches, Μηδαραῶς ὅσια καὶ θεομισῆ,¹⁰ *Unlawful, and detested by GOD.*

See *Cajet.* in *Matt.* xix.

7. All

⁵ But this Tradition of Precepts delivered to *Adam* or *Noah* is very uncertain, as I have already observed elsewhere.

⁶ For neither do we any where find the Law, by Vertue of which *Judah* would have had *Thamar* burnt. *Gen.* xxxviii. 24. Thus *Judith* says the *Shechemites* were justly slain for ravishing a Virgin, *Chap.* ix. 2. and *Jacob* cursed *Reuben* for the Incest he had committed. *Grotius*.

The Law against Adulteresses, like several others, were founded only on the Customs of the *Eastern Nations* in those Times. The Slaughter made by the Sons of *Jacob* among the *Shechemites*, was by no Means a commendable Action; as our Author observes in a Note on the Passage here quoted from

the apocryphal Book. See Mr. *LE CLERC* on the Chapter of *Genesis*, where this History is recorded. And the Sons of *Jacob* did not proceed thus by Vertue of a Law against Ravishers of a Virgin, but merely out of a Spirit of Revenge, which made them join Perfidiousness to the Action. As to *Reuben*, see *Gen.* xxxv. 22. xlix. 4.

⁷ *Cap.* VII.

⁸ It is said the *Ægyptians*, contrary to the common Custom of all Nations, made a Law that Brothers and Sisters should marry, in Imitation of *Isis*. *Lib.* I. *Cap.* XXVII. p. 16. *Edit.* H. *Steph.*

⁹ This Passage is found in a Fragment preserved by *St. AUGUSTIN*, *De Civ. Dei.* *Lib.* VI. *Cap.* X.

¹⁰ *PLATO* adds, καὶ ἀνθρώπων ἀνθρώπων, *And the most*

7. All which evidently proves, that there was an antient Tradition of a divine Law against such Marriages, and therefore we find that they commonly use the Word *Nefas*, (*Crime*) when they speak of them. And that all Brothers and Sisters are included here is plain from the Law itself, " which comprehends those of that Degree as well by the Father's as the Mother's Side, and those whether born and educated at home or abroad.

XIV. *Marriages with Relations of a more distant Degree, do not seem so unwarrantable.*

XIV. 1. Which clear and particular Recital seems to shew the Difference ¹ between these and more distant Degrees: For Example, to marry an Aunt by the Father's Side is forbidden; but to marry a ² Brother's Daughter, where there's the same Degree of Blood, is not forbidden; nay, there are several Instances of this Kind among the Jews. ³ To marry Nieces is to us entirely new, but very usual with other People; nor is it by any Law prohibited, says Tacitus. *Isæus* ⁴, and *Plutarch* ⁵ in the Life of *Lyfias*, observe, that it was allowed of at *Athens*. The Reason

most detestable of all Things. De Legib. Lib. VIII. p. 838. Tom. II. Edit. H. Steph. See my tenth Note on PUFENDORF, B. I. Chap. II. § 6.

11 See the Chaldee Paraphrast on the Text. The Lacedemonians and Athenians made a bad Distinction in this Case, and that in several Manners. GROTIUS.

See SELDEN on this Subject, in *Dē Jure Nat. & Gent. &c.* Lib. V. Cap. XI. p. 627, 628. Edit. Argentor. and PUFENDORF, B. VI. Chap. I. § 34. Note 1, 2. as also SPANHEIM'S Commentary on the Works of JULIAN, p. 89, &c. and my fourth Note on the following Paragraph.

XIV. (1) Our Author's Meaning is, that since the Law is thus particular, as to the several Sorts of Sisters with whom it forbids Marriage, this is a Proof that in those Places where it doth not thus specify such Degrees as have something near those here mentioned, we are not, merely on Account of an Analogy, to extend it to what is not expressed. In Reality, as most of the Things in Question are in themselves indifferent, by the Confession of the most rigid Doctors, the Number of the Degrees expressly prohibited, is so large, that Care should be taken not to multiply them by Conjectures, which are often very slender, which would be laying an unreasonable Restraint on the natural Liberty of Men.

² The Jewish Historian is of Opinion, that Sarah was thus related to Abraham, (*Antiq. Jud. Lib. I. Cap. XII.*) The same Author gives us an Instance of such a Marriage since the Law of MOSES, in the Person of Herod, who married his Niece Mariamne, and promised his Daughter to his Brother Pheroras. See *Antiq. Jud. Lib. XIV. and XVI.* Andromeda had been promised to Phineus, her Uncle. OVID, *Metamorph. Lib. V. (ver. 10.)* Such Marriages were prohibited among the Romans, before the Reign of Claudius. That Emperor allowed of them; Nerva renewed the Prohibition; and Heraclius removed it again. GROTIUS.

Sarah was not Abraham's Niece, but his Sister by the same Father. This is evident from the Patriarch's own Words, *Genesis* xx. 12. on which see Mr. LE CLERC. In SUTTONIUS'S Life of Claudius, Cap. XXVI. And TACITUS, *Annal. Lib. XII. Cap. V. VI. VII.* We find what induced the Emperor Claudius to get a Law passed for allowing a Man to marry his Niece; that is, his Brother's Daughter, for the Permission extended no farther, nor did it take Place in the Provinces of the Roman Empire; as Mr. NOODT proves in his *Observ. Lib. II. Cap. V.* tho' Mr. REYNOLD, Professor at Frankfort on the Oder, has undertaken to refute him on this Subject, in his *Varia. Jur. Civil. Cap. XXII.* Nerva, who, according to XIPHILIN,

(p. 241. Edit. Steph.) by a Law forbid marrying a Niece, ἀδελφιδήν, meant only a Sister's Daughter by that Term; as has been shewn by CUJAS, *Observ. XIII. 16.* and several other learned Interpreters after him. I do not find that Heraclius made any Law about this Matter. That Emperor indeed married Martina; his Brother's Daughter, for his second Wife; as we are assured by ZONORAS, in his Life, Tom. III. CEDRENIUS, p. 335, 354. Edit. Basil. 1566. PAUL DIAC. *Hist. Lib. XVIII. p. 551, &c.* Edit. Basil. 1569. and others.

The Translator of these Notes begs Leave to make a short Observation on the learned Mr. BARBEYRAC'S Assertion; viz. that Sarah was Abraham's Sister by the same Father; which he thinks evident from the very Words of that Patriarch here referred to. As to the Expression itself, *She is the Daughter of my Father, but not the Daughter of my Mother*, it is not necessary it should be taken literally, according to our own Way of speaking; nothing being more common in the Scripture than to call any near Relation Sister; a Grandson or Grand-daughter, Son or Daughter; and a Grandfather, Father. Add to this, that we no where read, that Terah, Abraham's Father, left any Female Issue. JOSEPHUS expressly tells us, that Haran had three Children, Lot, Sarah, and Milcha, *Antiq. Lib. I. Cap. VII.* toward the End. And in the Beginning of Chap. VIII. he calls Lot the Brother of Abraham's Wife, but makes no Mention of Iscab, one of Haran's Daughters, mentioned *Gen. xi. 29.* whence several antient Christian Writers have concluded the same Person meant under the two Names of Iscab and Sarah.

3 *Annal. Lib. XII. Cap. VI. Num. 4.*

4 I find nothing on the Subject in that Orator. It is very probable our Author has put one Name instead of another; for we have a very plain Example of this Kind in DEMOSTHENES'S Oration against Leocrates, where it is related that Midylides proposed marrying his Daughter Clitomache to his Brother Archiades, who declined the Offer, because he was not disposed to marry. p. 671. Edit. Basil. 1572. which evidently supposes such Matches allowable at that Time. The same Orator elsewhere speaks of one who married his Sister's Daughter. *Orat. in Neæran. p. 517.* Nor are we to be surprized, that this Degree was not prohibited at Athens, where a Man was allowed to marry his Father's Sister. See POTTER. *Archeol. Græc. Lib. IV. Cap. XI.* where he likewise observes, that at Lacedemon Marriages with collateral Relations, in the second Degree, were in Use; on which he produces the Example of Anaxandrides, who married his Sister's Daughter, as HERODOTUS relates, *Lib. V. Cap. XXXIX.*

5 He says, that Lyfias married the Daughter of his

Reason that the *Hebrews* alledge for it is this, that young Men often frequent their Grandfathers and Grandmothers Houses, or even live there with their Aunts; but they much seldomer go to their Brothers, nor have they so much Right in their Families. Now if we grant all this, as indeed it is consonant enough to Reason, we must acknowledge, that the Law of not marrying Relations in the direct Line, as well as Sisters, since the Multiplication of Mankind, is perpetual, and universal too, as being founded on natural Decency; insomuch that whatever is done contrary to this Law, is, on Account of the Vice that always subsists, null and void: But the Case is not the same as to Laws concerning other Degrees, since they are rather made to prevent certain Inconveniencies, than to divert Men from a Thing that is in itself dishonest: Besides that, there are other Means of remedying those Inconveniencies.

2. And by the antient Canons, which are called *Apostolical*,⁶ he who married two Sisters one after another, or his Niece; that is, his Brother's or Sister's Daughter, was only incapacitated for the Ministerial Office. Nor is there any Difficulty in answering what we said of the Sin imputed to the *Canaanites*, and the People about them. For the Terms of Scripture, tho' general, may be restrained to the most⁷ considerable Things mentioned in that Chapter, as to Sodomy, Bestiality, Commerce with Father or Mother, or with other Men's Wives; the Turpitude of which Conjunctions is such, in Comparison of the others, that it was to put, as the Rabbins speak, a Barrier to the former, that the Laws were made in Reference to the latter. The Prohibition against marrying two Sisters at once, may be a very just Argument for not understanding of every particular Thing in that Chapter, what is spoken in general Terms; for *Jacob's* Character and Piety, who himself acted contrary to this Prohibition, will not suffer us to believe, that it was formerly laid upon all Mankind. To which we may add, what *Amram*, *Moses's* Father, did; for he, before the Law, married *his Aunt by the Father's Side*, as *Diomedes* and *Iphidamas* amongst the *Greeks*, married their *Aunts by the Mother's Side*; and *Alcinous*, his Brother's Daughter *Arete*; and *Electra* was betrothed to *Castor*, her Uncle by the Mother's Side.

Exod. vi. 20.
Eust. in Iliad. l.
12. v. 224. Id.
in Odyss. l. 7. v.
146.
See Euripides's
Electra, v. 312
313.

3. But yet the primitive Christians were very much in the right of it, who voluntarily observed not only those Laws which were given in common to all Men, but those which were peculiarly designed for the *Hebrew* People: Nay, and extended the Bounds of their Modesty even to some farther Degrees of Relation, that in this Virtue too, as well as in all others, they might excel the *Jews*. And that this was done early, with an universal Consent, appears from the Canons. *St. Austin*, speaking⁸ of Cousin-Germans both by the Father and Mother marrying among Christians, *They*, says he, *seldom practised what the Laws allowed; because tho' the Law of GOD has not forbid it, nor the Law of Man is yet against it; they dreaded, however, a warrantable Action for its Nearness to what is unwarrantable*. Several Princes and States have followed in their Laws these Notions of Modesty: Thus *Theodosius's* Institution⁹ forbids any Cousin-Germans to marry, and

his Brother *Branchylus*. X. Orator. Vit. p. 836. Tom. II. Edit. Wech.

6 In the Latin Version we read a *Cousin-German* (*Consobrina*) instead of a *Niece*. Can. XVIII. but the Greek has ἀδελφίδην, a *Sister's Daughter*.

7 The Generality of the *Jewish* Doctors understood them thus. See SELDEN, *De Jure Nat. & Gent. juxta Hebr.* Lib. V. Cap. XI.

8 *De Civit. Dei*. Lib. XV. Cap. XVI. The Poet *ÆSCHYLUS*, speaking of the *Danaiids*, calls Marriages between Cousin-Germans, *Unlawful Conjunctions*, by which the Race is defiled. (Supplic. p. 309, 315. Edit. H. Steph.) But the Scholiast adds, (in his Observations on the former of those Passages) that they were unlawful, because the Fathers of the Virgins were alive; as if they would have been lawful after their Death, by Vertue of the Law concerning sole Heiresses. *LIVY* makes *Spurius Ligustinus*, a Roman Citizen, say, *He had*

married his Father's Brother's Daughter. (Lib. XLII. Cap. XXXIV. Num. 3.) See also *PLAUTUS*, *Pænul.* (Act. V. Scen. III. ver. 37.) *GROTIUS*.

9 This we learn from *AURELIUS VICTOR*, who tells us, that Prince had so great a Regard for Modesty and Chastity, that he prohibited the Marriages of Cousin-Germans, on the same Foot with those of Sisters. (De Vit. & Morib. Imp. Rom. Cap. XLVIII. Num. 10. Edit. Pitisc.) *LIBANIUS* also mentions this Law. *Orat. de Angariis*. We have in the *Theodosian Code*, a like Law, made by *Aradius* and *Honorius*, Lib. III. Tit. XII. De Incest. Nupt. Leg. III. It is well known, however, that the Emperor granted a Dispensation for such Marriages; as appears from another Law in the same Code, Lib. III. Tit. X. *Si Nuptiæ in Rescripto petantur*, Leg. unic. The Kings of the *Goths* reserved to themselves the Right of dispensing in such a Degree as we see in *CASSIODORUS*, who gives the

and is highly commended by St. *Ambrose*, as a Regulation of great Sanctity and Piety.

4. But we must at the same Time observe, that what an human Law forbids to be done, when done, is ¹⁰ not therefore invalid, unless the Law adds this Clause too, and expressly declares it void. ¹¹ By the LXth Canon of the Council of *Elberis*, if any Man, after the Decease of his Wife, marries her ¹² Sister, and she be a Christian, he is excluded from the Sacrament five Years; which evidently supposes that the Marriage Engagement still stands good. And as we just now said, by the Canons called *Apostolical*, he who married two Sisters, or his Brother's Daughter, was only rendered incapable of Orders.

XV. There may be some very warrantable Matches which yet maybe termed by the Law Concubinage.

XV. 1. But to go on to other Matters, we must observe, that there is a Sort of ¹ Concubinage, which is indeed a real and valid Marriage, tho' it may not have some of those Effects that are peculiar to the Civil Right, or perhaps, may lose some natural Effects by an Obstruction from the Civil Law. Thus, for Instance, the Commerce of a Man and Woman Slave, according to the *Roman Law*, was called *Contubernium*, ² Cohabitation, not Matrimony; tho' in such a Society there is nothing essential to a Marriage wanting; and therefore in the antient Canons it was expressly termed, *γάμος*, Marriage. So the Commerce between a Freeman and a Woman Slave, is called not Marriage but Concubinage; and afterwards that Name was given by Analogy to the Union of other Persons of a different Condition; as at *Athens*, when a Citizen espoused a Foreigner, their Children passed for Bastards, as appears from some Passages of *Aristophanes* ³ and *Ælian* ⁴. *Servius* ⁵ upon that Verse of *Virgil*,

Suppositos de Matre Nothos furata creavit.

expounds the Word *Nothos*, of mean and obscure Extraction by the Mother's Side.

the Form of the Dispensation, *Var. Lib. VII. Ep. XLVI. GROTIUS.*

In the *Justinian Code* we find a Law made by *Arcadius* and *Honorius*, which revokes the Prohibition of Marriages between Cousin - Germans, which had been confirmed by those Emperors in the first Year of their Reign, *Lib. V. Tit. IV. De Nuptiis. Leg. XIX.* See *THEODORE DE MARCILLY*, on the *Institutes*, *Lib. I. Tit. X. § 4.* and that excellent Interpreter of the *Theodosian Code*, *JAMES GODEFROY*, on the Laws quoted by our Author.

¹⁰ The Council of *AGDE*, after an Enumeration of prohibited Marriages, and, among others, that of a Man with his Brother's Widow, adds, *Which we at present prohibit, in such a Manner as not to dissolve those already contracted.* This Decision is inserted in the *Canon Law*, *Caus. XXXV. Quæst. II. III. Can. VIII.* Thus the Lawyer *PAUL* observes, that *Tho' the Law forbids Contracts of Matrimony without the Consent of the Father, such Contracts, when made, are not dissolved.* *Recept. Sentent. Lib. II. Tit. XIX. § 2.* Except it may be said, that the last Words are an Addition of *Anianus*. *TERTULLIAN*, speaking of Marriages contracted, with Persons, not Christians, says, *The LORD rather requires that such Marriages should not be contracted, than that they should be dissolved.* *Lib. II. ad Uxorem. (Cap. II. See § 16. of this Chapter).* *GROTIUS.*

In Regard to Marriages contracted without the Consent of the Fathers, see my fourth Note on *B. I. Chap. III. § 4.*

¹¹ In the first Edition we have the Addition of these Words, *And even tho' it doth, the Nullity regards only the Acts of such as are subject to the Law, that it may lay a Constraint on them; for the Power of annulling is a Sort of Constraint.* As the Paragraph ended with these Words, it is very probable that the Printers having copied the Examples of the

two preceding Periods, which are an Addition that the Author had undoubtedly written in the Margin, passed on to the following Paragraph.

¹² Because the Canons decree the same Thing in Regard to two Sisters, as they do in Regard to two Brothers. *Lex Longob. Lib. II. Cap. VIII. 13. GROTIUS.*

XV. (1) See *PUFENDORF, B. VI. Chap. I. § the last*; and a Dissertation by Mr. *THOMASIVS, De Concubinato*, printed at *Hall* in 1713.

² *Contubernium.* (See also *B. I. Chap. III. § 4.*) The Cohabitation of Slaves was however called a Marriage in *Greece*, at *Carthage*, and in *Apulia*. See *PLAUTUS*, in the Prologue to the *Casina*. It is allowed the same Appellation in the Laws of the *Lombards*, *Lib. II. Tit. XII. 10.* and *XIII. 3.* as also in the *Salic Law*, *Tit. XIV. § 11.* But among the *Jews* such Marriages were not good and valid, but when the Master consented to them; as is observed by the *Rabbies*, on *Exodus xxi.* where they are mentioned. The same Regulation obtained among the *Greek Christians*, as it appears from *St. BASIL's Canons*. We see also in *CASSIODORE*, that those who were desirous of marrying a Woman of a Condition inferior to themselves, commonly asked the Prince's Leave for so doing. *Var. Lib. VII. Cap. XL. GROTIUS.*

³ In the Comedy of the *Birds*, where *Pisphaterus* calls *Hercules* a Bastard (*νόθος*) because he was born of a foreign Woman, ver. 1649, 1650.

⁴ He produces the Law made by *Pericles*, the *Athenian General*, by which *All such as were not born of a Father and Mother, both Citizens, should be excluded from the Government of the Commonwealth*: And adds, that *Pericles himself suffered by this Law, for, his two legitimate Sons being dead, he had only Bastards remaining.* *Var. Hist. Lib. VI. Cap. X.*

⁵ On *Æneid VII. 284.*

2. Now as in the State of Nature there might be a real and true Marriage between such Persons as we have been speaking of, if the Woman was under the Husband's Protection and had promised him Fidelity: So also in a State of Christianity, that of a Man and Woman Servant, or of a Freeman and a Slave, will be a true Marriage; and much more that of a Citizen and a Foreigner, of a Senator and a free Woman, provided that there is, besides, what the Divine Christian Law requires, *viz. An indissoluble Union of one Man with one Woman*; this, I say, will be a true Marriage, tho' some Advantages of the Civil Law do not accompany it, or, if they would of themselves, are hindered by this Law. And 'tis in this Sense, that we must take these Words of the first Council of Toledo: *6 As for him who has no Wife, but 7 a Concubine instead of a Wife, let him not be refused the Communion; provided however, that he be contented with this one Woman, whether Wife or Concubine, as he pleases.* To which you may add a Passage in St. Clement's Institutions, B. viii. Chap. xxxii. And to our present Purpose it is, that Theodosius and Valentinian *8* call some Sort of Concubinage an *unequal Marriage*, and that from thence it is said *9* a Charge of Adultery may also arise.

See Decretal, l. 4. tit. 9. De Conjugio Servorum, c. 1.

XVI. 1. But besides, tho' a merely human Law prohibits the contracting of Marriages between some particular Persons, it will not therefore follow that such a Marriage, if it be actually contracted, is void. For to forbid, and to invalidate, are quite different Things; the Effect of a Prohibition may be reduced to a Punishment, either arbitrary, or determined by the Law. And this Sort of Laws which forbid the doing of a Thing, but don't disannul it when done, Ulpian *1* calls *imperfect*. Such was the Cincian Law, which forbade to give above a certain Sum, but did not make void the Gift which exceeded that Sum.

XVI. Some unlawful Marriages may yet be valid.

6 Cap. XVII. This is inserted in the Canon Law, Distinct XXXIV. Cap. IV. And the Council, from which it is quoted, was held in the Year CCCC: See the third and last Memoir in Favour of the legitimated Princes of France, in Tome IV. of *The General Collection of Pieces relating to the Affair of the legitimate and legitimated Princes*. p. 30, &c. where it is shewn that it was only before the fifth Century, that the Word Concubine was sometimes taken for a Woman with whom a Man might live with Security of Conscience, tho' he was not solemnly married to her; and thus their Children were not civilly legitimate.

7 St. AUGUSTIN makes it a Doubt, whether a Concubine, if she has promised to know no other Man, and is dismissed by the Person to whom she was subject, ought not to be admitted to Baptism. De Fide & Operib. (Cap. XIX.) The same Father elsewhere proposes this Question, *Whether, when a Man and a Woman have carnal Conversation together, not being Husband and Wife, and this without any Design of having Children; but only for satisfying their Desires, after a mutual Engagement not to take the same Liberty with others, this Contract may not be called Matrimony?* To which he replies, that *It may be termed Marriage, without any Absurdity, if they have agreed to remain in that State till the Death of one of the Parties; and if, tho' they did not enter into it for the Sake of propagating their Species, they have neither avoided it, nor by any evil Artifice hindered the Birth of such Propagation.* De Bono Conjugali. Cap. V. For this Reason, in the Capitularies of the Kings of France it is said, that *A married Man may not have a Concubine, lest his Love for the Concubine draw his Affections from his Wife.* Lib. VII. Cap. CCI.V. GROTIUS.

8 Code, Lib. V. Tit. XXVII. De natural. Libris, Leg. III. The Lawyer PAUL says the whole Difference between a lawful Wife and a Concubine, consists in the Degree of Affection; and therefore, *A Man is not allowed to have a Wife and a Concubine at the same Time.* Recept. Sent.

Lib. II. Tit. XX. § 1: See Mr. SCHULTING; and CUIJAS, on the Title of the Code, De Concubinis, v. 26. with Mr. FABROT's Notes.

9 The Person to whom she was Concubine, might accuse her by the Right of a Stranger, not by that of a Husband. Digest. Lib. XLVIII. Tit. V. Ad Leg. Jul. de Adulteriis, &c. Leg. XIII. See the President BRISSON's Treatise, Ad Leg. Jul. de Adult. p. 232, 233. Edit. Antwerp. 1585. The Law was the same in Regard to a Foreigner married to a Roman Citizen; as appears from a Fragment of PAPIAN, Collat. Leg. Mos. & Rom. Tit. IV. § 5. See Mr. SCHULTING on this Question.

XVI. (1) Institut. Tit. I. § 1. The Valerian Law forbid the Execution, or Whipping of such as appealed to the People; but decreed no other Penalty for those who violated that Law, than that of declaring them guilty of a bad Action. LIVY is of Opinion, that Sentiments of Honour and Probity had in those Days so strong an Influence on the Minds of Men, that a bare Declaration of that Nature seemed sufficient for preventing the Violation of the Law. (Lib. X. Cap. IX. Num. 5, 6.) The Furian Law prohibited the receiving of any Legacy or Gift on the Account of Death, exceeding a certain Sum (about 200 Crowns) plus quam mille Assum, some Persons excepted; and whoever took above that Value, was fined four Times the said Sum. ULPIAN, as above-quoted, § 2. MACROBIUS defines an imperfect Law, that which orders no Penalty for the Transgressors. In Somn. Scip. (Lib. II. Cap. XVII.) By a Rescript of the Emperor MARCUS ANTONINUS, it is declared, that *If an Heir hinders the Person named to that Purpose by the Testator, from Burying the Deceased, he doth ill; but then no Penalty was decreed against him.* (Digest. Lib. XI. Tit. VII. De Religiosis & Sumptibus funerum, Leg. XIV. § 14.) GROTIUS.

See PUFENDORF, B. I. Chap. VI. § 14. with the Notes; as also FRIDER BRUMMERI, Comment. ad Leg. Cinciam. Cap. III.

2. We know indeed that it was afterwards enacted by *Theodosius*, ² that in Case a Law only prohibited a Thing, and did not precisely add, that whatever was done contrary to that Law should be null and void; yet if the Affair came into Court, whatever was done should be declared, to all Intents and Purposes, as null and void, as if it never had been done. But this Extension of the Power of the Laws did not proceed from the proper and natural Force of Prohibitions: It was the Effect of a particular Law newly established, which other People were no Ways obliged to observe. And indeed, there is oftentimes more Indecency in the Act than in its Consequences, and the Inconveniencies ³ that follow the Recision of such an Act, are also frequently greater than the Indecency or Inconvenience of the Act itself.

XVII. The Right and Authority in all Sorts of Societies, is in the Majority.

Victor, de potestate civili. n. 14.

XVII. Besides this most natural Society, there are several other, both publick and private; and the publick are either *between a People and the Assembly or Person who governs them*, or *composed of several Nations*. But all of them have this in common to them, that in Matters for which each Association was instituted, the whole Body, or the major Part in the Name of the whole Body, oblige all and every the particular Members of the Society.¹ For it is certainly to be presumed, that those who enter into a Society are willing that there should be some Method fixed of deciding Affairs; but it is altogether unreasonable, that a greater Number should be governed by a less; and therefore, tho' there were no ² Contracts or Laws that regulate the Manner of determining Affairs, the ³ Majority would naturally have the Right and Authority of the Whole. *Thucydides* says, *κέρρον εἶναι ὅ, τι ἂν τὸ πλεονέκτημα ψηφίσῃ*, ⁴ *What the Majority Vote, must stand good*. *Appian*, *ἔστι δ' ἐν τε χειροτονίαις, καὶ δίκαις αἰεὶ τὸ πλεονεκτήσιμον*, ⁵ *In Elections and Judgments, the Plurality of Voices always carries it*. So *Dionysius Halicarnassensis*, *ὅ, τι ἂν δόξῃ πῶς πλείοσι τῶν νομῶν*, ⁶ *What the major Part approve of, must prevail*. And in another Place, *ὅ, τι δ' ἂν οἱ πλείους ψηφοὶ καθαιρώσι τῶν νόμων*, *What the Plurality of Voices shall repeal we must submit to*. And again, *ὅ, τι ἂν αἱ πλείους γνώμαι καθαιρώσι, τῶν νόμων εἶναι κέρρον*, *What the Majority of Opinions declare to be null and void, that must be so in Fact and Law*. So *Aristotle*, *κέρρον τὸ πῶς πλείοσι δόξαν*, ⁷ *The Opinion of the major Part is valid*. And *Curtius*, B. x. ⁸ *Let us stand to what the Majority have determined*. *Prudentius* says,

*In Paucis jam deficiente Caterva
Nec Persona sita est Patriæ nec Curia constat.*

² *Code*, Lib. I. Tit. XIV. *De Legibus*, &c. Leg. V. Some Doctors are of Opinion, that the Rule is not without Exception, even since this Constitution of the Emperors. See *Vinnius*, in his *Selectæ Juris Quæstiones*, Lib. I. Cap. I. To whom Mr. *Schulting* likewise refers, in his Explanation of the first Part of the *Digest*. Lib. I. Tit. III. § 8.

³ For this Reason *Alcinous*, King of the *Pheacians*, being made Arbitrator between the Inhabitants of *Colchis*, and the *Argonauts*, determined that *If Medea had lain with Jason, she should not be restored to her Father; but if she was still a Virgin, she should be sent back to him*. *Apollo-dorus*, *Bibliothec.* (Lib. I. Cap. IX. § 25. *Edit. Paris, Gal.*) See also *Apollonius*, in *Argonaut*, and his Scholiast. *Grotius*.

XVII. (1) On this Question, see *Pufendorf*, B. VII. Chap. II. § 15, &c. And our Author's Treatise, *De Imperio summarum potestatum circa sacra*, Cap. IV. § 6. As also *Boecler's* Dissertation, *De calculo Minervæ*. Tom. I. p. 226. &c.

² Thus, according to the Canon Law, if the Conclave is not unanimous, and two Parts agreeing in their Votes, the third will not agree with them, or presumes to name another Person: He, who shall

be elected and received by two Thirds of the Cardinals, is, without any Exception, to be accounted Pope by the universal Church. *Decretals*, Lib. I. Tit. VI. *De Electione & Electi Potestate*. Cap. VI. *Grotius*.

³ Thus the *Chaldee* Paraphrast, and the Rabbies understand what is said, *Exod. xxiii. 2, 3*: [But consult Mr. *Le Clerc* on that Text.] See *Digest*. Lib. XLII. Tit. I. *De re judicatâ*, &c. Leg. XXXVI. and XXXIX. and what I shall say, B. III. Chap. XX. § 4. *Grotius*.

⁴ Lib. V. Cap. XXX. *Edit. Oxon.*

⁵ I do not find those Words in *Appian's* History; nor have I the *Excerpta Legationum* in my Hands, to see whether they are taken from that Collection.

⁶ *Antiq. Rom.* Lib. II. Cap. XIII. p. 85. *Edit. Oxon.* (87 *Edit. Sylb.*) and Lib. VII. Cap. XXXVI. p. 428. (445 *Sylb.*) It is just, says he in another Place, that each Man should propose what he thinks will be to the Advantage of the Publick; and then submit to what shall be resolved by a Plurality of Voices, Lib. XI. Cap. LVI. p. 695, 696. (731 *Sylb.*)

⁷ *Polit.* Lib. IV. Cap. VIII. p. 372. See also Lib. VI. Cap. II. p. 414. *Edit. Paris.*

⁸ Lib. X. Cap. VI. Num. 15.

⁹ that,

⁹ that, *A small Number of People do not represent the State nor the Senate.* And a little afterwards,

*Infirma Minoris
Vox cedat Numeri parvæque in parte quiescat.*

that, *Their Suffrage ought to yield to that of the greater Number.* And in *Xenophon*¹⁰ you have this Expression, *ἐκ τῆς νικώσης πλείονος πάντων, We must do all Things in Conformity to the prevailing Opinion.*

XVIII. But if the Votes were equal, nothing could be determined, because there is not Weight enough to turn the Scale of the Affair one Way or other; upon which Account it is, that¹ when the Yea's and No's are equal, the Defendant is supposed to be acquitted. And this Right of Discharge the Greeks, from the Story of *Orestes*, call² *Minerva's Suffrage*: You have this Matter display'd in *Æschylus's Furies*, and in *Euripides's*³ *Tragedies of Orestes and Electra*. By the same Reason the Possessor, in that Case, is maintained in Possession of the Thing contested; as is very well observed⁴ by the Author of the Problems ascribed to *Aristotle*, Sect. xxix. In one of his Controversies *Seneca* expresses himself thus, *One Judge condemns and another acquits, in such a Difference of Opinions the milder Sentence should carry it.* It is here as in a Syllogism, where the Conclusion follows the weaker Part of the Premisses.

XVIII. What Opinion ought to prevail when the Number of Votes is equal.

XIX. But here a Question does commonly arise about joining or dividing Opinions: And if we would judge of this by the mere Law of Nature; that is, independently of every Agreement or particular Law that regulates the Method to be taken in that Case, we should distinguish between the Opinions that differ in the Whole, and those whereof one includes a Part of the other.¹ The latter ought to be

XIX. What Opinions are to be divided, what to be joined.

⁹ (*In Symmach. Lib. I. ver. 599, 600, 607, 608.*) St. AMBROSE says the same in his Epistle against *Symmachus*. GROTIUS.

¹⁰ *De Exped. Cyri. Lib. VI. Cap. I. § 11. Ed. Oxon.*

XVIII. (1) This is decided by the Roman Law, in the following Words, *If on a Division, the Number of Voices is equal, in Causes touching Liberty, (according to the Decree of the Emperor Pius) the Decision is given in favour of Liberty; but in other Causes for the Defendant, which ought to take Place also in publick Judgments.* Decret. Lib. XLII. Tit. I. *De Re Judicatâ, &c. Leg. XXXVIII.* SENECA says, *One Judge condemns a Man, the other clears him; in a Division of Opinions, let that prevail which shews more Mercy.* Controvers. (Lib. I. Controv. V.) A little after, he observes, that *Power is not odious, when it becomes superior by Mercy.* See what the Emperor JULIAN says in Commendation of *Eusebia*. (Orat. III. p. 115. Edit. Spanh.) Even among the Jews, a Criminal was not reckoned condemned, when the Number of Judges who declared him innocent, was less only by one Voice; as the *Chaldee Paraphrast* assures us, on *Exod. xxiii. 2, 3.* Rabbi MOSES DE KOTZKI says the same, *Præcept. jubent. XCVIII. & vetant. CXCV.* GROTIUS.

ZIEGLER observes here, that this takes Place chiefly in criminal Cases, where the Court ought to incline to the more merciful Side; but that in civil Affairs, the President or Dean of the Assembly sometimes turns the Scales, which, he tells us, is the Practice in *Portugal*, and in the Senate of *Piedmont*. On this Occasion he quotes ANTHONY DE GAMMA, *Decif. I. Num. 12.* And ANTHONY TE-SAURO, *Decif. I. Num. 13.* I know that in the Canton of *Berne* in *Switzerland*, the Magistrates have by this Means prevented this Inconveniency of Equality of Votes in all Sorts of Causes.

² See on this Subject BOECLER's Dissertation already quoted, and the learned GRONOVIVS's Oration on the *Royal Law*, p. 41. &c. of the French Translation, published in the second Edition of Mr. NOODT's Discourses *On the Power of Sovereigns, &c.* in 1714.

³ In the *Electra*, *Castor* and *Pollux* speak thus, *This shall be a Law for the future, that the Defendant be discharged when the Judges are equally divided in their Opinions.* (ver. 1267, 1268). See also his *Iphigenia*, (ver. 1470). GROTIUS.

To which join what SPANHEIM says on the *Frogs* of ARISTOPHANES, ver. 697.

⁴ *Problem. Sect. XXIX. Num. 13. p. 813. Tom. II. Edit. Paris.*

XIX. (1) For which Reason, in the Roman Senate, when any one had given his Vote, so as to include several Things, he was ordered to divide his Opinion, as we are informed by ASCONIUS, the Grammarian. In *Orat. Cic. pro Milone*. (Cap. VI.) We have an Instance of this Manner of proceeding in one of CICERO's Epistles. In the Affair of King *Ptolomey*, the House was divided, *Bibulus* proposed naming three *Embassadors* for conducting that Prince into his Dominions. *Hortensius* was of Opinion that *Lentulus* should perform this, but without an Army. *Volcatius* was for giving that Commission to *Pompey*. Whereupon it was required, that the Members should vote separately on the two Branches of *Bibulus's* Opinion. He pretended that, according to the *Sibylline Verses*, the King ought not to be re-established with an Army; this passed the more easily, because there was no Possibility of resisting the Motion; but in Regard to the three *Embassadors*, great Numbers voted against him. *Ad Familiar. Lib. I. Ep. II.* SENECA applies this Custom to philosophical Opinions, which one approves of only in part. *I am of Opinion*, says he, *that what is*

practised

be joined as to what they have in common, but the former cannot. If, for Example, some fine a Man twenty (Pounds), and others ten; the Fine must be reduced to ten, against the Opinion that acquits. But if some of the Judges condemn a Criminal to Death, and others to Banishment; these two Opinions ought not to be united together against that which acquits, because they are two Things altogether different, Death not including Banishment. No more can they who would acquit him, unite ² with those who are for banishing him; because, tho' they both agree not to take away his Life, yet this is not what their Opinion does directly import, but is only a Consequence drawn from it: But he who is for having a Man banished is far from acquitting him: And therefore *Pliny*, when such an Affair fell out in the Senate, ³ did very well observe, that the two Opinions were so opposite, that it was impossible to make them compatible together; and that it signified very little that the Voters all rejected the same Thing, since they did not all approve the same Thing. And *Polybius* ⁴ takes Notice, that *Postumius*, the *Prætor*, was guilty of a great Piece of Injustice, when, in summing up the Votes, he joined those who condemned the captive *Greeks*, and those who were for detaining them some Time, against those who were for discharging them immediately. There is a Question of this Nature in *Gellius*, B. ix. and in *Curius Fortunatianus*, in a Place where he treats *Of the Proportion of Quantities*: And in *Quintilian*, the Father, in his 365th Controversy. The Author last mentioned, declares against joining the Opinion of two Judges who condemned to Banishment, with that of two others who voted a Mark of Infamy, against three who condemned to Death.

XX. *The Right of the absent devolves on those who are present*
L. 3. contr. 10.

XX. Now to this we may add; that if any, by Reason of Absence, or any other Obstruction, are incapable of making Use of their own Right, that Right, for the Time being, devolves on those who are present; which *Seneca* maintains, in one of his Controversies, ¹ *Supposing yourself a Slave to two Masters, to whom you belong in common, (one of them being absent) you must serve the Master ² who is present.*

XXI. *What Rank is to be observed amongst Equals, even if they be crown'd Heads.*

XXI. As to ¹ the Rank naturally to be observed among the Members of a Society, it is according as every Man entered into it. So among Brothers, the Rule is for the ² eldest to take Place of the rest; and so on, without any Regard to other Qualifications: For, as *Aristotle* says, ἵσοι γὰρ (οἱ ἀδελφοὶ) πλὴν ἐφ' ὅσον ἢ ἡλικί-

practised in the Senate, ought to be done in Philosophy. When any Man has delivered his Sentiments, part of which I like, I order the Opinion to be divided, and then follow what I approve of. Epist.

XXI. *I also have a Right to deliver my Opinion, I will therefore follow one, and order another to divide his Opinion.* De Vita Beatâ, Cap. III. See likewise *PLINY* the younger, Lib. VIII. Epist. XIV. (Num. 15. Edit. Cellar.) *GROTIUS*.

² A celebrated Lawyer of *Friesland* does not agree with our Author in this Point. He requires that Regard be had to the Intention of the Opinions, rather than to the Nature of the Things declared. On this Foot, says he, those who absolve, would chuse rather to join those who are for banishing the Criminal, how innocent soever they themselves may believe him, than to suffer Sentence of Death to pass on him; and in Case of a Doubt, we ought always to incline to the most merciful Side. *ULRIC HUBER*, De Jure Civitatis, Lib. III. Sect. II. Cap. VI. Num. 5, 6. See the *Paræmiæ Juris Germ.* by the late Mr. *HERTIUS*, Lib. III. Cap. VIII. § 3. & ult. As also the late Mr. *COCCEIUS*'s Dissertation, De eo quod justum est circa numerum suffragiorum. Sect. III.

³ Lib. VIII. Epist. XIV. Num. 13, 14.

⁴ Excerpt. Leg. CXXIX. p. 1331. Edit. Amst. See *FULVIUS URSINUS*'s Note on the Place.

XX. (1) The Case is not exactly the same, as is evident; but it may serve for a Comparison.

² The Case is thus decided in the *Roman Law*, If the whole Number is reduced to one Person, it is

rather allowed that he may act alone; since the Right of all devolves to one Man, and the Name of the whole Body remains. *DIGEST. Lib. III. Tit. IV. Quod cujusque universit. nomine, &c. Leg. VII. § 2.* See *WESEMBEC* on the Passage; and *Lib. II. Tit. XIV. De Pactis, Leg. X. ZASIUS in Paratit. DIGEST. De Pactis. BARTOL. in Leg. I. § 3. De Albo Scribendo. BOER, Decis. I. Num. 4. ANTHONY FABER, Cod. Sab. Lib. I. Tit. III. Defin. 40. REINKING, Lib. I. Cl. V. Cap. VIII. But in this, as in the Rule concerning the major Part, the Laws often make an Exception, and require two Thirds should be present. *Leg. nulli. 3. DIGEST. Tit. Quod cujusque universit. nom. Leg. nominat. XLVI. C. De Decurionibus.* By the Canon Law the absent may depute some of those present to act for them. *Decret. in VI. Lib. I. Tit. VI. De Electione, &c. Cap. XLVI. GROTIUS.**

XXI. (1) Concerning the Right of Precedency, see M. ANTONY NATTA, *Consil. DC. Num. 22. and Consil. DCLXXVIII. Num. 31.* MARTIN WACHER, *Consil. Cæsar. in Controversia Saxonicâ. GROTIUS.*

See a Treatise written by JAMES GODEFROY, *De Jure Præcedentiæ*, second Edition, with large Additions, printed at Geneva, in 1664. *PUFENDORF* has since treated this Subject at large, B. VIII. Chap. IV. § 15. &c.

² *Ethic. Nicom. Lib. VIII. Cap. XII. pag. 111.*

αἱς ἀλλήλοις, *They are equal*, (that is, Brothers) *except only as they differ in Age.* Theodosius and Valens, in a Constitution regulating the Rank each Consul ought to keep, very pertinently ask, ³ *When Persons are of one and the same Quality, and in one and the same Post, who should have the Precedence, but he who was first advanced to that Dignity?* And therefore it was the antient Custom among Christian Kings and States, for those who had first embraced Christianity, to precede the rest ⁴ in all Councils, where the Affairs of Christianity were managed.

XXII. But here we must subjoin, that when a Society is founded on a Thing which all do not equally partake of; as for Instance, if in an Estate, or a Piece of Ground, one has a Moiety, another a third Part, another a fourth; in this Case we must not only let them take Place according to every Man's Share, but also consider their Votes with Regard to that Share; that is, *Mensoria proportionē*, as the Mathematicians call it, in a Geometrical Proportion. And as this is highly consonant to natural Equity, so was it also approved of by the ¹ Roman Laws. Thus Strabo ² relates, that when *Libyca*, and three other neighbouring Cities, were made, as it were, one Corporation, it was agreed that they should have one Vote a-piece, *Libyca* two, because this contributed much more to the Advantage of the Community than the rest. The same Author ³ tells us too, that in *Lycia* there were twenty-three confederate Cities, some of which were entitled to three Voices, ⁴ some to two, some to one only, and in Proportion to this, bore the Taxes and Expence of the Publick. But, as *Aristotle* very well observes, ⁵ this will be reasonable only, εἰ κτήματα χάριν κοινωνίᾳ, *When they are associated on the Account of Goods and Possessions.*

XXII. In Societies founded upon a certain Thing, the Votes are to be considered with Regard to every one's Share in that Thing. Dig. l. 2. tit. 14. De Pactis, leg. 8. l. 16. tit. 3. Depositi vel contra, leg. 14. l. 42. tit. 5. De rebus Auctorit. Jud. &c. leg. 16.

XXIII. The Union of many Heads of Families into one People or State, gives such a Body of Men the greatest Power over its Members, because this is the ¹ most perfect of all Societies: Nor is there any outward Act done by any Person, which does not either by itself, or by some Circumstances or other, refer to this Society. And this is what *Aristotle* means, when he says, τὰς νόμους ἀπορρέουσιν ἀπ' αὐτῶν, ² *That the Laws prescribe concerning all Sorts of Things.*

XXIII. The Power of a State over its Subjects.

XXIV. 1. And here it is usual to enquire, ¹ whether Subjects may go out ² of the State they belong to, without obtaining Leave for so doing. We know there are

XXIV. Whether Subjects may leave the State they belong to, explained by a Distinction.

³ Code, Lib. XII. Tit. III. De Consulibus, &c. Leg. I. See also Tit. VIII. Ut Dignitatum ordo servetur, Leg. II. Tit. XLIV. De Tironibus, Leg. III. and Digest. Lib. L. Tit. III. De Albo Scribendo, and Tit. VI. De Jure immunitatis, Leg. V. GROTIUS.

⁴ See JOHN FICE, Conf. Latino. LXXVII. Num. 16. AFFLICTUS, Decis Neapolit. I. Num. 8. BARTOL. in Leg. I. DIGEST. De Albo Scrib. INNOCENTIVS, in C. Tua. De Majoritate & Obbedientiā. ANTHONY TESSAURUS I. Quæst. for. XLVIII. Num. 5. TIBERIUS DECIANUS, Resp. XIX. Num. 183, &c. INNOCENTIVS BUTR. FELIN, in C. Statuimus, Tit. De Majoritate, &c. BALDUS, in Decernimus, in 2. Notabili. C. De sacro sanctis Eccles. But above all consult ÆNEAS SYLVIVS, in his History of the Council of Basil. GROTIUS.

XXII. (1) The Laws quoted by our Author in the Margin, do not speak of the Rank of Persons, nor of the Weight of their Opinions; but only of the Share each Man ought to have in the Thing to which they have a Right in common.

² Geograph. Lib. XIII. p. 936. Edit. Amst. (631, Paris.) The Author, or the Printers, had put *Libyca* instead of *Cibyra*, as it is in STRABO, Κίβυρα; which Fault appears in all the Editions of this Work, published since the Addition of these Examples, which were not in the first, till mine, which was published at the Beginning of 1720.

³ Lib. XIV. p. 980. Edit. Amst. (665, Paris.)

⁴ Thus in the Treaty of Smalcald, the Elector of Saxony had two Votes. GROTIUS.

This Regulation was made in 1535, when the League was renewed for ten Years; and each of the Confederates had a Right of Voting on that Occasion, in Proportion to his Dignity and Power. See the History of the XVIth Age, by the late Mr. PERIZONIUS, p. 247. where, as all through that Piece, it is to be wished he had quoted his Vouchers; tho' I do not doubt of his Fidelity and Exactness in general. I find nothing of this in SLEIDAN, History, Lib. IX. toward the End; where he speaks of the Renewing of the League.

⁵ Politic. Lib. III. Cap. IX. p. 348.

XXIII. (1) See B. I. Chap. I. § 14.

² Οἱ δὲ νόμοι ἀπορρέουσιν ἀπὸ πάντων. Lib. V. Cap. III. p. 59. All Editions before mine had ἀπαρρέουσιν, which makes a different Sense from what our Author himself gives in his Translation of the Words. Besides, the Passage does not perhaps signify precisely what he finds in it. See Mr. MURET's Commentary on it, in p. 370, &c. of a Collection, printed at Ingolstadt, in 1602.

XXIV. (1) On this Question see PUFENDORF, B. VIII. Chap. XI. § 2, &c.

² See the Treaties of the Swiss Cantons, in SIMLER, De Repub. Helvet. (Lib. I. p. 203. Edit. Elziv. 1627.) and in other Authors. SERVIVS, his Additions from the Manuscript of the Abby of Fuld, says, *It was customary among the Antients, for Persons who entered into a new Family or Nation, to renounce that which they left, before they could be received into the other.* On Æneid. II. (v. 156.) MARIANA's History affords us some Instances of Persons who have declared they have disengaged

are some People that have no such Thing allowed them, as particularly the *Muscovites*; nor do we at the same Time disown, but that one may enter into a Civil Society under such Conditions, and that the Custom of the Place may have the Force of an express Agreement. By the *Roman* Laws indeed, at least by those of later Date, every Man was at his Liberty³ to remove his Habitation whither he pleased: But yet was he no less obliged to bear a Part in all the Offices of the Community of the Place from whence he went. But then this affected those only who continued within the *Roman* Empire, and the Design of that Law was the particular Advantage that arose⁴ from thence in Regard to Contributions.

2. But what we desire to be satisfied in, is what would naturally obtain, were there no Agreement to the contrary; nor are we speaking of going out of one Part of the State into another, but out of the whole State, or out of the whole Extent of the Dominion of the Sovereign. That we ought not to go out⁵ in Troops or large Companies, is sufficiently evident from the End and Design of Civil Society, which could not subsist if such a Permission were granted; and in Things of a moral Nature, what is necessary to obtain the End has the Force of a Law. But the Case seems to be quite different, when a single Person leaves his Country; as it is one Thing to draw Water out of a River, and another to divert the Course of a Part of that River. *Tryphonius* says,⁶ that *Every Man is at Liberty to chuse the State of which he has a Mind to be a Member*. And *Cicero*,⁷ in his Plea for *Balbus*, commends that Privilege which every one has, of *Not staying in any State against his own Inclinations*: And he calls the Power of either keeping or parting with one's Right, the Foundation of Liberty. But even here must we observe that natural Rule of Equity, which the *Romans*, in the Dissolutions of private Societies, always had Regard to; that one is not to go out of the State, if the Interest of the Society requires he should stay in it. For, as *Proculus* very well observes,⁸ *A Regard is commonly had to the Interest of the Society, and not merely to the particular Interest of any of its Members*. Thus, for Instance, it is no Ways for the Benefit of a Civil Society, if there be any great publick Debt contracted, for an Inhabitant to leave it, unless he be ready to pay down his Proportion towards it: Or if a War be undertaken upon a Confidence in the Number of Subjects to support it, and especially if a Siege be apprehended, no Body ought to quit the Service of his Country, unless he substitutes another in his Room, equally qualified to defend the State.

3. Excepting in such Cases as these, it is to be presumed that Nations leave to every one the Liberty of quitting the State, because from this Privilege they them-

engaged themselves from the Obedience they had promised to a King. The last Example of this Kind, which is very remarkable, may be found in *B. XXVIII. Chap. XIII. GROTIUS*.

3 The Law runs thus, *Municipes sunt liberti & in eo loco, ubi ipsi domicilium suâ voluntate tulerunt; nec aliquod ex hoc origini patroni faciunt præjudicium, & utrobique muneribus astringuntur*. *Digest. Lib. L. Tit. I. Ad municipalem, & de Incolis, Leg. XXII. § 2.* Where it speaks of a Freedman, who was reckoned to belong to the Place from whence his Patron or Master came, that if he settled elsewhere, he was obliged to bear Offices, both in the Place he had quitted, and where he then lived. This was a general Rule for all the Citizens of municipal Cities, (*Municipia*). See *Code, Lib. X. Tit. XXXVIII. De Municipibus & Originariis*, with *CUJAS's* Notes; and *SPANHEIM's Orbis Romanus, Exercit. I. Cap. V. and VI.*

4 For thus the Quantity of the Contributions remained always the same; and the Inhabitants of each Place (*Municipii*) were not more oppressed than before.

5 The War between the Romans and Persians, (in the Time of the Emperor *Justin*) was occasioned by the King of the Lazians, (named *Tzathius*) who had revolted from the Persians to the Romans; so

that the former complained, that *the Emperor drew away their Subjects, and made them his own*. *ZONARAS, Tom. III. in Justin Thracæ. GROTIUS.*

It is evident the Case is different, that here mentioned can hardly ever happen but when the Government is tyrannical, or when a large Number of People cannot subsist in the Country; as when Manufacturers, for Example, or other Workmen, have no Means left for making or vending their Goods. If the Government is tyrannical, the Sovereign is obliged to change his Conduct; and no Citizen has engaged to live always under Tyranny. If the People who go out in large Companies are forced to it by Want, this is also a reasonable Exception from the most express and formal Engagement. The natural Obligation of preserving one's Self takes Place of all Contracts; and whoever submits to a Government, does it only for his own Good and Advantage.

6 *Digest. Lib. XLIX. Tit. XV. De Capt. & Postlimin. Leg. XII. § 9.* See *SPANHEIM's Orbis Romanus, Exercit. I. Cap. V.*

7 *Cap. XIII.*

8 *Digest. Lib. XVII. Tit. II. Pro Socio, Leg. LXV. § 1.*

Bembo, l. 7.

selves may reap no less an Advantage by the Number of Strangers they receive in their Turn.

XXV. Nor has the State any Power over ¹ Exiles. The *Heracidæ* being by *Eurystheus* banished *Argos*, do in *Euripides*, ² by the Mouth of *Iolaus* their Defender, thus express themselves,

XXV. A State has no Power over those it has banished. See B. 3. Ch. 20. § 41.

Πῶς ἂν δικαίως ὥς Μυκηναίους αἴτοι
ὦδ' ὄντας ἡμᾶς, εἰς ἀπήλασε χθονός;
Ξένοι γὰρ ἐσμέν.

For with what Justice can he claim us,
As Myceneans, when we're settled here,
Us whom he banished from his Country?
We now are Foreigners.

Alcibiades's Son, in one of *Isocrates's* Orations, ³ speaking of the Time of his Father's Banishment, "ὅτ' εἰδὲν αὐτῷ τὴν πόλεως προσήκεν, *When the State had nothing to do with him, nor he with the State.* We should now speak of the Society that is composed of several Nations, either by themselves, or by their Heads. But as it is a Sort of an Alliance we shall have Occasion to treat of it elsewhere, when we explain the Nature and Effects of every Alliance in general; that is, when we come to talk of the Obligations that arise from any Agreement.

Ch. 15. of this Book.

XXVI. Let us then pass to the Right which one acquires over Persons, by Vertue of a Subjection into which they enter by their own Consent. This Subjection is either private or publick. Private Subjection may be as various as there are various Sorts of Authority or Command. The most reputable Kind of it is Arrogation, by which a ¹ Person who is his own Master, does so give himself up to another, as to become a Member of his Family, and to depend upon him afterwards, as a Son at the Years of Maturity depends on his Father. A Father likewise sometimes gives his Son to another, who adopts him in this Manner; but he does not thereby transfer to him all his paternal Rights, nor disengage himself from all the Duties to which he stands bound as a Father; for Nature does not permit this; all he can do is to trust his Son to another, who undertakes to maintain him, and whom he substitutes in his own Stead for that Purpose.

XXVI. What Power is granted a Man over his adopted Child, from his voluntary Subjection to him.

XXVII. 1. The most ignoble and scandalous Kind of Subjection, is that by which a Man offers himself to perfect and utter Slavery; as those amongst the *Germans*, who at the last Stake ventured their very Liberty upon the Cast of a Die, *He that lost*, says *Tacitus*, ¹ voluntarily became a Slave to the Winner. Nay, even amongst the *Greeks*, as *Dion Pruseensis*, in his fifteenth Oration relates, *Μύριοι δὴ πρὸς ἀποδιδόν' ἐαυτοὺς ἐλευθεροὶ ὄντες, ὥστε δουλεῦν κατὰ συγγεφυλῶ, Thousands who are free* ² oblige themselves by Contract to be Slaves.

XXVII. What Right a Person has over his Slaves.

XXV. (1) See PUFENDORF, B. VIII. Chap. XI. § 6, 7.

2 HERACLIDES, ver. 186, &c.

3 (Orat. De Bigis, p. 349. Edit. H. Steph.) NICETAS says, *It is no Wonder if a Person who finds his own Countrymen his Enemies, applies to a publick Enemy for Friendship and Protection.* Hist. in rebus Isaaci Angeli. (Cap. X.) GROTIUS.

XXVI. (1) *Adrogatio, quâ quis se, &c.* Thus the Words stood in all the Editions before mine. I have given them thus, *Adrogatio, quâ quis sui juris se, &c.* and it is evident that the Author, or rather the Printer, had omitted the two Words here inserted. The Matter is too clear, and too well known, to leave any Doubt concerning the Author's Meaning; and in the following Period, *Pater autem, &c.* he manifestly opposes the Adoption of Son under his Father's Power, to that of a Person, who is his own Master. See the *Institutes*, Lib. I. Tit. XI.

XXVII. (1) *De morib. Germ. Cap. XXIV. Numi.*

3.

2 This was formerly prohibited in *Aegypt*. It was allowed at *Athens* till *Solon's* Time, who by one of his Laws abolished the Practice of engaging the Body; that is, Liberty, for a Debt. PLUTARCH, in *Solon*, (p. 86. Edit. Wech.) The *Petilian* Law, among the *Romans*, contained the same Prohibition. GROTIUS.

The *Aegyptian* Law was made by King *Boccheris*, and allowed the Creditors to seize only the Goods of their Debtors. DIODORUS SICULUS, who relates the Fact, *Biblioth. Hist. Lib. I. Cap. LXXIX.* p. 59. Edit. H. Steph. adds, that *Solon* imitated that Law. As to the *Petilian* Law, see VARRO, *De Ling. Lat. Lib. VI. p. 82. Edit. H. Steph.* and LIVY, *Lib. VIII. Cap. XXVIII.* as also what is said on PUFENDORF, B. III. Chap. VII. § 3. Note 7. of the second Edition.

See Euseb. Le-
gat. Turc. Ep.
3.

2. Now perfect and utter Slavery, ³ is that which obliges a Man to serve his Master all his Life long, for Diet and other common Necessaries; which indeed, if it be thus understood, and confined within the Bounds of Nature, has nothing too hard and severe in it; for that perpetual Obligation to Service, is recompensed by the Certainty of being always provided for; which those who let themselves out to daily Labour, are often far from being assured of: And from hence does that which Eubulus ⁴ said, frequently happen,

ἔθελα δ' ἄνευ μισθοῦ παρ' αὐτοῖς καλᾶμεναι
ἐπὶ σιτίσις.

He was willing to stay with them for his Victuals without Wages. And the same Comedian in another Place,

πολλοὶ φυγόντες, &c.

Many that run away from their Service, return of themselves ⁵ to their old Manger. Thus too Posidonius the Stoick has observed in his History, ⁶ that there were many People formerly, who, sensible of their own Weakness and Incapacity for getting a Livelihood, voluntarily submitted themselves Slaves to others, ὅπως παρ' ἐκείνων, &c. That their Masters should provide them Necessaries, and they should, in return, do them all the Service they were able. Others add an Instance of this in the Mariandini; who, for the same Reason, made themselves Slaves ⁷ to the Hera-
cleotæ.

XXVIII.
How far the
Power of Life
and Death may
be said to be
comprehended
in this Right.

XXVIII. But no Masters, (if we judge by the Rules of full and compleat Justice, or before the Tribunal of Conscience) have the Power of Life and Death over their Slaves: Nor can one Man have any Right to kill another, unless he has committed some capital Crime. Tho' by the Laws of some Nations, the Master, who upon any Account whatever, kills his Slave, does it with Impunity; as indeed Kings, who have an absolute and uncontrolable Power, may every where do it. Seneca has long before us made this Comparison, *If the Necessity be is under, and the Dread of suffering severely in Case of a Fault, makes it impossible for a Slave to be entitled to any Merit for his Service, the same will be a sufficient Objection to any Plea of Merit in him who has a Prince, and in him who has a General; for, tho' under a different Denomination, their Authority is the same.* Not but that a Slave may undoubtedly be injured by his Master, as the same Seneca ² with Reason asserts, but the Impunity passes for a Right in an improper Sense. It was such a Right or Power that ³ Solon, and the old Roman Laws, granted Pa-

³ On this Subject see PUFENDORF, B. VI. Chap. III.

⁴ These Words may be found in ATHENÆUS, Lib. VI. Cap. XII. p. 247. but our Author has put ἐπὶ σιτίσις, instead of ἐπισίτις. It is surprising that our Author, who quotes this Passage, taken from the *Dedalus* of Eubulus, should forget it in his *Excerpta ex Trag. & Com. Græcis*, where we have not so much as the Name of that Comedy.

The Passage of EUBULUS here quoted, is in STOBÆUS, Serm. LXII.

⁵ In one of PLAUTUS's Comedies, a Slave says, he chooses to continue in that State, *Because, says he, were I free I should live at my own Expence, now I live at yours.* *Casin. Act. II. Scen. IV. v. 14.* Melissus of Spoleto, the Grammarian, would not accept of his Freedom. (SÆTONTIUS, *Illustr. Gramm.* Cap. XXI.) GROTIUS.

⁶ *Deipnosoph.* Lib. VI. Cap. XVIII. p. 263. Ed. Ludg. 1657.

⁷ This Fact is related immediately after the Words of POSIDONIUS, produced in the foregoing Note. But STRABO tells us, that the Mariandyni were reduced to Slavery by the Milesians, who were in

Possession of Heraclea. *Geograph. Lib. XII. p. 817. Edit. Amst. (542, Paris.)*

XXVIII. (1) *De Benef. Lib. III. Cap. XVIII.*

² *Ibid.* Cap. XXII. See B. III. Chap. XIV. of this Treatise.

³ The Passage here referred to runs thus, Solon made a Law for the Athenians, concerning such Actions as were not to fall under the Cognizance of a Court of Judicature; according to which he allowed each Man to put his own Child to Death. But, as it has been observed, DIONYSIUS of Halicarnassus says expressly, that *Among the Grecians, a Father might turn an undutiful Child out of his House, and disinherit him, but could do nothing farther.* *Antiq. Rom. Lib. II. Cap. XXVI. p. 93. Edit. Oxon. (98. Sylb.)* He had been speaking of Solon, Pittacus, and Charondas. MEURSIUS, however, in his *Themid. Attic. Lib. I. Cap. II.* produces a Passage of SOPATER, an ancient Rhetorician, from whence it appears, that even Mothers had a Power over the Life of their Children; but neither that learned Man, nor FABRICIUS, who quotes him, take any Notice of the quite contrary Authority of an Historian so famous and judicious as the Grecian Author of the *Roman Antiquities*.

rents over their Children. Thus *Sopater*, Ἐξὴν πατρὸς ὄντι, &c. ⁴ *He was allowed, as a Father, to kill his Children. He is allowed it, in Case they have committed any Crime; and indeed the Reason why the Law has indulged a Parent this Privilege, is, the Presumption that he would certainly prove a very equitable Judge.* And *Dion*, in his fifteenth Oration, says, that the same Right does prevail, ὅθεν πολλοὶς καὶ σφόδρα ἐννομιζμένοις, among several People, and those the most eminent for good Discipline and Constitutions.

XXIX. 1. Concerning those who are born of Slaves, the Point is more difficult. By the ¹ *Roman Laws*, and by the Law of Nations in Regard to Prisoners of War, (as we shall shew elsewhere) as the young ones of Beasts, so the Children of Slaves follow the Condition and Circumstances of the Mother: Which, however, is not altogether so agreeable to the Law of Nature, when the Father can by any sufficient Token be discovered. For since among Brutes, the ² *Male* no less than the Female, takes Care of its Young, it is evident, that the Young do belong as much to the one as the other: And therefore, if the Civil Law had been silent in the Matter, Children would ³ follow as much the Father's Condition as that of the Mother. Let us suppose then, to lessen the Difficulty, that both Parents are Slaves, and let us see whether their Children would be naturally Slaves too. If there were indeed no other Way of maintaining their Children, Parents might with themselves bring their future Progeny into Slavery: Because upon the very same Account, Parents may even sell their free-born Children.

2. But since this Right does naturally rise from mere Necessity, ⁴ it is in no other Circumstances allowed, that Parents should enslave their Children; nor have Masters any other Right over the Children of their Slaves, than as they are to ⁵ find them Victuals and other Necessaries of Life; and therefore, when the Children of Slaves have been a long Time maintained before they are capable of being serviceable to

XXIX. What the Law of Nature directs about Children born of Slaves.

See *Leo Afer*, l. 6. d. *Barca*.

⁴ I do not know whence our Author takes these Words, or whether they belong to the Rhetorician, or to the Philosopher of that Name.

XXIX. (1) *Code*, Lib. III. Tit. XXXII. *De rei vindicatione*, Leg. VII. See also *Lib. VII. Tit. XVI. De liberali Causa*, Leg. XLII. Consult the famous Mr. SCHULTING, on ULPIAN, *Tit. X. § 8. p. 580.* of his *Jurisprudencia Antefustiniana*.

² See Chap. VIII. of this Book, § 18. *PLINY* says, that among the Pigeons, the Male and the Female love their Young equally. *Hist. Nat. Lib. X. Cap. XXXIV. GROTIVS.*

³ *SENECA* has observed, that Children belong equally to both Father and Mother, who when they have two Children, are not said each to have one, but each two. *De Benefic. Lib. VII. Cap. XII.* In the Laws of the *Wisigoths*, this Question is asked, *If a Son is produced by the Concurrence of both Parents, why should he share the Condition of his Mother only, since he could not have existed without a Father?* From which it is concluded, that according to the Law of Nature, Children born of two Slaves, belonging to different Masters, are to be divided equally between them both, *Lib. X. Tit. I. 17.* The Children of two *Slavonians* followed their Father; as appears from the *Speculum Saxonicum*, III. 73. The same Thing was practised in some Parts of *Italy*. See the *Decretals*, *Lib. IV. Tit. IX. De Conjug. Servorum. Cap. III.* Among the *Lombards* and *Saxons*, the Children shared the Fate of that Parent whose Condition was lowest, *Spec. Saxon. I. 16.* This Regulation took Place also among the *Wisigoths* in *Spain*, in *ISIDORE's* Time; as appears from the *Canon Law*, *Caus. XXXII. Quest. IV. Can. XV.* The Laws of the *Wisigoths* formally declare, that a Child born of a free Father and a Mother who is a Slave, thereby became a Slave. *Lib. III. Tit. II. 3. Lib. IV. Tit. V. 7. Lib. IX. Tit. I. 16.* Those who were born of two Slaves served the Masters of both their Parents equally. If there

was but one Son, he belong'd to the Father's Master, on paying the Mother's Master half his Value. In Regard to those who were termed *Originarii*, the Father's Master had two Thirds; and the Mother's Master the other; according to the Edict of King *Theodorick*, in *CASSIODORE*, C. 67. In *England* a Person is either free or a *Villain*, (*Francus* aut *Villanus*) according to the Condition of his Father. *LITTLETON; De Villanagio.* See also the Book *De laudibus Legum Angliæ.* These Laws differ from the *Roman Civil Law*; but *THOMAS of Aquino* owns they are not repugnant to the Law of Nature, (*Supplement. Quest. LII. Art. IV. in Conclus.*) Even the *Roman Laws* were not always conformable to their Principle; for one of them declares, that whether the Father or the Mother of a Child were Foreigners, the Child was so too. *ULPIAN, Tit. V. De his qui in potestate sunt. § 8. GROTIVS.*

The *Slavonians* (*Slavi*) mentioned by our Author at the Beginning of this Note, are the Slaves of that Nation, who becoming very numerous by the long Wars with *Germany*, gave Name to all in general, who were reduced to Slavery. See a Dissertation by the late Mr. *HERTIUS, De Hom. Propr. Tom. II. Comm. & Opusc. § 5. p. 161, 162.* We have but little Reason to doubt that the *French Word Esclave*, [and so of the *English Word Slave*] is hence derived; as has been observed by some Etymologists. As to the *Originarii*, who are likewise called *Adscriptitii*: See *JAMES GODEFROY's* excellent Comment on the *Theodosian Code*, *Lib. V. Tit. IX. p. 451, &c. Tome I.* as also Mr. *SCHULTING's Jurisprud. Antefustin. p. 380.*

⁴ This was established by *CHARLES the Bald*, *Cap. XXXIV. Edict. Pist. GROTIVS.*

⁵ Add here what I have said in a Note on *PUFFENDORF's Duties of a Man and a Citizen*, B. II. Chap. IV. § 6. of the third and fourth Edition.

their

Leſs, l. 5. c. 5.
Dub. 5.
1 Cor. vii. 21.
Eph. vi. 5.
Coloff. iii. 22.
1 Pet. ii. 18.
Cauf. 17. Qu.
 4. C. 37. 38.
 See B. iii. Ch.
 7. § 6. of this
 Treatiſe.
 XXX. *Several*
Sorts of Servi-
tude.

Exod. xxi. 2.
Lev. xxv. 40.

their Maſter, and their Work then can only answer the Expence of their preſent Maintenance, ſuch Children can never quit their Service, unleſs they pay what is reaſonable for all their former Entertainment. If indeed the Maſter's Cruelty be extremely great, it is an Opinion highly probable, that thoſe Slaves, even they whoſe Slavery was their own Choice, may run away, and in that Manner conſult their Safety. For what the Apoſtles and antient Canons enjoin Slaves, of not leaving their Maſters, is ⁶ a general Maxim, and only oppoſed to the Error of thoſe who rejected every Subjection, both private and publick, as a State inconfiſtent with the Liberty of Chriſtians.

XXX. Beſides that perfect and utter Slavery, of which we have juſt been ſpeaking, there are alſo ſome imperfect Kinds of Servitude, and thoſe are either for a certain Term of Time, or upon ſuch and ſuch Conditions, or only to do ſuch and ſuch particular Things. Such was the Service of ¹ Freedmen, who were yet obliged to do ſome Offices for their Patrons; of ² thoſe who were to continue Slaves no longer than till ſuch and ſuch Articles were performed; of ³ thoſe who voluntarily became Slaves to their Creditors till their Debts were paid; of thoſe who were ſentenced by a Judge to be Slaves till their Debt was diſcharged; of ⁴ Huſbandmen, who belonged to the Lands given them; the ſeven Years Service among the *Hebrews*, and that Service which was to laſt till the Jubilee; that of the ⁵ *Penestæ* among the *Theſſalians*; that which they call the Service of ⁶ *Mortmain*; and laſtly, that of ⁷ hired Servants: All which Differences do depend either upon

⁶ We have ſeveral Maxims in Scripture, which ſeem general, and are really ſo, if we conſider the Terms only; but which however admit of Exceptions, which eaſily appear from the Nature of the Thing, and the Circumſtances. Sometimes theſe Maxims are general only as they regard what commonly takes Place. This is the Meaning of our Author, who answers the Objection more at large in the Place quoted in the Margin.

XXX. (1) Among the *Romans* tho' a Slave received his Liberty, he was ſtill obliged to reſpect his Patron, (for ſo they called the Perſon who had been his Maſter) and the Patron could demand ſeveral Services of him, ſuch as attending him, taking the Care of his Affairs, &c. If the Freedman failed in his Duty, and became guilty of Ingratitude to a certain Degree, he might again become a Slave to his former Maſter. If he died without Children, the Patron inherited his Goods; half of which the Freedman was obliged to leave him by Will. See *Digeſt*. Lib. XXXVII. Tit. XIV. *De Jure Patronatus*, Lib. XXXVIII. Tit. I. *De oper. Libertorum*, Tit. II. *De bonis Libertorum*.

² *Statu liberi*; that is ſuch as received their Liberty by Will, but on certain Conditions, and after a fixed Time; or *Slaves free in Hope*. The former is the Definition of the Term given by the Roman Law. *Digeſt*. Lib. XL. Tit. VI. *De Statu liber*. Leg. I. See ULPIAN's Fragments, Tit. II. with the Notes of Mr. SCHULTING, and others, which he has collected in his *Juriſprud. Ante-juſtin.* p. 571.

³ *Nexi*. Perſons who voluntarily made themſelves Slaves to their Creditor till they could diſcharge the Debt. *Additi*. Thoſe who were obliged ſo to do by the Judge's Sentence. VARRO, *De Ling. Lat.* Lib. VI. p. 82. See SALMASIUS, *De Modo Uſurarum*, Cap. XVIII. QUINTILIAN, Lib. VII. Cap. III. p. 620, 621. Edit. Burman.

⁴ *Adſcripti*, or *Adſcriptii Glebæ*. Huſbandmen, who belonged to the Lands given them, [and changed Maſters with the ſaid Lands]. The *Grecians* called them *ὀμόδικοι τῷ ἄλλῳ*, as appears from a Paſſage of SOZOMEN, *Hiſt. Eccleſ.* Lib. IX. Cap. ult. where he applies that Term to *Calemerus*. Men in that State went with the Lands

which they cultivated; for the Proprietor might alienate them when he alienated his Lands. But their State was not ſo hard as that of Slaves. See CUIJAS on the *Code*, Lib. XI. Tit. XLVIII. *De Agriculis, cenſitis & colonis*; as alſo JAMES GODEFROY's Commentary on the Place in the *Theodoſian Code*, quoted in Note 3. of the foregoing Paragraph.

⁵ *Penestæ*. ATHENÆUS gives the following Account of their Origin from ARCHEMACHUS, an antient Hiſtorian. "A Colony of *Bæotians* coming into *Theſſaly*, ſome of them returned into their own Country, while the reſt, liking their Situation, engaged to ſerve the Inhabitants, and cultivate their Lands, on Condition that the *Theſſalians* ſhould neither drive them out of the Country nor kill them." *Deipnoſoph.* Lib. VI. Cap. XVIII. p. 264. [That Writer ſays they were formerly called *Μένεσαι* from *μένω*, to remain or ſtay; but afterwards *Πενέσαι*]. JULIUS POLLUX ranks the *Penestæ* with the *Ilotæ* among the *Lacedæmonians*; and ſays they were a middle State, between Freeman and Slaves, Lib. III. § 83. Edit. Amſtel. DIONYSIUS of *Halicarnaffus* compares them to the *Clientes* of the old *Romans*. But there was a wide Difference between them, as H. STEVENS proves in his *Schediaſm.* Lib. IV. Cap. XIV. XV. XVI. where he likewiſe treats of the Etymology of the Word *Πενέσαι*.

⁶ *Quos manus mortuas vocant*. Perſons who could not diſpoſe of their Goods by Will, without the Conſent of their Patron, nor marry out of his Lands. When they died without legitimate Iſſue, the Patron became Heir to all their Goods, or at leaſt to thoſe of a certain Kind. They were called *Manus mortuæ*, becauſe on the Death of the Head of a Family ſubject to that Law, the Patron ſeized on the moſt valuable Piece of Goods he found in the Houſe; and if there were none, the right Hand of the Decealed was cut off and preſented to him. *Mag. Chron. Belg.* p. 153. at the Year 1123. BODIN I. *De Repub.* V. p. 61, 63. DES. HERALD, *Rer. quotid.* Lib. I. Cap. X. Num. 13. p. 81.

⁷ Among whom ſuch as the *Engliſh* call Apprentices come neareſt to the State of Slavery, during their Apprenticeship. GROTIUS. See THOMAS SMITH, *De Repub. Anglic.* Lib. III. Cap. X.

the Laws, or upon particular Agreements. Those who are born of one Parent who is free, and of another who is a Slave, seem naturally, ⁸ for the Reason above-mentioned, to be subject only to an imperfect Servitude.

XXXI. Publick Subjection is that of a whole Nation, who put themselves under the Power and Jurisdiction, either of one Person or of several, or even of another Nation. The Form of such a Subjection we gave you before, in an Instance of *Capua*. Such another is that of the *Collatines*, ¹ *Do you to me, and to the Roman People, deliver yourselves up, you the Collatine People, your City, your Lands, your Water, your Frontiers, your Temples, your Goods, whatever you have sacred or civil? We do. And I accept them.* Alluding to which, *Plautus*, ² in his *Amphitryon*, says,

*Themselves, and whatever's divine or human,
Their Town, their Children, all is surrender'd
To the Thebans, and to their Discretion left.*

The *Persians* term this, ³ *Giving up Land and Water*. But this is a perfect and entire Subjection; there are some other not so absolute, either in Regard to the Manner of enjoying the Sovereignty, or with Respect to the Extent of Power; you may learn the several Degrees of them from what we have already said above.

XXXII. There is also an involuntary Subjection arising from some Crime or other, and this happens when he ¹ who has deserved to lose his Liberty, is forced to submit himself to him who has a Right to punish him; and who it is that has such a Right of punishing we shall see by and by. And here not only particular Persons may be thus brought into a particular Subjection; as those at *Rome*, who did not appear when ² summoned to inlist themselves; and those ³ who either gave no Account of their Estate, or gave a false one. ⁴ And afterwards, those Women who ⁵ married another's Slave: But likewise a whole People ⁶ may be brought into Subjection for a publick Crime; with this Difference only, that a Nation's Slavery is perpetual, for a Succession in the Members of it does no Ways hinder it from being one and the same People still; whereas that Slavery which is

XXXI. What Power there is over a People who voluntarily become Subjects.
B. i. Ch. 3. § 8:

XXXII. What Power over a Person who has forfeited his Liberty by some Crime.
Ch. 20. of this Book.

⁸ That is, as they belong equally to the Father and Mother they ought likewise to partake equally of the Condition of both; and consequently be obliged to serve for a Time only, or in a Manner which softens the Rigour of their Fate.

XXXI. (1) *LIVY*, Lib. I. Cap. XXXVIII. Num. 2.

² In his *Amphitryon*, where he puts these Words into *Sofia's* Mouth. *Æt. I. Scen. I. ver. 102, 103:*

³ *Xerxes* and *Darius* made this Demand on the *Grecians*; which *QUINTUS CURTIUS* calls a Piece of *Insolence*, Lib. III. Cap. X. See the Commentators on that Place.

XXXII. (1) Thus when *Ulysses* came into *Ægypt*, some of his Companions plundering the Inhabitants, great Numbers of them were killed, and others made Slaves, as we read in *HOMER*, *Odyss.* Lib. XIV. (ver. 271, 272). *APOLLODORUS* tells us, that *Jupiter* was on the Point of throwing *Apollo* into *Tartarus* for killing the *Cyclops*; but *Lætona* interceding in his Favour, he only sentenced him to a Year's Slavery. *Biblioth. Lib. III. (Cap. X. § 3. Edit. Paris. Gal.) GROTIUS.*

² This appears from a Passage of *CICERO*, quoted by our Author in the Margin, *When the People*, says he, *sell the Man who declined the Service, they do not take away his Liberty, but judge him not free who would not purchase his Liberty by exposing himself to Dangers.* When they tell a Man, who either gives no Account of his Estate, or gives a false one, they judge, that as he who is really a Slave is excused from the Cess, so he who would not submit to it when he was free, renounces his own Liberty. *Orat. pro A. Cæcina, Cap. XXXIV.* But the Lawyers speak thus on the Subject: *For formerly*

such as did not appear when called on to inlist themselves, were reduced to Slavery, as Persons who had forfeited their Liberty: DIGEST. Lib. XLIX. Tit. XVI. De re militari, Leg. IV. § 10. See DUAREN, Disput. annivers. Lib. I. Cap. IV.

³ *Incenti.* The Lawyers speak of them. See *ULPIAN*, Tit. XI. § 11. *Servius Tullius*, one of the ancient Kings of *Rome* made a Law, that whoever did not give in a faithful Account of the Value of his Estate, should forfeit it, be whipt, and sold. *DIONYSIUS HALICARNASSENSIS, Antiq. Rom. Lib. IV. Cap. XV. p. 212. Edit. Oxon. (221, Sylb.) LIVY* speaks of this Law in the following Passage, which I shall set down, because I am of Opinion there is a Fault in the Text, *Censu perfecto, quem maturaverat METU Legis de Incentis lata, cum vinculorum minis mortisque, &c.* Lib. I. Cap. XLIV. Num. 1. I think it should be read *metus Legis*. The Assessment was not hastened by the King; but the Fear of incurring the Penalty made every one hasten to give in his Name, and Value of his Estate. This little Alteration makes the Expression at least more natural.

⁴ In *Lycia* Thieves also were condemned to Slavery, as we learn from a Fragment of *NICHOLAS of Damascus*. (Excerpt. Pieresc. p. 517.) Among the *Wissgoths* the same Penalty was inflicted for several other Crimes, as appears from the Collection of their Laws. *GROTIUS.*

⁵ See *TACITUS*, *Annal. Lib. XII. Cap. LIII.* *SUETONIUS*, in *Vespas.* Cap. XI. and the Passage of *ULPIAN*, referred to in Note 3.

⁶ See some Examples of this Kind, *Chap. XIII.* of this Book, § 4. with the eighth Note.

inflicted on particular Persons, extends no farther than their own selves, because ⁷ Crimes are personal. But both Sorts of Servitude, either that which is publick or that which is private, may be perfect or imperfect, according to the Degree of the Fault and Punishment.

B. iii. Ch. 7. But of that Slavery, whether publick or private, that is founded on the voluntary Law of Nations, we shall hereafter have Occasion to speak, when we come to mention the Consequences and Effects of War.

⁷ *Noxa caput sequitur. Crimes are personal.* Thus our Author understands these Words, which frequently occur in the Roman Law, as in PAUL'S *Receptæ Sententiæ*, Lib. II. Tit. XXXI. § 8. in the *Digest*. Lib. XIII. Tit. VII. *Commodati, vel contrā*, Leg. XXI. § 1. and in the *Code*, Lib. III. Tit. XLI. *De noxalib. Action.* Leg. I. But in a Sense somewhat different: For the Lawyers mean that the Action which might be brought for repairing the Damage done by a Slave, (*Actio Noxalis*) follows the Person of the Slave; so that if he was alienated after the Fault was committed, the

Action lay against the new Master; but if the Slave was made free, he himself was liable to Prosecution. Thus the Rule is elsewhere explained. *Digest*. Lib. IX. Tit. IV. *De Noxalib. action.* Leg. XX. *Institut.* Lib. IV. Tit. VIII. § 5. See also *Digest*. Lib. IV. Tit. V. *De Capite minutis*, Leg. VII. § 1. and Lib. XLIV. Tit. VII. *De Obligat. & Action.* Leg. XIV. *Code*, Lib. IV. Tit. XIV. *An Servus ex suo facto, post manumissionem, teneatur?* Leg. IV. So that the Law here speaks neither of a Punishment, nor of the Right of perpetuating it in the Persons of the Criminal's Descendents.

CH A P. VI.

Of an Acquisition (Possession or Purchase) derived from a Man's own Deed; where also of the Aliénation of a Government, and of the Things and Revenues that belong to that Government.

I. *What is required in the Giver to make the Alienation valid.*

Soto, l. 4. qu. 5. art. 1.

Ch. 4. of this Book, § 3.

Leff. l. 2. c. 3. Dub. 3.

I. I. **A** Thing becomes ours from a ¹ derivative Acquisition, either by the Deed of another, or by Vertue of some Law. Since the Establishment of Property, ² Men, who are ³ Masters of their own Goods, have by the Law of Nature a Power of disposing of, or transferring, all or any Part of their Effects to other Persons; for this is in the very Nature of Property; I mean of full and compleat Property; and therefore ⁴ *Aristotle* says, 'Ὅπου τὰ οἰκείον εἶναι, ὅταν ἐφ' αὐτῷ ἢ ἀπαλλοτριῶσαι, *It is the Definition of Property, to have in one's Self the Power of Alienation.* But there are two Things here to be observed; the one in the Giver, and the other in the Receiver. In the former it is required, that whatever he does in this Kind should appear by Words, or by some other open or external Sign, the mere internal Act of his own Will and Mind being no Ways sufficient; nor is such an Act, as we have observed elsewhere, agreeable to the Nature of human Society.

2. But that there should be a formal Delivery made, is what is ⁵ required only by the Civil Law; which, because it is now received by many Nations, is improperly stiled the Law of Nations. So in some Places we find it customary for

I. (1) See Chap. III. of this Book, § 1.

2 On this Question consult PUFENDORF, B. IV. Chap. IX.

3 That is, who are of an Age sufficient for managing their own Affairs.

4 *Rhetoric*, Lib. I. Cap. V. p. 523. Edit. Paris.

5 The Right of Property is one Thing, and the actual Use of that Right another. The latter indeed doth not appear before the Delivery; but the Right itself is not therefore less real, and independent of the physical Power of exercising it. There is no more Necessity of being put into Possession of a Thing, in Order to be its real Pro-

prietor, than of always keeping Possession of one's Goods, in Order not to lose the Right of Property. The Law of Nature is extremely clear in this Point; and it is owing to a Prejudice, taken from the Roman Law, which some Doctors still maintain, that the Delivery is made necessary, even according to the Law of Nature, for transferring Property. The ablest Commentators, however, are now agreed, that this is a Refinement of the ancient Lawyers; for whom on other Accounts they have a great Respect. See what the famous Mr. SCHULTING says, in his Notes on the *Jurisprud. Ante-Justin.* p. 473.

such an Alienation to be made, either ⁶ before the People, or before some Magistrate, and that the Particulars thereof be also ⁷ recorded; all which Circumstances are most certainly owing to the Civil Law. And as for the Act of a Will, that is thus expressed by some external Sign, it is always to be supposed the Act of ⁸ a Will governed and directed by Reason:

II. So also in the Receiver (without any Regard to the Civil Law) it is naturally required, that his Willingness to accept of what is given him do appear by some outward Sign or other; which Willingness, tho' it does generally succeed the Act of the other Party, may also be sometimes antecedent to it; as for Instance, if any Man shall request that such a Thing be given or granted him; for it is here to be supposed, that that Desire continues still, unless it appears that he has altered his Mind. What further relates as well to the transferring as the receiving of a Right, and how both these may be done, we shall hear by and by, in that Chapter where we treat of Promises; for in this Respect the Rules of Alienations, and those of Promises ¹ are the same, if we judge of them by the Law of Nature alone.

II. What in the Receiver.

Ch. 11. of this Book.

III. Now as it is in other Things, so it is also in Sovereignty, ¹ it may be alienated by him who has a just Title to it; that is, as we shewed above, by a King, if the ² Crown be patrimonial; otherwise ³ by the People, but not without the King's Consent; because he too has some Right here, like to that of an Ufructuary, which Right he ought not to be deprived of contrary to his Will. And this regards the whole Extent of Sovereignty.

III. Crowns may be alienated sometimes by the King, sometimes by the People. B. i. Ch. 3. § 12.

IV. But in transferring a Part of the State there is something else required; ¹ it must be done with the Consent of that Part also, which is to be thus transferred. For when Men form themselves into a State, they make together a Sort of perpetual ² and eternal Society, in respect of those Parts, which are called ³ integral; from whence it follows, that these Parts are not so subjected to the Body, as the Limbs of a natural Body are, which entirely depend on the Life of that Body, and ⁴ therefore may be justly cut off for the Service of it; for this Body that we

IV. The Government over one Part of the People cannot be alienated by the other, if that Part do not give their Consent.

are

⁶ As, for Example, according to the Saxon Law. See HERTIUS, *Dissert. de Conventionib. dominii translativis.* § 15. in Tom. III. of his *Opusc. & Commentat.* p. 77. and the *Differentiæ Juris Communis & Saxon.* by Mr. MENKENIUS, at the End of the third Volume of HUBER's *Prælectiones Juris Civilis*, p. 8. Edit. Lips. 1707.

⁷ Thus, according to the Roman Law, all Donations, above a certain Sum, were to be registered. See *Instit. Lib. II. Tit. VII. De Donationibus*, § 2. and the Commentators on that Place.

⁸ It is a Maxim of CASSIODORE, that *The Alienation of Goods requires an entire Freedom of Judgment.* Var. Lib. II. Epist. XI. GROTIUS.

These Words contain the Reason why King THEODORIC annulled Alienations made by a Woman, who leading a debauched Life, had left her Husband. See Chap. XI. of this Book, § 5.

II. (1) For which Reason Presents may be sent to the absent by Messengers, as SERVIUS observes, on those Words of VIRGIL, *Quæ mittit dona.* Æneid. IX. (v. 361). GROTIUS.

III. (1) See PUFENDORF on this Subject, B. VIII. Chap. V. § 9, &c.

² See what I have said on B. I. Chap. III. § 11. Note 4. and § 12. Note 20.

³ See BALDUS and OLDRADUS, in *Cap. Intellecto, &c. De Jure jurando.* The same BALDUS, *Conf. CCCXXVII. Num. 7.* Cardinal THUSCUS, P. I. *Concl. XL. Num. 1. and Conclus. DCXCIV.* We have Instances of such an Alienation in FRANCIS HARÆUS, *Annal. Ducum Brabant. & utriusq; Belgii*, Tom. II. at the Year 1526. And in GUICCIARDINI, *Lib. XVI.* GROTIUS.

IV. (1) This is the Opinion of GAILLIUS, *De Pace publicâ*, Cap. XV. Num. 14. See DE SER-

RES, *Inventaire de l'Histoire de France*, in the Life of Charles the Wise. [In Regard to some Towns and Countries which that Prince had granted to the English, by the Treaty of Bretigny, p. 194. Edit. Paris. in Folio, 1627.] See the same Historian, in the Life of Francis I. where he is speaking of the Dutchy of Burgundy, [which the King, being Prisoner, had promised to deliver up to the Emperor, p. 565.] GROTIUS.

² That is, which is to last for ever, as far as in them lies, unless all concerned consent to some Separation.

³ That is, Towns, Provinces, in a Word, all the particular Bodies of which the general Body of the State is composed.

⁴ The learned GRONOVIUS pretends, that the Conclusion to be drawn from thence is directly contrary from what our Author infers. For, says he, since the Parts of a State may subsist, when separated from that Body, less Difficulty is to be made of cutting them off, than the Limbs of the human Body, which perish the Moment they are separated from it. This would be good Reasoning, if the Manner in which the Parts of a State depend on the whole Body, was the same with that in which our Limbs depend on our Body. Those Limbs are made for the Body, and their Interest can never be divided from that of the Body: But the several Parts of a Kingdom are not made for the whole Body of the State, they are connected with it only for their own Good, and by the Effect of their own Will. Beside the common Interest of the whole Body they have a particular Interest; and if the latter is to be sacrificed to the former, this is not to be done at all Times, or beyond the Engagements which they have contracted voluntarily. But no Part of the State can be supposed to have consented that the others

are now speaking of, is of a very different Nature from that, it being formed by Compact and Agreement only, and therefore the Right that it has over its particular Members, is to be determined by the Intentions of those who originally framed it; which can never be reasonably imagined to be such, as to invest the Body with a Power to cut off its own Members whenever it pleases, and to subject them to the Dominion of another.

V. Nor can such a Part transfer the Government over its own Self, unless in Case of extreme Necessity. B. i. Ch. 4. § 7. and B. ii. Ch. 2. § 6.

V. So, on the other Hand, no Part has a Right to separate from its Body, unless it plainly appears, that it is absolutely necessary for its own Preservation; for, as we have before observed, in all Matters of human Institution, Cases of extreme Necessity, by which all Things return to a mere State of Nature, seem to be excepted. St. Austin, *De Civit. Dei*, B. xviii. *In almost all Nations this Voice of Nature has been loudly heard, that they should rather submit to their Conquerors, than suffer all the Ruin and Havock of War.* And therefore in that Oath of the Greeks by which they engaged, with many Imprecations, to punish those amongst them, who should put themselves under the Dominion of the Persians, this Clause was subjoined, *μη ἀναγκασθέντες*, ³ *Unless compelled to it.*

VI. The Reason of this Difference.

VI. And from hence it is easy to comprehend, why in this Case a Part has a greater Right to preserve itself, than the Body has Power over the Part; because the

others should have a Right to make it change its Master against its Will. This is not one of those Things which is decided by a Plurality of Voices, as HERTIUS pretends, who founds an Objection on it against our Author, in his Treatise *De Feudis Oblatis*, Part II. § 28. Tom. II. *Comment. & Oppusc.* p. 543, 544. For the Right of a Plurality of Votes doth not go so far as to separate those from the Body who have not broken through their Engagements and violated the Laws of Society.

V. (1) See Chap. XXIV. of this Book, § 6. On this Principle the Lacedemonians formerly declared *Anaxilaus* innocent, who had surrendered *Byzantium*, being forced to it by Famine. *XENOPHON, Hist. Græc.* Lib. I. (Cap. III. § 12. *Edit. Oxon.*) The Emperor *Anastasius* even thanked the Governor of *Martyropolis* in *Mesopotamia*, for surrendering that Town to the Persians, when he was no longer able to defend it. *PROCOPIUS*, who relates this in his Treatise on *Justinian's Buildings*, (Lib. III. Cap. II.) elsewhere observes, that *Valour and Famine cannot dwell together; nor will Nature bear, that the same Persons should want Food and act bravely.* Gothic. Lib. IV. (Cap. XXIII. *Hist. Miscell.*) And in a Letter written by *Cephalus* to the Emperor *Alexius*, concerning the Siege of *Larissa*, that Commander declares his Resolution of submitting to Necessity, and the irresistible Force of Nature, in surrendering the Garrison to the Enemy, who not only besieged, but evidently starved it. *ANN. COMNEN.* Lib. V. (Cap. IV.) *GROTIUS.*

2 *De Civit. Dei*, Lib. XVIII. Cap. II.

3 *HERODOTUS*, Lib. VII. Cap. 132.

VI. (1) The Body of the State has indeed no Power so to alienate one of its Parts, as to oblige it, against its Will, to acknowledge the new Master, into whose Hands they would deliver it, and give him a Right over it, without any other Title. But, this notwithstanding, the Body of the State may abandon one of its Parts, when in evident Danger of perishing by continuing united to it. The Right ought certainly to be equal on both Sides; and the Body of the State may, without Doubt, consult its own Preservation as well as that Part. It is sufficient that no direct Force be employed for putting it under another Government, and that it be allowed a Right of defending itself, if it can: In a Word, that it no longer protects it, which is all that can be reasonably required by him who has reduced the Body to so said an Extremity. Thus,

in this Case, the Body of the State does not alienate the Part in Question; but only renounces a Society, the Engagements of which are at an End, by Vertue of the tacit Exceptions made by Cases of Necessity. It is in vain for our Author to pretend, that when a Part of the State divides itself from the Body, being forced by Necessity so to do, it makes Use of that Right of preserving itself which it had before the Establishment of Society; whereas the Case is not the same in Regard to the Body. This is founded on a subtle Reason, from which a false Consequence is drawn, *viz.* that the Body being formed only by the Establishment of Society, it had no Right before it was a Body, and consequently, had not that of preserving itself. But, tho' a moral Body has no Right precisely as a Body, before it is formed, it still has a Right to preserve itself, so far as each of the Members that compose it has such a Right. The single Persons, who enter into a Civil Society, having both a Right and a Will to preserve themselves, which they cannot do without the Preservation of the Body; they are and ought to be supposed to communicate that Right to the Body itself. The Body therefore may as lawfully divide itself, in the Manner aforesaid, from any one of its Parts, when its own Preservation requires it; as that Part might divide itself from the Body in the like Case. And it may so much the more lawfully do so, as the Part is commonly but little considerable in Comparison of the Rest of the Body. Add to this, that, according to our Author's Principle, the Part itself in Question would have no Right to separate itself from the Body of the State, even when in the last Necessity. For, in short, the Question does not turn on a bare private Person, or a Master of a Family; but on a City, or a Province, that is on a Body, which is indeed a Member of a larger Body; but at the same Time as real a moral Body, as the whole Body of the State, and consequently, had no Right, as a Body, before it was formed. After all, in the Case of Necessity here supposed, and which I own to be the only one that authorizes the Body of the State to abandon any one of its Parts; in that Case, I say, the Body would in vain endeavour to preserve and defend such a Part, being not in a Condition of preserving and defending itself. It is therefore a Misfortune, under which the unhappy Part must console itself, if it finds no Way of remedying it; and it would be highly unreasonable to expect, that

the Part makes Use of that Right it had before it entered into that Society; but it is quite otherwise with the Body. Nor let any Man pretend to tell me, that the Sovereign Power is lodged in the Body, as in its Subject, and may therefore be alienated by it, as a Thing that properly belongs to it. ² For if the Sovereignty resides in the Body, it is as in a Subject which it fills entirely, and without any Division into several Parts; in a Word, after the same Manner as the Soul is in perfect Bodies. Necessity itself, which reduces Things to the mere Right of Nature, cannot take Place here, because the Law of Nature gave indeed a Right to use Things; as for Instance, to eat or keep them, which are natural Acts, ³ but not to alienate them. This Power was introduced by the Fact of Men, and therefore it is by that we must judge of its Extent.

VII. But why the Jurisdiction over any particular Place; that is, any Part of a Territory, that lies, suppose, uninhabited and waste, may not be alienated by a free People, or by a King in Concurrence with his People, I see no Manner of Reason to dispute. Were indeed any Part of the People to be transferred, as they have a Freedom of Will, so have they likewise a Right to oppose such an Alienation; but the Territory, whether wholly, or in part, belongs in common and inseparably to the People; and consequently, is entirely at their Disposal. And certainly, if the Jurisdiction over any Part of the People cannot be alienated by the People themselves, much less can it be done by a King, who tho' he be vested with the full Sovereignty, yet he does not possess it with a full Right of Property; a Distinction we made above.

VII. *The Jurisdiction over a Place may be transferred.*

VIII. For which Reason we can never agree with those Lawyers, who to the general Rule of not alienating the Parts of a State, subjoin these two Exceptions of Necessity and the publick Good; unless we understand them in this Sense, that if the Alienation be advantageous to the Part as well as to the Body, we may from their Silence, tho' of no long Time, conclude that both People, and the Part

B. i. Ch. 3.

§ 11, 12.

VIII. *The Opinion, that a Prince may for Advantage, or out of Necessity, make over some Parts of his Kingdom, refuted.*

the Body of the State should uselessly sacrifice itself for the Sake of such a Part. Our Author's Opinion being thus rectified, will be sheltered from the Criticism of some of his Commentators, who offer several poor Reasons for confuting it, and perplex Things according to their usual Custom.

² As the Objection is subtle, and not very solid, so the Answer is obscure and unsatisfactory. The Sovereignty is indeed seated in the Body of the State; but it doth not thence follow, that the Body of the State may alienate any one of its Parts against its Will. Two different Things are here confounded, the Sovereignty, and the Members of the State or of Civil Society. The Sovereignty is still Sovereignty, tho' the Number of the Members of the State decreases; as it is not the more Sovereignty merely because that Number increases. On the contrary, part of the Sovereignty may be laid down, without any Increase or Decrease of the Number of the Members of the State. Thus all that ought to be inferred from the Sovereignty's residing in the Body of the State, is, that the Body of the State may alienate the Sovereignty, or some one of its Parts; and even in that Case, there is a Necessity of the Consent of all the Members of the State, or of all the small Bodies, which compose that great Body. But in Order to know whether the Body of the State has a Right to cut off any one of its Members, and give it to another Master, we are to enquire whether there is Reason to believe, that each Member designed in this Point to subject itself to the Will of the whole Body, which is not the Case. Even the most absolute Sovereignty does not, in its own Nature, include a Power of making the Subjects acknowledge another Master against their Will; as we have observed on B. I. Chap. III. § 11. Note 4. In answer to the Objection before us therefore, it is not necessary to

say, with our Author, that the Sovereignty is indivisible, and resides equally in the Members of the Body of the State, because the Question in Hand does not regard the Extent and Exercise of the Sovereignty. The very Comparison he employs, taken from that Maxim of the old Philosophy, *The Soul is intire in the Body, and intire in every Part*, might enable a Disputant to draw a contrary Conclusion from his Principle: For the Soul is not less a Soul, tho' a Member of the Body be cut off, and it may command such a Separation, when the Good of the Body requires it.

³ This is another subtle Answer, founded on false Ideas of the Nature and Origin of the Right of Property. While the primitive Community of Goods subsisted, if any Man who had taken Possession of a Piece of Land, had pretended, on quitting it, to convey it to another, that he might be Master of it after him; the Person to whom it was thus transferred did thereby acquire a Right, equivalent to what we call *Alienation*. For he who was first in Possession of the Piece of Land, had a Right to keep it as long as he pleased, and it was in his Power to dispossess himself of it, in favour of whom he thought proper. When he actually dispossessed himself of it, he thereby gave up his Right to the other, who might likewise keep it as long as he pleased. But whatever Idea is entertained of Alienation of Goods, it is out of the present Question, and our Author ought to have remembered what he had said before, B. I. Chap. III. § 12. that when a whole People is alienated, the Persons themselves are not alienated, but only the Right of governing them. And after all, it has, in my Opinion, ever been a Maxim of the Law of Nature, *That every one may transfer to another, all the Right which in its own Nature may pass from one Man to another.*

Belluga in pr.
spec. in rub. 8.
p. 3. & 4. *Roche*
de Curte de
Conſuet. q. 5.
col. 6. tom. 1.
& alii allegati
a *Vafq.* l. 1. c. 4.
contr. illuſtr.
IX. *Infeoffment*
and *Mortga-*
ging are a *Sort*
of *Alienation*.
Smith, de Rep.
Ang. l. 1. c. 9.
Buch in *Baliol*.
Froſſar. l. 1. c.
214, & 246.
Monſtrelet. Hiſt.
C. 22, 5. *Guic.*
l. 16.

X. *The People's*
Conſent and
Approbation,
either particu-
larly expreſſed,
or founded on
Cuſtom, is re-
quired to the
transferring
even of *Juriſ-*
dictions and
Employments in
the State that
are not Sover-
eign.

alienated, agree to it, and much more ſo, if there appears beſides any Neceſſity for ſuch a Separation; but if either of them ſhall openly declare the contrary, we muſt look upon ſuch an Alienation to be utterly null and void, unleſs, as we be- fore obſerved, the Part ſhould be compelled to ſeparate from the Body.

IX. Under the Title of Alienation, is juſtly comprized an Infeoffment, or grant- ing a Dominion in Fee, under the Penalty of Forfeiture, in Caſe of Felony, or for Want of Iſſue; for this is a Sort of conditional Alienation. Wherefore we find, that as Alienations, ſo likewiſe ſome ¹ Infeodations of Kingdoms, which Princes have made without the People's Approbation, have by many of them been con- ſidered as void. Now the People are underſtood to give their Approbation, either when they aſſemble in a whole Body for that Purpoſe, as was formerly the Cuſtom with the *Gauls* and *Germans*, or when they ſignify their Conſent by particular De- puties commiſſioned thereunto, and inveſted with a ſufficient Power from the in- tegral Parts of the State; ² for whatever we do by another, is equally the ſame as done by ourſelves. Nor can any Part of the Dominion be mortgaged, except it be done by the like Agreement, not only for this Reaſon, becauſe a real Aliena- tion uſually follows ſuch an Engagement, but becauſe a King is bound to the Peo- ple, to exerciſe the ſovereign Power by himſelf, and the People are bound to each of their Parts, to preſerve the Adminiſtration of the Government entire, which in- deed was the Motive of their firſt entering into a civil Society.

X. But as for Jurifdictions that are ¹ not Sovereign, I ſee no Reaſon why the People may not grant them, even for an hereditary and perpetual Right, ſince it no Ways affects the whole Body, nor is any Ways destructive of the Sovereignty it ſelf; but the King cannot do ſo without their Conſent, if we regard natural Right only; becauſe a temporal Right, ſuch as is that of Kings elective, and of thoſe who owe to the Law their Succeſſion to the Crown, can produce nothing but ² temporal Effects. Yet might the People, as well by their expreſs Conſent, as by a tacit Conſent, founded on Cuſtom, (and this is what we ſee does now almoſt every where prevail) give up this Right to their Princes. And we frequently find

IX. (1) For the ſame Reaſon the People have annulled a Diſcharge of Homage, granted by their King, by his own bare Authority, to a Vaſſal of the Kingdom. See CROMER. *Hiſt. Polon.* Lib. XXV. GROTIUS.

² Thus in *Germany*, in the Caſe of Alienations, the Conſent of the Electors is looked on as the Conſent of all the States, according to Cuſtom, and the Agreements made on that Article. GRO- TIUS.

The Authors who have treated of the publick Law of *Germany*, are not agreed that the Conſent of the Electors is ſufficient for making the Alienation of ſome Part of the Lands of the Empire val- id, whether ſuch Alienation be made in Favour of a Foreigner, or ſome other Member of the Em- pire. See BOECLER's Note on this Paragraph, p. 220, &c. and the late Mr. HERTIUS's Diſſerta- tion *De Superioritate Territor.* § 91, 92, 93. Tom. II. *Comment. & Opuſc.* p. 363, 364. as alſo the *Juris Publici Prudentia*, by the late Mr. COCCET- US, Cap. XIV. § 9, &c.

X. (1) *Minores Functiões Civiles*. In the Sum- mary of this Paragraph, the Author ſtiles them *Juriſdictiones minores*; by which Words he means the Employments, Governments, and in general, all the civil Rights and Powers which have any Relation to the Government; or ſuch as not be- ing to be exerciſed without publick Authority, ought to be conferred by the Sovereign; ſo that they are exerciſed under his Name, however they are poſſeſſed.

² This Maxim is not univerſally true; and our Author has, with Reaſon, been blamed on this Score, who leaves Room for Criticiſm by too looſe and inderterminate Expreſſions. An Uſufructuary, (a Tenant) to whom he compares the Kings under

Conſideration, has only a temporary Right; and yet the Diſpoſals by him made of the Income of the Eſtate which he enjoyed, ſubſiſt after the End of the Term for which he was Tenant. Laws made by an *English* Parliament, do not loſe their Force as ſoon as the Parliament is diſſolved, whether a new one be called or not. Our Author himſelf does not pretend that a King can revoke all the Acts of his Predeceſſors; as appears from *Chap.* XIV. of this Book, § 11, &c. The Principles he there lays down, will help us to diſcover what is his Opinion in this Place. When a King beſtows any one of the Rights or Powers in Queſtion, this is not a Contract made between one private Man and another, but a Favour granted by him as Head of the State. In Order therefore to determine how far this Favour may be extended, we muſt examine the Extent of the Power of him who grants it. But it does not follow merely from the People's confer- ring the Sovereignty on any one, that they inveſt him with a Power of conferring a Lordſhip, an Office, or any other Thing of that Nature, for ever, and much leſs under an hereditary Title: For this may be contrary to the Good of the State; eſpecially when the Right or Power granted is con- ſiderable. Princes themſelves have ſometimes found by Experience how prejudicial ſuch Sort of Con- ceſſions have been to them; becauſe thoſe who have been favoured with them, have in Proceſs of Time made themſelves ſo great, that they have en- tirely ſhaken off the Yoke, and ſet up for Sove- reigns. So that, unleſs the People either expreſſly or tacitly, conſent to the Perpetuation or Aliena- tion of the Rights or Powers in Queſtion, they of themſelves expire at the Death of the King who gave them; and his Succeſſor is not bound to con- firm them any farther than he pleaſes.

in History, that this was a Right which the Kings of the *Medes* and *Persians* enjoyed, who gave away not only ³ Towns, but even whole Countries, to be held for ever.

XI. Nor can ¹ Kings alienate, either in Whole or in Part, the People's ² Demain, the Revenue whereof is appropriated to the Service of the State, or to the Maintenance and Support of the Royal Dignity. ³ For they have no more than a Tenant's Right to it. Nor do I at all allow the Exception, *If the Thing be but of little Value*, because I can have no Right to make over the smallest Part of what is none of mine at all. But the People indeed, when they know the Affair, and are silent in it, may much more easily be supposed to consent in smaller Matters, than in those of greater Moment. And in this Sense too, what we just now observed, of alienating any of the Parts of a State, in Cases of Necessity, or for the publick Advantage, may be applied to what concerns this Revenue; and the rather, because the Thing we are speaking of here, is of far less Consideration. For the publick Demain is established on Account of the Sovereignty, and consequently, cannot have more Privilege.

XII. But here lies the Mistake of many, they confound the Revenue and Profits of the Demain, with the Demain itself. Thus, for Instance, the Right of Alluvion is usually in the Demain; but the Pieces of the Land which the River leaves dry in retiring are in the Revenue. The Power of levying Taxes is in the Demain, the Money arising from thence in the Revenue: The Right of Confiscation in the Demain, the Lands thus confiscated in the Revenue.

XIII. But after all, Princes, who have a full and absolute Sovereignty; that is, who have a Power upon a lawful Occasion, and when Reasons of State require to levy new Subsidies, may, upon such an Occasion, mortgage any part of the publick Patrimony. For as Subjects are obliged to pay such Subsidies as are laid upon them, upon such Reasons of State; so are they no less obliged to redeem what is upon such Reasons mortgaged: Because that very Redemption is no more than a Sort of Payment of Subsidies. And the Patrimony of the People is engaged to the Prince, as a Security for the Payment of the Debts of the People. And whatsoever is thus pawned to me, ¹ I have also a Right to pawn again. What we have hitherto said of this Matter, will only hold good, provided there be no fundamental Law of the State, which shall either enlarge or confine the Power of Prince or People.

XIV. I. And here you would do well to observe, that when we are treating of an Alienation, we design under that Head to include also a Will or Testament. For altho' a Will, as all other Acts, may receive its Form from the Civil Law, yet is it in Substance and Reality very like the Right of Property, and, that being once

³ Thus *Darius* gave *Syloson* the City and Island of *Samos*. GROTIUS.

This Example is not entirely just. *Darius* only drove out *Meandrius*, who had seized on the Government, and thus facilitated *Syloson's* Way to the Throne, of which his Brother *Polycrates* had taken Possession. The Story, with all its Circumstances, may be read in *HERODOTUS*, Lib. III. Cap. CXXXIX. &c. It would have been more to the Purpose to have related what *CORNELIUS NEPOS* says, viz. that *Darius* gave the Heads of some Cities in *Ionian* and *Æolian* the perpetual Command of each respective City. Vita *Miltiad.* Cap. III. Num. 1. See also the Life of *Themistocles*, Cap. X. Num. 3.

XI. (1) See *PUFENDORF*, B. VIII. Chap. V. § 8, 11.

² The antient *Grecians* gave the Name of *Τέμενος*, to a Portion of the publick Lands assigned to Kings. We have Instances of this in *HOMER*, in Relation to *Bellerophon*, King of *Lycia*, *Iliad.* Lib. VI. (v. 194.) In Regard to *Meleager*, *ibid.* Lib. IX. (v. 573, &c.) And in Regard to *Glauco* the *Lycian*, Lib. XII. (v. 313, &c.) GROTIUS.

We have a memorable Passage of the Grammarian *SERVIVS*, on that Verse of *VIRGIL*,

Insuper his, campi quod Rex habet ipse Latinus.
Æneid. IX. v. 274.

It was customary, says that Commentator, to give some Portion of the publick Lands to valiant Men, or Kings, as a Mark of Honour, as was done in Favour of *Tarquinius Superbus*, in the Campus Martius. Which Space *HOMER* calls *Τέμενος*. According to the Laws of *Lycurgus*, a King of *Lacedæmonia* was allowed Such a Portion of the best Lands as was necessary for supporting him handsomely, without making him too rich. As we learn from *XENOPHON*, *De Repub. Laced.* Cap. XV. § 3. Edit. Oxon.

³ Therefore they cannot alienate it, without the Consent of the States of the Kingdom. See an Instance of this in *Mr. DE THOU*, *Hist.* Lib. LXIII. at the Year 1577. GROTIUS.

XIII. (1) *Digest.* Lib. XX. Tit. I. *De pignori-bus & hypothec.* Leg. XIII. § 2.

Crævet. Conf. 894. num. 2. *Loannet.* de Rom. Imp. n. 162.

XI. Princes cannot alienate the People's Demain.

Alberic. in C. Intellecto, de Jure Jur. *Bartol.* in Leg. 3. § 4. Dig. *Quod vi, &c.* Conf. in Tract. de excell. Reg. q. 4. *Loazes*, all. a *Vasq* *Natta* conf. 367. *Bonif. Rug.* conf. 49. n. 43.

XII. The Revenue of the Demain, or Patrimony, must be distinguished from the Demain, or Patrimony, itself.

XIII. How far, and why some Part of the People's Patrimony may be mortgaged by the Prince.

XIV. That a Will or Testament is a Kind of Alienation, and of natural Right. *Arist.* Pol. I. 111 c. 7.

established, belongs to the Right of Nature; for I may give away my Estate by Will, not only absolutely, but on certain Conditions; and that not only irrevocably, and for ever, but with a Power too of recalling it, reserving to myself still the Possession of it, and the full Liberty of enjoying the same. ¹ For a Will is the making over one's Effects in Case of Death, 'till then to be reversed or altered at Pleasure; and in the mean Time reserving the whole Right of Possession and Enjoyment. *Plutarch* very well saw this, and therefore when he had related, that *Solon* allowed his Citizens the Privilege of making Wills, he adds, *Τὰ χρήματα, κτήματα τ' ἐχόντων ἐποίησεν*, ² *He thereby made what they had properly their own.* And *Quintilian*, the Father, in a Declamation of his, ³ *Our very Estates would seem burthensome, if we had not a full Liberty to dispose of them; and if, after having had a full Power to dispose of them during our Life, we should be deprived of it when we die.* It was by Vertue of this natural Right, that *Abraham*, in Case he should die without Issue, was ⁴ to have left all his Effects to *Eliezer*, as is plain from the Passage, *Gen. xv. 2.*

2. But that Foreigners have not in some Places a Power to dispose of their Effects by Will, is not from the Law of Nations, but from the Civil Law of such or such a State; and I am much mistaken, if it does not proceed from those Ages when Foreigners ⁵ were looked upon as so many Enemies; and therefore, among the more civilized Part of Mankind, ⁶ it hath been justly abolished and laid aside.

XIV: (1) On this Question see PUFENDORF, B. IV. Chap. X. with the Notes.

² *Vit. Solon.* p. 90. Tom. I. Edit. Wech.

³ *Declam.* CCCVIII.

⁴ SOPHOCLES has given us the Will of *Hercules*. *Trachin.* ver. 1164, &c. That of *Alceftis* appears in EURIPIDES, (*Alceft.* v. 282, &c.) We read in HOMER, that *Telemachus* made a Donation, in Case of his Death, which is a Sort of Will. *Odyss.* Lib. XVII. (ver. 79, &c.) In the same Poet are some Examples of a Declaration of a last Will in Relation to certain Things to be done; as PLUTARCH shews from the Words of *Andromache* and *Penelope*. We have already produced other Instances of Wills made by the Antients, B. I. Chap. III. § 12. in the Text and in the Notes. The Practice of making Wills among the *Hebrews*, appears from *Deut. xxi. 16.* and *Eccl. xxxiii. 25.* GROTIUS.

The Wills of *Hercules* and *Alceftis* contain no

Disposals of Goods, but only Directions for doing certain Things. We find in EURIPIDES's *Alceftis*, a Sort of Donation in Case of Death, made not by *Alceftis* herself, but by *Hercules*, ver. 1020, &c. Our Author has produced this Example in his *Florum sparsio ad Justinian.* p. 36. Edit. Amst. and this probably gave Occasion to the Mistake, which made him confound the Persons in this Place. PLUTARCH's Reflection occurs in the Treatise on HOMER's Poetry, by some attributed to DIONYSIUS of *Halicarnassus*. He there says, that *The Poet knew it was customary for Persons going to War, or being in Danger, to recommend certain Things to their Relations.* p. 74. Edit. Barnes. The Words of *Andromache*, from which he infers this, are in *Iliad* XXIV. v. 744, 745. Those of *Penelope*, in *Odyss.* XVIII. v. 264, &c.

⁵ See Chap. XV. of this Book, § 5.

⁶ It has not been quite abolished. See BODIN, *Of the Commonwealth*, B. I. Chap. VI.

C H A P. VII.

Of an Acquisition derived to one by Vertue of some Law; where also of succeeding to the Effects and Estate of a Man who dies without a Will.

I. Some Civil Laws are unjust, and therefore do not transfer a Property; such are those that confiscate the Goods of Shipwrecked people.

I. NOW that derivative ¹ Acquisition, or Alienation, which is owing to some Law, is either from the Law of Nature, or the voluntary Law of Nations, or from the Civil Law. We are not treating of Civil Law here, for that would be an endless Task, neither are the most considerable Disputes in War to be determined by it: But we shall only observe, that there are some of the Civil

I. (1) See Chap. II. of this Book, § 1.

Laws ² that are plainly unjust; as those by which ³ all shipwrecked Goods are confiscated. For to take away a Man's Property, without any apparent Cause, is manifest Injustice. Very well then has *Euripides* said in his *Helena*,

Ναυαγὸς ἤκω ξένῳ, ἀσύλῳ γένῳ.

*Being shipwrecked, and a Stranger, I am one of those who ought not to be plundered. For what Right can the Prince's Treasury have (they are ⁵ Constantine's own Words) in the Calamity of any Man, that it should pursue its Advantage in so unfortunate an Affair? And *Dion Pruseensis*, in his seventeenth Oration, speaking of a Shipwreck, Μὴ γὰρ ἐν πῶρῃ, ὃ ξεῦ, &c. GOD forbid that I should gain by Mens Misfortunes.

II. 1. By the Law of Nature; that is, by a Law which results from the very Essence and Virtue of Property; an Alienation is made two Ways, by Compensation, or by Succession. Alienation by ¹ Compensation is effected, when ² for any Thing which belongs to me, or which is due to me, if I cannot get the very Thing itself, ³ I take some other Thing of an equal Value from him who will not re-

store

II. By the Law of Nature a Man gains a just Right to that which he has taken from another, in Satisfaction for his own Debt; and when this holds good.

² I have produced several Examples of this Kind in my Discourse *On the Permission of the Laws*, &c. printed in 1715.

³ As formerly in *England*, *Britany*, and *Sicily*. A Constitution of the Emperor *Frederick* supposes this practised in several Countries; for it orders, that Both the Ships driven on any Coast, and the Goods found in them, should be kept entire for the Proprietors, &c. notwithstanding the Custom of some Places to the contrary. Except they be Pirates, Enemies to the Empire or Christianity. Code, Lib. VI. Tit. II. De Furtis, Authent. post. Leg. XVIII. SOPATER and SYRIANUS, in *Hermogen*. (Εἰς ἑτάσεις, p. 107. Edit. Venet. 1509.) mention such a Law as established among the ancient Grecians. *Christian*, King of *Denmark*, said, that by the Abolition of the Law for confiscating the Goods taken up after a Wreck, he lost an hundred thousand Crowns a Year. Notice is taken of this bad Custom, in the Revelations of *Bridget* Queen of *Sweden*, Lib. VIII. Cap. VI. and in the *Speculum Saxonicum*, II. 29. where the Author treats of *Denmark*. See also the *Decretals*, Lib. V. Tit. XVII. De Raptorib. &c. Cap. III. CRANTZIUS, *Vandalic*. XIII. 40. XIV. 1. CROMER, *Polonic*. Lib. XXII. (p. 509. Edit. Basil. 1555.) GROTIUS.

See PUFENDORF, B. IV. Chap. XIII. § 4. and my first Note on that Paragraph, in the second Edition. Tho' this barbarous Custom is at present insisted on one Way or other in but too many Places; it must be acknowledged, that some Governments have had serious Thoughts of moderating or abolishing it. I could give the Example of the Republick of *Venice*, of which I have an authentick Proof in my Hands. It is a Law made by the Council of the *Pregadi*, in 1583, which, under severe Penalties, forbids the taking of any of the Goods belonging to such as are Shipwrecked; and regulates Things with all the Precautions necessary for putting the Masters of such Goods in a Way of recovering them easily. I find this Law in a curious Manuscript of Instructions, given, about that Time, by the Senate to a Governor sent by that Body into the Island of *Cephalonia*; a Manuscript, for which I am beholden to the Liberality of Mr. BOURGUET, a worthy and learned Gentleman, who resided at *Venice* many Years.

4 Ver. 456.

5 Code, Lib. XI. Tit. V. De Naufrag. Leg. I. See also Digest. Lib. XLVII. Tit. IX. De incendio, ruinâ, naufragio, &c. Leg. VII. NICETAS CHONIATES, in his History of the Emperor An-

dronicus, calls this a most unreasonable Custom, ἐβδ. ἀλοώτατον. (Lib. II. Cap. III.) See likewise CASSIODORE, Var. IV. 7. I cannot imagine how it came into BODIN's Head to defend such a Practice. But the same Author blames *Papinian* for chusing to die rather than injure his Conscience. GROTIUS.

The Place where BODIN blames *Papinian*, the Lawyer, is in B. III. Chap. IV. of his Republick, p. 458, 459. Lat. Edit. Francof. 1622. and says, He shewed more Courage than Wisdom. See Mr. OTTO's *Papinian*, Chap. XVI. § 5, 6. As to the Apology he is accused of making for the Law, which confiscates the Goods of Persons shipwrecked, the Commentators charge our Author with accusing him wrongfully; for he expressly calls that Practice, A Barbarity and Cruelty both to fellow Citizens and Strangers. B. I. Chap. X. p. 267. in the same Latin Edition; for those Words are not in the French.

II. (1) Expletione juris. I could not find a Term more proper for expressing our Author's Thought, than that of *Compensation*. I am sensible that in the Law stile it is taken in a Sense somewhat different. See PUFENDORF, B. V. Chap. XI. § 5, 6. But it is still allowable to fix a more general Idea to the Word, when the Necessity of making one's Self understood requires it. Our Author himself, in his third Note expresses himself thus, In compensationem operæ, viz.

2 The Definition in the Original runs thus, Quoties id quod meum nondum est, sed mihi dari debet, aut loco rei meæ aut mihi debita, &c. Mr. BARBEYRAC, in his Latin Edition of this Work, published in 1720, omits the Words here expressed in Roman Characters. In a Note on the Place, which he has enlarged in his French Translation, he very judiciously observes, that these Words are a manifest Redundancy, and no better than an Explication or anticipated Repetition of mihi debita. As the Author was far from being fond of Superfluities, the Commentator supposes he at first wrote Quoties loco illius quod meum est, vel quod meum nondum est, sed mihi dari debet, &c. but finding the same might be said thus in fewer Words, Quoties loco rei meæ, aut mihi debita, &c. changed the Expression, but forgot to efface something of what he had before written. Those who are acquainted with his Stile, says Mr. BARBEYRAC, and understand what Criticism is, will easily perceive the Truth of what I advance.

3 See B. III. Chap. VII. § 6. Thus St. IRENEUS justifies the Conduct of the *Israelites*, who took

Sylw. in Verb.
Bellum, p. 2.
q. 13.

store what is mine, or pay what he owes me. For expletive Justice, when it cannot obtain precisely what one has a Right to demand, seeks the Equivalent, which by moral Estimation is considered as the same Thing. And that the Property then passes from the Debtor to the Creditor is proved by the necessary Connexion of this Conveyance with a lawful End; which is the best Argument in moral Things. For in the Case under Consideration, one cannot attain to the Enjoyment of his Right, unless he becomes Proprietor of what he seizes: The bare Possession of a Thing being useless, without the Power to dispose of it as one pleases. ⁴ A very antient Example of this we find in the History of *Diodorus* [Lib. 4.] where *Hesioneus* seized *Ixion's* Horses, for what, according to Promise, he ought in Justice to have performed to his Daughter.

2. We know that the ⁵ Civil Laws do not allow any Man to do himself Justice; and he that shall take any Thing by Violence from another, altho' it be in Reality his Due, it shall be accounted no less than a Sort of ⁶ Robbery; nay, and in many Places ⁷ he shall by that Means lose his Debt. And tho' the Civil Law did not directly forbid this, yet, from the very Design of erecting Courts of Justice, it may be easily presumed to be illegal. But where there are no Courts at all to appeal to, it is there we must have Recourse to the Law of Nature, of which above; nay, tho' the Exercise of Justice should but for the present be interrupted, we might certainly seize on what we find, if the Debtor were running away, and there should be no other Method of recovering our own: Yet so, that we can have no Property therein, till such Time as a formal Judgment hath passed in our Favour, as is usual in the Case of Reprisals, of which hereafter. But if the Right be certain, and it be also morally certain, that the Law, for want of good Proof, will not give a Man Satisfaction; ⁸ in such a Circumstance, the Obligation of having Recourse to the common Methods of Justice ceases, and he returns to the Right he had before the Establishment of Tribunals: And this, I think, is the best founded Opinion.

III. ¹ Succession to the Estate of him who dies intestate, Property being once introduced, and independently of all Civil Laws, is founded on ² a natural Conjecture of the Will of the Deceased. For since the Nature and Power of Pro-

took the Gold and Silver Vessels of the Egyptians, in Compensation for what was due to them for their Work. For, says he, the Egyptians were indebted to the Israelites, not only for their Goods but also for their Lives. TERTULLIAN, *Adv. Marcion*. Lib. II. (Chap. XX.) has the same Thought. The Egyptians, says that Father, redemand their Gold and Silver Vessels. The Hebrews, on the other Hand, urge their Demand, alledging their Right to Wages for their Service and Work, &c. He afterwards shews, that what the Israelites took was very much short of their Due. GROTIUS.

⁴ See PUFENDORF, *B. V. Chap. XIII. § 10* and last.

Instead of *Hesioneus*, *Ἡσιονεύς*, read *Eioneus*, *Ἐιονεύς*; an Emendation long since made by MEZIRIAC, in his learned Commentary on OVID's Epistles, *Tom. I. p. 151. Edit. 1716.* and received by MUNCHER on *HYGIN, Fabul. CLV. p. 227.*

⁵ If by Vertue of a Bargain I owe you any Thing, and do not deliver it to you, but you take Possession of it, you are a Thief. In like Manner, if I sell you Goods, but do not deliver them, and you take Possession of them without my Consent, you do not possess them as a Buyer, but are a Thief. Digest. Lib. XLI. Tit. II. *De adquir. vel amittendâ possessione*, Leg. V.

⁶ When MARCIAN said, I have committed no Violence, CÆSAR (DIVUS MARCUS) replied, Do you imagine Violence is employed only when Men are wounded! He also is guilty of using Violence, who demands what he thinks his Due by any but legal Means. Digest. Lib. XLVIII. Tit. VII. *Ad Leg. Jul. de vi privatâ*, Leg. VII. See also Lib. XLVII. Tit. VIII. *De vi bonor. rapt.* Leg. II. § 18.

⁷ If it shall be proved to me, that a Man rashly takes or possesses any Thing belonging to his Debtor, or Money due from him, which is not willingly delivered, and claims it as his own, he shall have no Right to the Debt. Digest. Lib. IV. Tit. II. *Quod metus causa*, &c. Leg. XIII.

⁸ The Author supposes, without Doubt, that the Person on whom the Demand is made, is, or ought to be convinced, that he owes what is demanded. For if he might be ignorant of the Debt, as if he was Heir to a Person who had borrowed something, the Creditor ought to blame himself only, for not taking a Note of Hand, or his Misfortune in losing it. We must here likewise suppose a Case, where the Creditor, without wronging any one, finds Means of getting what is due to him; so that, if he cannot prove the Debt, neither can the Debtor prove what he has done towards paying himself; for otherwise it would be entirely useless to take this Expedient, since the Judge would oblige the Restitution of what was taken. What I have here said is sufficient for answering the Criticism of the Commentators on this Place, and particularly the pretended Contradiction which one of them finds between what our Author says here, and what he lays down, *Chap. XXIII. of this Book, § 11.*

III. (1) See PUFENDORF, *B. IV. Chap. XI.*

² PAUL, the Lawyer, says, that *A Feoffment of Trust may be granted (by a Codicil) to the Successors of Persons dying intestate; because the Master of the Family is supposed willing that they should succeed to the Inheritance which falls to them by Law.* Digest. Lib. XXIX. Tit. VII. *De jure Codicill.* Leg. VIII. § 1. GROTIUS.

B. i. Ch. 3. § 2.
Code, l. 10. tit.
31. De Decur.
&c. leg. 54. & l.
1. tit 3. de Ep.
& Cler. leg. 12.
& D. D. in leg.
39. § 1. in fin.
Dig. ad Leg.
Aquil.
Bart. intr. De
Repres. q. 59.
B. iii. Ch. 2.
§ 4. 5.
III. How the
Succession to the
Estate of him
who dies with-
out a Will does
originally and
naturally arise.

perty is such, that the Owner may transfer it to another Person at his Death, and yet be in Possession of the same during Life, as we said before; it is not to be supposed, that because a Man dies without a Will, he designed his Estate for any Person who should first lay Claim to it, or get Possession of it, and therefore it follows, that such Effects should go to him, to whom there is the greatest Probability that the Deceased, had he made a Will, would certainly have bequeathed them. ³ *To know the Intentions of the Deceased*, says the younger Pliny, *stands for a Law*. But in Cases that are doubtful, it is always presumed that a Man would do that which is the most fair and honest: And among Things fair and honest, we must rank in the first Place, that which is strictly due; and afterwards that which has a certain Suitableness to the Character or Person of one, tho' not strictly due.

IV. 1. It is a Thing disputed amongst ^a Civilians, whether Parents are obliged to maintain their Children? Now there are some who will by no Means allow, that there is any such direct Obligation; but yet, at the same Time, think that it is agreeable to Reason that it should be so. It is our Opinion entirely, that we ought to distinguish the Word *Obligation*, which is sometimes taken strictly, for that which is founded on expletive Justice; sometimes in a larger Sense, for that which cannot be omitted without offending against the Rules of Decorum, tho' this Decorum proceeds from some other Source than rigorous Right, properly so called. Now the Obligation we are speaking of here, ¹ is to be taken in this larger Sense, except there should be some human Law that lays Parents under a stricter Obligation. And it is thus that I understand what *Valerius Maximus* has advanced, when he says, that ² *Our Parents, by maintaining us, have laid an Obligation upon us, that we do the same by their Grand-Children*. And *Plutarch*, in his most elegant Treatise of the Affection to one's Children, οἱ πατέρες οἱ υἱοὶ ἀδελφοὶ καὶ ἀδελφαὶ ἐκδεχόμενοι, ³ *Our Sons expect our Estates after us*, ⁴ *as a Debt that we owe them*.

Soto, De Just. q. 3. art. 2. Cajet. d. q. 66. Ch. 6. § 14. and last.

IV. *Whether any of the Parents Effects are by the Right of Nature their Children's Due. This is explained by a Distinction.*

³ *Epist. Lib. IV. Ep. X.* See also *Lib. II. Ep. XVI.* GROTIUS.

That Author speaks of what an Heir ought to do, when there is Reason for thinking the Deceased had an Intention of doing certain Things, tho' there be not sufficient legal Proofs of it, or tho' his Dispositions may be annulled by the Law. This therefore is a particular Case, or rather a Sort of Case of Conscience, on which the Reader may consult PUFENDORF, *B. IV. Chap. X. § 7, 8.* together with Note 2. on §. 8. second Edition. Whereas the Business here is to lay down a general Rule for knowing to whom the Goods of a Person ought to belong, who has not disposed of them by Will, and whose private Intention is supposed not to be known.

^a *Franc. Piscin. De Stat. exc. Fem. n. 133. Mench. in Auth. Novissima, Cod. de inoff. Test. n. 296. Tell. Fernand. in l. 10. Taurin. Q. 4.*

IV. (1) In my Opinion, we are here to distinguish between the Time, during which Children are not in a Condition of providing for their own Subsistence, and that, in which they are able to make such Provision. In Regard to the former, Fathers and Mothers are strictly obliged to allow or leave their Children what is necessary for their Support; this is a necessary Consequence of the Obligation, under which they lie of doing all in their Power for preserving the Life which they have given their Children. But as soon as the Children are able to provide themselves with Necessaries, and much more when they already have acquired them, the Law of Nature alone does not impose an indispensable Obligation on Parents to leave them their Estates, either in the whole or in part. They cannot indeed find nearer Relations to make their Heirs; and therefore, when they have no considerable Reason for thinking it would be better to leave them to others, they would do ill to prefer any one to their

own Blood. But even in this Case, Children would have no Cause to complain of any *Wrong*, properly so called; and still less, when the Father or Mother had good Reasons for disposing of some Part of their Estate in Favour of Persons more worthy, or such as had more Need of it.

² These Words are taken from a Discourse, which he supposes the Censors might make to such as they sentenced to pay a Fine for having lived to old Age unmarried. The Words immediately preceding those here quoted, are, *Nature has prescribed you a Law for getting Children, as well as for being born yourselves*, *Lib. II. Chap. IX. Num. 1.* so that the Sentence taken together, speaks directly of marrying, of which the Obligation of maintaining Children is a Consequence.

³ *Tom. II. p. 497. Edit. Wech.* where he observes, that this is the Reason why Children have so little Gratitude to their Parents for what they leave them, and shew so little Concern for honouring and serving them.

⁴ The Emperor JULIAN says, *It is just* [or rather *a received Custom, νῆμιστος*] *that Children should inherit their Father's Estates*. In *Cæsarib. (p. 334. Edit. Spanheim.)* Nor are Daughters to be excluded; and it appears from the Book of JOB, that according to the Custom of the most remote Antiquity, they had a Share in the Inheritance of their Parents, after the Sons. On this Principle of Equity ST. AUGUSTIN would not have the Church receive the Goods of such as disinherited their Children. His Words on that Subject may be seen in the *Canon Law*, *Caus. XIII. Quest. II. (Can. VIII.)* and *Caus. XVII. Quest. IV. (Can. XLIII.)* The first Passage is taken from *B. II. De Vita Clericorum*; and the second from his fifty-second Discourse, *Ad Fratres in Eremo*, if the Piece last mentioned is really ST. AUGUSTIN'S. PROCOPIUS observes, that *The Laws, tho' in other Respects different*

them. For, as *Aristotle* has it, whoever gives the Form, gives also what is necessary for producing that Form; and therefore, whoever is the Cause of a Man's Being, ought, as much as in him lies, to supply him with what is necessary for human Life; that is, both natural and social, for Man is born for Society.

2. And for this Reason it is, that other Animals too do, by meer natural Instinct, supply their young Ones with such Necessaries as are convenient for their Subsistence. Hence *Apollonius Tyaneus*, what was said by *Euripides*,⁵

ἄπαντι δ' ἀνθρώποισιν ἡ ψυχὴ τέχνα.

All Men look on their Children as their own Life. Has thus altered,

ἄπαντι δ' ζώουσιν ἡ ψυχὴ τέχνα.

All Animals look on their Off-spring as their own Life. And this innate Affection he proves by several Arguments, which may be seen in *Philostratus*, B. vii. Ch. 7. and 8. To which Passage that in *Oppian*, in his *Cynegetica*, Lib. iii. (ver. 107, &c.) and *Halieutica*, Lib. i. (ver. 646, &c. 702.) does perfectly agree. And the same *Euripides*, in his Tragedy of *Diety*, says, that *This one Law is what all Men have in common among themselves, and with all other Animals*. Hence it is, that the antient Civilians refer the Education of Children⁶ to the Law of Nature, whereof the very Beasts have some Sense from a natural Impression, and which is prescribed to us by Reason. ⁷ A certain natural Incentive, as *Justinian* expresses it; that is, the *στοργή*, a natural Tendernefs and Affection urges Parents to provide for the Maintenance and Education of their Children. And in another Place,⁸ Nature has obliged the Father to maintain either Son or Daughter. So *Diodorus Siculus*, ἁλὰθ' ἡ φύσις, &c. Nature teaches all Animals to preserve themselves and their Off-spring, that by this Means their Race may be perpetuated for ever. So by *Quintilian* a Son is introduced delivering himself thus, I claim my Part by the Law of Nations. And *Sallust* called a Will by which a Son is disinherited, *Impious and unjust*. And because this is a natural Duty, therefore is the Mother obliged to provide for⁹ such Children which she has got by common Conversation with several Men.

3. And tho' the Roman Laws ordered nothing to be left for such Children as were¹⁰ illegitimate; and that by *Solon's*¹¹ Laws it was provided, that a Man should not be obliged to leave any Thing to his natural Issue; yet the Canons^b of

ferent in different Nations, agree in this, both among the Romans and Barbarians, that Children are the proper Masters of what is left by a Father. *Perfic. Lib. I. Cap. XI. GROTIUS.*

⁵ *Androm.* ver. 418.

PLINY, speaking of Swallows, says, They feed their young ones by Turns, with the greatest Equity. *Nat. Hist. Lib. X. Cap. XXXIII. GROTIUS.*

⁶ *Instit.* Lib. I. Tit. II. De Jure Naturæ, &c. See also *Digest.* Lib. I. Tit. I. De Just. & Jure, Leg. I. § 3.

⁷ *Code.* Lib. V. Tit. XIII. De rei uxoriæ actione, &c. Leg. unic. § 5.

⁸ *Code.* Lib. VI. Tit. XLI. De bonis, quæ liberis, &c. Leg. VIII. § 5. *DIODORUS SICULUS*, (Lib. II. Cap. L. p. 94. Edit. H. Steph.) *QUINTILIAN*, (*Instit. Orat.* Lib. VII. Cap. I. p. 591. Edit. Burm.) *GROTIUS.*

The Passage of *SALLUST* appears in a Fragment containing the Letter from *Mithridates* to *Arfaces*, King of *Pontus*; where he speaks of the Will by which *Attalus* had made the Roman People his Heirs. *Fragm.* Lib. IV. Cap. II. Edit. Waff.

⁹ *Digest.* Lib. XXV. Tit. III. De agnoscend. & alend. liberis, Leg. V. § 4.

¹⁰ Children born of an adulterous or incestuous Commerce; for such were not called natural Children. See *Novel. LXXXIX. Quibus modis naturales, &c. Cap. XV.*

¹¹ Our Author, deceived without Doubt by his Memory, makes a wrong Application of this Law of *Solon*, concerning natural Children. That celebrated Legislator, according to *HERACLIDES* of *Pontus*, as quoted by *PLUTARCH*, ordered, not that a Father should not be obliged to support such Children; but that they should not be obliged to support their Fathers. The Reason given for this Law is, because those Fathers had no other View than that of gratifying their own Passion, and instead of expecting any grateful Return from their Children, they gave them a Sort of Right to resent the Ignominy of their Birth. *Vit. Solon. Tom. I. p. 90. Edit. Wech.* As to the Business of Fathers in Regard to their natural Children, tho' the latter were not Heirs to the Goods of their Fathers, unless they had been legitimated, yet they received a certain Portion of the Inheritance, which was termed the *Bastard's Part*, *Νοθεῖα*, and which was fixed at a thousand Drachms, or ten *Minæ*, that is about a hundred Crowns, a pretty considerable Sum for those Times. See *ARISTOPHANES*, in his *Birds*, ver. 1655, &c. *HARPOCRATION*, on the Word *Νοθεῖα*: And *MEURSIUS*, in his *Themis Attica*, Lib. II. Cap. XII.

^b *Decretal.* Lib. 4. Tit. 7. De eo qui duxit in Matrimonium quam polluit per Adulterium. Cap. 5. in fin.

the Christian Church have very much softened this Rigour, by instructing us, that our Children, however begotten, should be a Part of our Care; and that in Cases of Necessity, we ought to leave them whatsoever is necessary for the Support of their Lives. Thus we are to understand the common Maxim, that human Laws cannot deprive Children of their Portion. For that is only true; so far as the Portion includes a Part of the Estate necessary for their Maintenance. Whatever is beyond that, may be taken from Children without Prejudice to the Law of Nature.

Decretal. Lib. IV. Tit. VII. De eo cui duxit in Matrimonium quam poluit per adulterium, Cap. V. in fin.

4. Neither are we obliged to maintain our Children of the first Degree only, but those of the second too; and even beyond this, if the Case be so: This is what *Justinian*¹² informs us of, when he declares, that for Nature's Sake we ought to provide not only for our Sons, but for those who come after them, and this extends to such also who are descended from us by our Daughters,¹³ if they have no other Subsistence.

V. I. Children too ought to support their Parents; a Duty not only prescribed by the Laws but also taught by a common Proverb, *Ἀντιπελαρῆν*, *Do as the Storks do, return the Kindness you yourselves have received*; and we find that *Solon*² is highly applauded for setting a Mark of Infamy upon such Persons as refused to do it. But the Practice of this Duty is not so frequently necessary as that which we have instanced concerning Children: For Children when they come into the World, bring nothing with them for their Maintenance and Support; and they have a longer Time to live than their Parents; and therefore, as Honour and Obedience are due to Parents, and not to Children; so are Education and Subsistence rather due to Children than to Parents: And in this Sense it is that I understand that of *Lucian*, *ἡ τοί γε ἡ φύσις, &c.*³ *Nature enjoins Parents to love their Children, more indispensibly and more strongly, than Children to love their Parents.* And that of *Aristotle*, *μᾶλλον (συγκαίῳ), &c.*⁴ *That which begets is more affectionate towards that which is begotten, than that which is begotten is towards that which begets it; for we look on that as our own to which we have given Being.*

V. In a Succession Children are preferred to the Father and Mother of the Deceased, and why?

2. Hence it is, that even without the Assistance of the Civil Law, the first Succession to one's Effects devolves on the Children, because that Parents are supposed to be willing not only to supply them, as being Parts of themselves, with Necessaries, but also to make such a plentiful Provision for them, as shall enable them to live agreeably and handsomely; and especially at a Time when they can no longer enjoy their Estates themselves. *Natural Reason*, says *Paulus*⁵ the Civilian, *is as it were a silent Law, that entitles Children to the Inheritance of their Parents, calling them to that Succession as their Right and Due.* *Papinian*, another Civilian,⁶ maintains, that *Parents cannot claim such a Right to their Children's Estates, as Children can to the Estates of their Parents; for the Estates of Children come to Parents, as if it were to comfort them in their Affliction; whereas Children are called to inherit the Estates of Parents, not only by Nature, but also by the usual Desire of Parents.* That is, the Estate goes to the Children, partly from an express Obligation in Nature, and partly from the natural Conjecture, that Parents would have their own

¹² See the Law quoted in Note 8. on this Paragraph; and Law V. § 1, 5. of the Title of the *Digest*. cited in the Note immediately following this.

¹³ It is evident, that a Daughter's Children are not a Burthen to their Grandfather, but to their own Father, unless the Father is either dead or in Want. *Digest. Lib. XXV. Tit. III. De agnoscend. & alien-dis liberis, &c. Leg. VIII.*

V. (I) *Ἀντιπελαρῆν*. See [a Passage of *PHILO*, quoted in the Preliminary Discourse, § 7. Note 1. and] what *LEO AFRICANUS* observes on a Bird of Africa, called *Nestus*, *Lib. IX. (toward the End).* *GROTIUS.*

² *DIAGENES LAERTIUS* quotes and commends this Law, *Lib. I. § 55.* See also the Fragments of *MENANDER*, collected by Mr. *LE CLERC*, p. 278.

³ *In Abdicat. Tom. I. p. 721. Edit. Amst.*

⁴ *Ethic. Nicom. Lib. VIII. Cap. XIV. p. 112. Edit. Paris.*

⁵ *Digest. Lib. XLVIII. Tit. XX. De bonis damnatorum, Leg. VII.*

⁶ *Ibid. Lib. XXXVIII. Tit. VI. Si Tabulae Testamenti, &c. Leg. VII. § 1.* *PHILO* the Jew says, that Since it is a Law of Nature that Children should succeed to the Inheritance of their Parents, and not Parents to that of their Children, *MOSES* has said nothing of this latter Case, as being ominous, and against the Wishes of Parents. *De Vit. Mosi, Lib. III. (p. 689.)* *SOCRATES* observes, that *A Man (when he marries) thinks of providing what will be necessary for the Subsistence of his future Children, and that as plentifully as is in his Power.* *XENOPHON, Memorabil. Lib. II. (Cap. II. § 5.) GROTIUS.*

Children to be as handsomely provided for as possible. ⁷ He did so out of Regard to his own Blood, says *Valerius Maximus*, speaking of *Q. Hortensius*, who tho' he was not well satisfied with his Son's Conduct, had yet declared him his Heir. And to this Purpose is that of *St. Paul the Apostle*, *ἐ γὰρ ὀφείλει, &c.* Children ought not to lay up for their Parents, but the Parents for the Children.

2 Cor. xii. 14.

VI. The Original of that Succession called a Representation where one Person comes in the Room of another who was deceased before.

VI. And now, because it is usual for the Father and Mother to take Care of their Children, therefore while they live, the Grandfather or Grandmother are thought to be under no Obligation of providing for them: Yet if they, or either of them die, it is then but reasonable, that the Grandfather or Grandmother should, in the Stead of their deceased Son or Daughter, take Care of, and provide for, their Grand-sons or Grand-daughters: And this Duty does also, by a Parity of Reason, extend to Parents that are still farther removed. And hence has that Right its Original, which entitles the ¹ Grandchild to succeed in the Son's Room, ² as *Ulpian* expresses it. *Modestinus* termed it, *τὸ πατρὸς, &c.* * To fill up the Place of the dead Father. And *Justinian*, *τὸ πατρῶον υπεισιέναι τὰξιν, ** To come into the Father's Room. *** Isæus*, in his Oration, where he speaks of *Philodemus's* Estate, calls this *ἐπανιέναι, To enter upon again.* And *Philo the Jew*, *τιανὸς γὰρ, &c.* ³ For the Grandchildren, their Fathers being dead, supply the Place of Sons to their Grandfather. And this Kind of Vice-Succession, ⁴ our modern Civilians are pleased to call a Representation, where the Children represent the Persons of their Parents. And that this was in Use amongst the *Hebrews*, is sufficiently proved from the Division of the ⁵ promised Land to *Jacob's* Sons. As my Son and my Daughter are the nearest related to me, so next to them are those who are born of them, as ⁶ *Demosthenes* says, in his Oration against *Macartatus*.

VII. Of Abdication and Disinheritance.

VII. What we have hitherto said of the Right of Succession, by making a Conjecture at the Will of the Intestate, holds good, unless there appear some certain and evident Signs to the contrary; amongst which Signs was that which the *Greeks* styl'd an ¹ Abdication, and the *Romans* a Disinheritance ²; yet in this Case, if the Person so disinherited has not by his Crimes merited Death; he ought, for the Reasons above-mentioned, to have a sufficient Maintenance allowed him.

⁷ Lib. V. Cap. IX. Num. 2.

VI. (1) *JUSTINIAN* pronounces this, just and equitable, *æquum. Institut. Lib. III. Tit. I. De hæreditatibus, quæ ab intestato deferuntur, § 6.* It is a Maxim among the *Jewish* Doctors, that Children succeed, even in the Grave; and, that Our Children's Children are as our own Children. *Rabbi JOSEPH*, the Son of *Jacobi*, mentions this Right as natural, in his Comment on *DANIEL, Chap. V. ver. 2.* *EGINHART* speaking of *Charlemagne*, who observed it religiously, in Regard of his Grand-Children, considers his Conduct as the Effect of his paternal Tenderness. *De Vita Caroli Magni. (Cap. XIX. Edit. Schminck.)* And *MICHAEL ATTALIATA* says, that Each of the Descendents takes the Place of his Father. *GROTIUS.*

² Digest. Lib. I. Tit. VI. De his qui sui, vel alieni juris sunt. Leg. VII.

* Lib. XXVII. Tit. I. De excusationibus tutorum, Leg. II. § 7.

** Novell. CXXVII. Princip. GROTIUS.

*** *ISÆUS*. Our Author had read the Words of the *Greek* Orator too hastily, and without due Attention to the Sequel of the Discourse. The Passage occurs, p. 467. Edit. Wech. 1619. *Ὁ γὰρ νόμος ἐκ ἐπ' ἐπανιέναι, ἐὰν μὴ ἴδιον κατὰλίπη γνήσιον.* He is there speaking of an Article of one of *Solon's* Laws, by which an adopted Child could not return to his own Family, and become Heir to his natural Father, except he himself had left a legitimate Child, who might remain in the Family of his adopted Father. This Law may be seen at Length in *DEMOSTHENES*, in the Close of his Oration against *Leocrates*. The same Expression occurs in the same Oration, p. 673. Edit. Basil. 1572.

where it is explained by *ἐπανιέναι ὅτι τὴν πατρῶον ἔσταιν Return to inherit his Father's Substance.* And *ISÆUS* himself elsewhere terms this, *ἐπανελθεῖν εἰς τὸν πατρῶον οἶκον. Returning to his Father's Family.* Orat. IX. De hæreditate *Aristarchi*, p. 553. See also *HARPOCRATION*, under the Words *οἱ οἱ πατρίδες παύσαι. &c.* The Passage therefore is intirely foreign to the Purpose.

³ *PHILO, Ad Cajum. p. 996. Edit. Paris.*

⁴ Thus in the Division of *Peloponnesus* among the *Heracidae, Procles, and Eurysthenes*, as representing their Father *Aristodemus*, drew Lots for one Portion only, against *Temenes* and *Cleippus*, who each drew one; as we learn from *APOLLODORUS, Biblioth. Lib. II. (Cap. VIII. § 4. Edit. Th. Gal.)* *PAUSANIAS, Messeniæ. (Chap. III. p. 113. Edit. Wech.)* *STRABO, Lib. VIII. (p. 560. Edit. Amst. 364 Paris.) GROTIUS.*

⁵ The Descendents of *Ephraim* and *Manasseh, Joseph's* Sons, did not succeed only by Right of Representation; for on that Foot they ought to have had among them but one Portion, equal to that of each of their Uncles. But *Jacob* had adopted them, as our Author himself observes, Note 3. on § 8. See *Numbers xxvi.* and *Joshua xvii.*

⁶ Orat. adversus *Macartatum. p. 661.*

VII. (1) *Ἀποκέρυξις.* *ARISTOTLE* calls this *ἀπέπαυσθαι, and ἀποσῆναι. Ethic. Nicom. Lib. VIII. Cap. XVI. and ult.* where he says, *It perhaps never happens that a Father renounces his Son, unless the Son be extremely wicked.*

² See a Treatise intitled *Baba Kama, Cap. IX. § 10. and § 25. of this Chapter. GROTIUS.*

VIII. I. Another

VIII. 1. Another Sign, which forms an Exception to the general Rule, is, when there is not a sufficient Proof, that he who passes for the Son of the Deceased is really so. Indeed, as to Facts we cannot have Demonstration; but that which is usually done in the Sight of Men, is considered as certain in its Kind, on Account of the Testimony they give of it. In this Sense it is said, that it is certain such a Woman is Mother to such a Child, because there are some Persons of both Sexes to be found, that assisted at its Birth, and were Witnesses of its Education. But it is impossible to have such an Assurance of the Father. And this ¹ *Homer* intimates, when he says,

οὐ γὰρ πῶς τις ἔον γένεσθαι ἀνέγνω.

No Man is certain of whom he is descended. And ² *Menander* after him,

αὐτὸς γὰρ εἰδὲς οἶδε πῶς ἐγένετο.

No Man can tell himself how he was born. And again in another Place, *

Ἔστιν ᾧ μήτηρ φιλότεκνον, &c.

A Mother loves her Children better than the Father, because she knows they are hers, but he only thinks they are his. And therefore Recourse was to be had to some Means whereby the Father of every Child might be probably discovered. And this Means was Marriage, taken according to the mere Law of Nature, for a Society that places the Woman under the Care and Custody of the Man. But indeed if it does in any other Manner appear, that such a Man is the Father of such a Child; or if the Father be persuaded of it himself; that Child shall then as justly inherit, according to natural Right, as any other whatever; and why not, when we see that even Strangers, who had been openly reputed as Sons, or adopted, as they are called, ³ inherit by Vertue of a Presumption of the Deceased's Will?

2. But our natural Issue too, tho' distinguished by Law from such as are legitimate,

(τῶν γνησίων γὰρ εἰδὲν ὄντες ἐνδεεῖς
νόμῳ νοσῶσιν.

⁴ They are not inferior to our legitimate Children; but the Law renders their Condition less advantageous, as said *Euripides*) may however be adopted, unless some particular Law do prohibit it. And this was granted formerly by the Roman Law of ⁵ *Anastasius*; but afterwards, in Favour of lawful Marriage, the Means of making them equal to such as were legitimate, was rendered more difficult, by obliging the Fathers either to marry the Mother, or to ⁶ offer them to be Members of

VIII. (1) *Odyss.* Lib. I. ver. 215, 216.

² EUSTATHIUS ON HOMER, p. 1412. Edit. Rom.

Ἀνδρὸν ᾧ εἰδὲς οἶδε τὸ πῶς ἐγένετο,

Ἄλλ' ἄπονομον πάντες, ἢ πιστεύοντες.

No Man knows of what Father he is born, but we all suppose, or believe, in this Case. The first Verse, as here produced by our Author, speaks a different Sense, No Man knows how he was begotten, or born. But he translates it according to the true Reading, both here and in his *Excerpta à vet. Trag. & Com.* where he quotes it right. He there observes, that the Passage is quoted in the other Manner by CLEMENT of Alexandria; but with this Difference, that that Father reads ἐγένετο, and not ἐγένετο.

* In ΣΤΟΒΑΙ *Florilegio*. Tit. LXXVI.

³ Or a Grandson adopted, as was done by the

Patriarch Jacob, in Relation to his Grandsons Ephraim and Manasseh. GROTIUS.

See *Genesis* xlviii. 5. and Mr. LE CLERC on the Place.

⁴ *Ex Andromed.* Fragm. Barnet. v. 12, &c.

⁵ *Code*, Lib. V. Tit. XXVII. *De naturalib. liberis.* Leg. VI.

⁶ *Per Curiae oblationem.* By the Word Curia was understood the Court or Council of municipal Towns; that is, such as had received the Privilege of Roman Citizenship. The Members of that Body were termed Curiales or Decuriones. But tho' the Employment was very honourable, most Men avoided it, because it was become very burthensome. The Curiales, or Decuriones, were charged with all the publick Affairs, and that frequently at their own Peril, and the Hazard of their Fortunes, while they were forbidden to meddle with several Things which would have brought them some Profit. For this Reason the Christians, among other Persecutions,

of Town-Councils. We have an Instance of this antient Way of adopting natural Children, in the Case of *Jacob's Sons*, who by their Father were put upon an equal Foot with the Children of the free Women, and came in for an equal Share of his Estate.

3. On the other Hand, it may sometimes so happen, that not only by Vertue of a Law, but by some particular Agreement, such Children as are born in lawful Wedlock, shall have no more than a Maintenance, or at least be excluded from the Bulk of the Estate. Now a Marriage that was contracted in this Manner, notwithstanding it was with a free Woman, was what the *Hebrews* called *Concubinage*; such as was that of *Abraham* with *Keturah*, whose Children, as also *Ismael*, the Son of *Agar* his Bond-maid, received some few Presents or Legacies for their Portions, but came in for no Share at all of the paternal Estate. Such a Sort of Marriage is that which is called a ⁸ *Morgengabic* Marriage: Not very different from which are those second Marriages in *Brabant*, where the Children of the first Marriage acquire the Property of the real Estate ⁹ that was in Being at the Dissolution of the former Marriage ¹⁰.

Gen. xxv. 6.

IX. Upon Failure of Issue, and where there is no Will, nor express Law, the antient Estate and Effects must return to them from whom they at first came, or to their Posterity.

IX. 1. But where there are no Children, it is not so easy to determine on whom a Man's Estate should naturally devolve; neither do the Laws vary in any one Point so much as they do in this particular. All which Difference may, notwithstanding, be for the most Part referred to these two Heads: The former whereof respects the nearest Degree of Blood, the latter will have the Effects return from whence they originally came, and this is usually signified, by *The Father's Effects to the Father's Relations, the Mother's to the Mother's*. And here, in my Opinion, we should distinguish betwixt ¹ a paternal Estate, that comes from Father to Son, (as was usually expressed in the Form that cut off the extravagant Son from the Administration of his Estate) and ² one that is newly acquired. In Regard to the former,

Persecutions, were sometimes sentenced by cruel Emperors, to enter into these Bodies, as appears from *CASSIODORE's Tripart. Hist. Lib. I. Cap. IX. Lib. VI. Cap. VII. and Lib. VII. Cap. ult.* as then in Process of Time almost every one strove to be excused from that Office, or quit it at any Rate, there was a Necessity of granting such Privileges as in some Manner should counterbalance the Burthen annexed to it. For this Reason therefore *Theodosius* the Great allowed a Father to legitimate his natural Sons, by offering them to be *Curiales*; and even a natural Daughter, by marrying her to one of that Council. *Code, Lib. VII. Tit. XXVII. De naturalibus Liberis, &c. Leg. III.* See also the *Institutes, Lib. I. Tit. X. De Nuptiis. § 13.* and *BRISSEAU's Selectæ Antiq. Lib. III. Cap. XIII.* as likewise *GODEFROY*, on the *Theodosian Code, XII. 1.*

7 This was formerly the Case of all the Children but the eldest, in the Country of *Mexico*. *GROTIUS.*

See *FRANCIS LOPEZ DE COMARA's Gen. Hist. of the West Indies, B. II. Chap. LXXVI.*

8 *Matrimonium ad Morgengabicam*; or, as the Writers on Fiefs call it, *ad Morgnaticam, Lib. II. Tit. XXIX.* This Word comes from the German *Morgen-Gab*, which signifies a Morning Present. The Person who marries a Woman in the Manner here specified; or, as the *Germans* express it, *with the left Hand*, the Day after his Wedding makes her a Present, which consists in the Assignment of a certain moderate Portion of his Goods, to her and her future Children after his Death, on which Condition they have no further Pretensions. *GREGORY of Tours* calls this *Matutinale Donum, Lib. IX. 19.* as *GRONOVIVS* observes, who likewise refers us to *LINDENBROG's Glossary* on the *Codex Legum Antiquarum*. See *CUJAS, Lib. IV. De Feud. Tit. XXXII. (Edit. vulg. II. 29.)* and *Mr. HERTIUS's Dissertation, De specialib. Rom.*

Germ. Rebus pub. &c. Sect. II. § 5. p. 104, &c. Tom. II. Comment. & Opuscul. &c. The Reader may likewise consult a Dissertation written by the late *Mr. COCCEJUS, De Lege Morgnaticâ*, printed at *Francfort on the Oder*, in 1695, where he pretends that it is the same as the *Salic Law*; and as that Law allowed of the Marriages here mentioned, they were therefore termed *Matrimonia ad morgnaticam*; or *ex Lege morgnaticâ*.

9 Both that of the Father and Mother: For on the Death of either of them, the Children inherit his or her real Estate, as if they died intestate; and the same Sort of Estate in Possession of the Survivor belongs to them, so that he or she cannot alienate them, but is obliged to preserve them entire, in Order to leave them to those Children of the first Marriage, who are from that Time reckoned Proprietors of them. We have a Treatise on this Subject, intitled *Tractatus de Jure Devolutionis*, written by *PETER STOCKMAN*, Counsellor in the Court of *Brabant*, and Master of Requests to the King of *Spain*, in whose Favour he published it in 1667.

10 The antient *Burgundians* had a Law like this, by which it was ordered, that *If a Father has divided his Estate with his Children, and marries again, the Children of the second Venter shall partake only of the Portion which the Father reserved for himself.* *Lib. I. Tit. I. Num. 2. GROTIUS.*

IX. (1) This Form may be seen in the Lawyer *PAUL's* Collection of *Receptæ Sententiæ*. It runs thus, *Seeing that you squander away your Father's patrimonial Estate, and are bringing your Children to Poverty, I (the Prætor) therefore deprive you of the Administration of such Estate, Lib. III. Tit. IV. De Testamentis, § 7.* See *Mr. SCHULTING's* excellent Notes on the Place.

2 The *Hebrews* distinguish those two Sorts of Estates: They called that which descended from Father to Son *נְכֻסֵי אֲבִירָה*, and that which was lately acquired

former, this Passage of *Plato* may take Place, Ἐγὼ ἐν νομοθέτῃς, &c. ³ *I who am a Legislator, do pronounce, that neither your Persons nor your Patrimony are properly yours, but belong to all the whole Race of you, as well that which has been, as that which is still to come.* And therefore *Plato* is for having κλήρον πατρῶν, *The paternal Estate*, secured ⁴ to that Family from whence it came; which I would by no Means have so construed, as that a Man has not a natural Right of disposing by Will, of such Things as came to him by his Ancestors. (For oftentimes one's ⁵ Friends are in such Necessity, that it is not only commendable, but even a Duty, to leave them an Estate). But that it may appear what in doubtful Cases we should most naturally suppose to be the Design and Intention of the Intestate; for I grant and suppose, that he, whose Design and Intention we want to find out, was absolute Master of his Estate, so that he could have disposed of it as he thought fit.

2. But since a Man when he is once dead, can no longer retain any Right or Property in what he had, and since we take it for granted, that he would be unwilling to lose the Opportunity of doing the Favour that is in his Power, let us now see what is the most natural Order by which we could suppose such Favours might be conferred. *Aristotle* well observes, Ἀρεγέτη ἀνταποδοσίον, &c. ⁶ *We should rather return a Kindness to our Benefactor, than oblige a Friend with a new one.* And *Cicero* says, ⁷ *No Duty is more necessary than Gratitude.* And again, *Whereas there are two Kinds of Liberality, the one that inclines us to do Good, and the other to requite it; it is in our own Power to do a Piece of Service or not to do it; but an honest Man can never be allowed not to requite a good Turn, whenever he can, without injuring any other Person.* So *St. Ambrose*, ⁸ *The Value and Esteem which you have for your Benefactor, ought to be greater than that for any other Person.* And presently after, *For what is so contrary to a Man's known Duty, as not to repay what he has received?* Now one may be grateful either to the Living, or, as *Lysias* ⁹ has shewn, in his Funeral Oration, to ¹⁰ the Dead, when we do kind Offices to their Children, who are naturally a Part of their Parents, and to whom, were their Parents living, they would earnestly wish we did Good, preferably to any other.

3. The *Roman* Lawyers, whose Decisions form the Body of the Civil Law of *Justinian*, and who adhered closely to the Rules of Equity, have followed the Principles of natural Equity, which I have now laid down in deciding Disputes between whole and half Brothers; Brothers by the same, both Father and Mother;

acquired נדלה. See a like Distinction in the *Burgundian Laws*. Lib. I. Tit. I. Num. I. GROTIUS.

³ *De Legib.* Lib. XI. Tom. II. p. 923. Edit. Steph.

⁴ *Ibid.*

⁵ *SENECA* speaks thus on the Subject, *When we are at the Close of Life, when we make our Wills, do we not then distribute those Benefits which will be of no further Use to us? What Time do we not employ in considering with ourselves how much, and to whom, we are to give? What signifies it to whom we give, since we can receive no Return? However, we never give with more Deliberation and Precaution; we never rack our Thoughts more, than when, laying aside all Considerations of our own Interest, we have nothing in View but how to do what is honest and decent.* *De Benef.* Lib. IV. Cap. XI.

⁶ These Words are not a Decision but a Question. The Philosopher places it in the Rank of problematical Questions, Ἀπορίαν δ' ἔχει ἡ τιμὴ, &c. And if he doth afterwards decide it, it is with some Restriction, adding, that this most commonly takes Place, ὁπποῦν; in short, ceteris paribus, all Things else being equal. *Ethic. Nicom.* Lib. IX. Cap. II.

⁷ *De Offic.* Lib. I. Cap. XV.

⁸ *Offic.* Lib. I. Cap. XXXI.

⁹ In his funeral Oration on those who had been

killed in a War, where the *Athenians* had sent Succours to the *Corinthians* against the *Lacedemonians*. Cap. XX.

¹⁰ Thus in *PROCOPIUS*, a Man in his last Moments says to another, *The Good you do to my Children is done to me.* *Perfic. Lib. I. (Cap. IV.)* See an Example of this Kind in what the Emperor *Theodosius* did in Favour of *Valentinian the Younger*, acknowledging, in his Person, the Obligations he had to his Father; as we learn from *ZOSIMUS*, Lib. IV. By the Laws of *MOSES*, the Uncle inherited after the Brothers, as being a nearer Relation to the first Possessor of the Estate than the Nephews. Numb. xxvii. 10. GROTIUS.

The Emperor *Gratian*, to whom *Theodosius* had great Obligations, and who raised him to the Imperial Throne, was not *Valentinian's* Father, but his Brother, as is well known. Besides *ZOSIMUS* is so far from saying what our Author attributes to him, that he tells us, that when *Valentinian* fled into the Dominions of *Theodosius*, and sent Ambassadors to desire his Assistance against *Maximus*; *Theodosius*, contrary to the Advice of his whole Council, would not, on that Account, engage in a War, into which he was at last brought only by his violent Passion for the Princess *Galla*, Daughter to the Empress *Justina*, and Sister to *Valentinian*. See Chap. XLIII. and XLIV. of B. IV. of that Historian. Edit. Cellar.

Brothers by the same Father, but different Mothers; Brothers by the same Mother only; and also in some^a other Questions. Ἀδελφοὶ ἀλλήλους φιλεῖσιν, &c. Brothers, says Aristotle, ¹¹ as they are born of the same Parents, do by Consequence love one another, for the same Birth being common to both, makes them as it were the same Persons. So Valerius Maximus, ¹² As the receiving of many and great Favours from him whom we love, is the first Tye of Friendship; so the receiving from one and the same Person such Favours, jointly with others, is the second. And therefore, By the common Right of Nations (as Justin¹³ says) one Brother should succeed another.

4. But in Case neither that Person from whom such and such Effects have been more immediately received, is to be found, nor any of his Children; our Gratitude then must extend to those who have next to him the justest Title to it; for Instance, to the Father of the Degree above, (the Grandfather) and to his Children; especially since by this Means we still keep in the same Family, not only of him whose Inheritance we are speaking of, but also of him from whom such and such Effects were more immediately derived; so the same Aristotle observes, Ἀνεψιοὶ δὲ, &c. ¹⁴ Cousin-Germans, and other Relations are united together, in so far as they are descended of those, who are, as it were, the same Persons. And there is between them more or less Union as they are more or less remote from the common Stock.

X. What has been newly purchased goes to the next Relations.

X. 1. But as for such Effects as are newly acquired, called by Plato, περίοντα τῆς κλήρης, ¹ The Surplus of a Patrimony, as they lay no Obligation of Gratitude upon us, so all we have to do in this Case, is to see that the Succession be made over to him whom the Deceased is supposed to have the greatest Affection for; and that is, as it is reasonable to imagine, ² the Person who is nearest related to him. And therefore Iffius³ says, that it was customary with the Grecians, ταῖς ἐγγύσιν, &c. For the Effects of the Deceased to pass to the next of Kin; and then adds, τί ἂν, τι δικαιότερον, &c. Why not, for what is more equitable than that the Estate of one Relation should pass to another? There is a Passage to the same Purpose in Aristotle, in his Book to Alexander, Ch. xi. ⁴ Nothing can be more, says Cicero⁵, for the Support and Preservation of Society, than to be the most kind to him who is the nearest related to us. And in another Place⁶ he ranks immediately after Children, those Relations with whom one maintains a good Understanding; and so does Tacitus, ⁷ Nature itself would have every Man's Children and Relations the dearest to him; and Cicero in another Passage, speaking of Relations, says, ⁸ Whatever is necessary and convenient for the Support of Life, is in a more particular Manner their Due from us; their Due, not according to expletive or rigorous Jus-

^a Novel. 84. De conf. & uter. frat. Code, Lib. 6. Tit. 57. De Legit. hered. Leg. 13. § 1. and Tit. 59. Comm. de Success. Leg. 11. Tit. 61. De bonis quæ liberis, &c. Leg. 3.

¹¹ Ethic. Nicom. Lib. VIII. Cap. XIV. p. 112.

¹² Lib. V. Cap. V. princip.

¹³ There is a Mistake in this Quotation; but it doth not lie where the learned GRONOVIVS supposes, who observes, that the Passage of JUSTIN, which he imagines our Author had in View, (Lib. XXXIV. Cap. III.) speaks of the Prerogative of an elder Brother. Our Author has quoted one Writer for another. He puts Lib. X. in his Margin; and the Reflection in Question is in QUINTUS CURTIUS, Lib. X. where he makes a Person of the lowest Rank say, that those who would not acknowledge Aridens, Brother to Alexander the Great, for his Successor, unjustly deprived him of a Crown which was his Due by the common Law of Nations. Cap. VII. Num. 2.

¹⁴ Ethic. Nicom. Lib. VIII. Cap. XIV. p. 112.

X. (1) De Legibus, Lib. XI. p. 923. Tom. II. Edit. Steph.

² See Deuter. xv. 11. xxiii. 7. Prov. xi. 17. SERVIUS treats of this upon that Passage of the sixth Æneid.

Nec Partem posuere suis. (ver. 611.)

Who dare not give, and ev'n refuse to lend
To their poor Kindred.

DRYDEN.

HIEROCLES, Ἡ δὲ τῶν ἀρχισίων, &c. The Respect that is due to Relations, must be in Proportion to the Proximity of Blood and Nature, that so, after our Parents, each of our Kindred may receive so much Regard from us, as their Nearness to them gives them a Title to. [In Aurea Carmina, ver. 4. p. 46, 48. Edit. Needham.] And POSSIDIUS of St. AUSTIN, He saw it was just and reasonable that the Children, or Parents, or Relations of the Deceased, should rather possess them. He means the Estates he is discoursing of there. (Cap. XXIV.) GROTIUS.

³ Orat. III. Seu de Nicostriati hæredit. p. 413. in fin. Edit. Wech. T. 2v, &c. Ibid. p. 417. init.

⁴ Page 611.

⁵ De Offic. Lib. I. Cap. XVI.

⁶ Ibid. Cap. XVII.

⁷ Vit. Agricol. Cap. XXXI. Num. 1.

⁸ De Offic. Lib. I. Cap. XVII.

tice, but κατ' ἀξίαν, *By Way of Decency and Fitness*; and again, ⁹ when he had mentioned that Love we bear to our Relations, he presently adds, *From this Affection are derived the Testaments and Recommendations of dying Men*; and ¹⁰ that it is abundantly more reasonable, that we give and bequeath our Effects to Relations than Strangers. And St. Ambrose too, ¹¹ *It is a Liberality justly commendable, not to neglect those of your own Blood and Family.*

2. Now the Succession to the Estate of a Person intestate, of which we are now treating, is nothing else than a tacit Will, founded on just Presumptions of the Will of the Deceased. So Quintilian ¹² the Elder, in one of his Declamations, *Next to such Persons as are mentioned in a Will, the nearest Relations have the justest Title; as they also have if the Deceased died intestate, or left no Issue. And this not merely because it ought in Justice to be so, but because such Effects being as it were deserted, and without an Owner, there is none nearer to take Possession of them.* What we have said of later Purchases, that they should naturally go to the next Relations, will hold equally good in those also that come by Inheritance, in Case that neither the Persons from whence they came, nor any of their Children are then in Being; because then Gratitude cannot serve as a Foundation to the Succession.

XI. 1. But what we have here advanced, tho' highly agreeable to a natural Conjecture, yet is it not of any absolute Necessity from the Law of Nature; and therefore very frequently altered, according to the various Humours of People, either by Compacts, by Laws, or by Customs. In certain Degrees they admit the Right of Representation, ¹ in other Degrees they do not; in some Places they consider from whence ² the Estates came, and in others they mind no such Thing; in some Countries the Eldest has a larger Share than the Younger, as among ³ the antient Jews, and in others the Children have all alike; with some, Preference is shewn to the Relations on the Father's Side; with others those of the Mother's Side are upon a Level with them; some have a particular Regard to the Sex, and others have none at all; with some the nearest Degrees of Relation only are allowed of, with others the most remote ones are not excluded. But to enter into a Detail of all these, as it would be extremely tedious, so would it be far from agreeable to our present Purpose.

XI. A Variety of Laws about Succession.

2. It is proper, however, to observe here, that when there is not a clearer and more certain Evidence of the Intention of the Deceased, every one is supposed to have designed that the Succession to his Estate should be regulated by the Laws of the Country; and that not only because of the Power that Sovereigns have to make or authorize such Regulations, but even from a ⁴ Conjecture of the Will of the Deceased; which Conjecture also is in Force, in Regard to those Persons in whom the supreme Power is lodged. For it is but reasonable to believe, that Sovereigns ⁵ have

⁹ *De finib. bonor. & mal. Lib. III. Cap. XX.*

¹⁰ *De Offic. Lib. I. Cap. XIV.*

¹¹ *De Offic. Lib. I. Cap. XXX.* This is taken from *Isa. lviii. 7.* You have some other such Expressions in St. CHRYSOSTOM, upon *1 Cor. iv. 7.* and St. AUGUSTIN, *De Doctrina Christ. B. II. 12.* GROTIUS.

¹² *Declam. CCCVIII. init.*

XI. (1) The antient Germans knew nothing of any such Representation, not even among their Children. Childebert was the first who introduced this Right into France by a particular Edict; and Otho, Son of Henry, brought it up in the Parts on the other Side the Rhine, as is attested by WITHEKIND, *B. II.* See the Lombard Law, *B. II. Tit. XIV. 18.* And the old Scots Right of Succession regarded only the Nearness of the Degree. See PONTAN, *Danic. VII.* where he relates, that it was so declared by the King of England, who was made Umpire in this Affair. GROTIUS.

2 Formerly this Rule took Place in some of these Provinces, according to the Law of Zeland, otherwise called *Jus Scabinicum*; and on the contrary, in others, the old Law of the Frieſlanders was fol-

lowed, (*Jus Afdomicum, or Aſingicum*) which required a Regard only to the Nearness of Blood. See VINNIUS on the *Institutes, Lib. III. Tit. V.*

3 See *Deut. xxi. 17. Gen. xlix. 3.* and Mr. LE CLERC on the Text.

4 We have Reason to believe, that the Deceased designed the Succession to his Estate should be regulated by the Laws of the Country, as what commonly seem to every one most reasonable; and if he had an Intention of disposing of it otherwise, he might have done it by Will.

5 The late Mr. HERTIUS, in his Dissertation, *De collisione Legum, Sect. IV. § 33. p. 196, 197.* Tom. I. of his *Comment. & Opuscul.* undertakes to confute our Author's Opinion by two Reasons. First, Because the Manner of possessing or acquiring the Sovereignty does not depend on the sovereign Power, in non-patrimonial Kingdoms, as our Author himself maintains, § 28. Num. 1. Secondly, Because the Case is not the same in Regard to the Sovereignty; as to other Things regulated by Laws or Customs, it is of a much superior Order, according to our Author himself, *Chap. IV.* of this Book,

have thought it very just to follow, in what concerns their own Affairs, the Dispositions or Laws they themselves have made, or the Customs they have approved; such Affairs I mean, in which they can be no Ways injured.

XII. What Kind of Succession there is in patrimonial Crowns. B.i. Ch. 3. § 11.

XII. But as to what relates to the Succession of Crowns we must distinguish betwixt such as are possessed with a full Right of Property, and as a Patrimony; and such as are enjoyed in a certain Manner, determined by the Consent of the People; a Distinction which we have treated of before. Patrimonial Kingdoms may be divided even between the Males and Females², as we find it was usual formerly in *Ægypt* and *Great Britain*.

*Nullo discrimine Sexus
Reginam scit ferre Pharos.*

*Pharos no Distinction makes,
But Male or Female Monarch takes.*

Says³ *Lucan*: And⁴ *Tacitus* of the Britons, *Nor do they make any Difference of Sex in their Government*. And adopted Sons are no less capable of succeeding than real ones are, by a Presumption that it was the Desire of the deceased Prince that it should be so; thus did *Hyllus*, the adopted Son of *Hercules*, succeed *Æpalus* the King of *Locris*. So *Pyrrhus*,⁵ having no lawful Issue, declared *Molossus*, his natural Son, his Successor to the Crown of *Epirus*; so King *Atreus* promised to

Strabo, l. 9.

Book, § 12. The first of these Reasons is inconclusive; for our Author certainly here speaks of patrimonial Kingdoms, in which he supposes the King has a Power of alienating the Crown, and consequently, disposing of the Succession as he pleases; whereas in § 28. he treats of Kingdoms originally established by the free Consent of the People. But the second Reason is good; and there is still less Reason to suppose that Sovereigns had an Intention to regulate the Succession by the Civil Laws, or Customs of the Country, when those Laws and Customs are very extraordinary, and very different from the common Manner of succeeding in most States. For there is much more Room for presuming they designed to follow such Customs as are most generally received, in Regard to the Succession to the Crown. See *Introductio ad Jus Publicum universale*, by Mr. BOHMER, Part. Spec. Lib. III. Cap. IV. § 19. with the Note. Concerning the Matter of Succession to the Crown in general, consult PUFENDORF, B. VII. Chap. VII. § 11, &c.

XII. (1) In *Asia* the Brothers reigned jointly, only one had the Prerogative of wearing the Crown. POLYBIUS, *Exc. legation*. XCIII. And in *Livy*, and the same POLYBIUS, you will find that *Egypt* was divided between the two Brothers the *Ptolomies*. *Attila's* Sons desired that the Nations might be parted among them in just and equal Shares. JORNANDES, *De Rebus Gothicis*. GREGOR. B. VII. speaking of *Irene* the Wife of *Andronicus Palæologus*, τὸ δὲ καὶ νόμιμον, &c. What is still more strange, is, that she would not that one only should reign, according to the antient Custom of the Eastern Roman Emperors; but as it was the Western Practice, would have their Cities and Countries shared amongst her Sons, that each of them might have a separate and independent Government to himself, as if they had been so many distinct Crowns derived to them as their proper and paternal Inheritance, in the same Manner as ordinary Persons come to their private Estates and Possessions, and so to descend to their Children and Successors after them. For she herself being of Western Extraction, had a Mind to bring

up here that new and unprecedented Custom she had received from thence. GROTIUS.

2 Of *Alexander* and *Laodice*, see POLYBIUS, *Exc. legat*. CXL. Of *Auletas's* Daughter. STRABO, XVII. ARRIAN (ἀναβάσει) relates, that several Women reigned in *Asia* after *Semiramis*. So *Nitocris* in *Babylon*, *Artemisia* at *Halicarnassus*, *Tomyris* among the *Scythians*. And SERVIUS upon the first *Æneid*. (ad ver. 654) says, *Because Women governed before*. And upon the ninth *Æneid*, ad v. 596, he says, that this was a Custom among the *Rutuli*. GROTIUS.

3 *Pharsal*. Lib. X. ver. 91, 92.

4 *Vit. Agricol*. Cap. XVI. Num. I.

5 Our Author, in his Margin, quotes PAUSANIAS, Lib. I. but gives a wrong Account of the Fact. *Molossus* was not *Pyrrhus's* Bastard; but the eldest of three Sons which *Pyrrhus* had by *Andromache*, *Heëtor's* Widow. The two others were *Pielus* and *Pergamus*. SERVIUS tells us, that *Pyrrhus* considered *Andromache*, tho' his Captive, as a lawful Wife, so that his Children by her had a Right of succeeding to the Crown. On *Æneid*. Lib. III. v. 297. PAUSANIAS doth not say, that *Pyrrhus* appointed *Molossus* to succeed him, on Default of legitimate Children; but that *Helenus*, the Son of *Priam*, who married *Andromache* after the Death of *Pyrrhus*, succeeded him, and left the Crown to *Molossus*. Cap. XI. p. 10. Edit. Wech. SERVIUS indeed doth, in the Place above cited, make *Helenus* reign either after *Molossus*, or in his Name, as his Guardian; for the Terms are not very clear, *Inde factum est ut teneret Helenus regnum privigni, qui successerat patri; à quo Molossia dicta est pars Epiri*, &c.

6 Among the *Tartars* natural and legitimate Sons are upon an equal Foot. But HERODOTUS (Lib. III. Cap. II.) says of the *Persians*, Νέβον δὲ σφι νόμιμον ἐστὶ βασιλεύσαι, γνησίᾳ παρὰ νόμον, They never let a natural Son have the Crown, if there is a legitimate one in the Way. Two *Vandals* reigned in *Spain*, *Gontharis*, who was legitimate, and *Zigerich*, the base-born Son of *Godigisclus*, as PROCOPIUS reports; according to the old Custom of the Northern Nations, testified by ADAM BRE-

MEN.

to adopt *Philip*, in Order to succeed him in *Scythia*; and so *Jugurtha*, tho' a Bastard, succeeded in the Kingdom of *Numidia* by Adoption. And we read^a too, that Adoption was received in those States which were conquered by the *Goths* and *Lombards*. Nay, the Crown shall descend to the last Prince's Relations, tho' not at all of the Blood of the first King, if such an Order of Succession be established in those Places; thus does *Mithridates*, in *Justin*, declare, that the domestick Princes of *Paphlagonia* being all dead, the Right of Succession did belong to his Father.

XIII. But if it be expressly said, that a Kingdom shall not be divided, and at the same it be no ways declared to whom it shall go, the eldest then, whether Son or Daughter, shall undoubtedly enjoy it. We read in the *Talmud* Title of Kings, *He that has the best Claim to a private Inheritance, has also the best Title to the Crown; and therefore, in this Case, the eldest Son is preferable to the younger.* Νομίζουσιν ὡς, &c. says *Herodotus*,² *It is the Custom of all Nations for the eldest Son to sit upon the Throne.* And in other Places he frequently terms this, Νέμω, *The Law and Practice of Kingdoms.* So *Livy*³ speaking of two Brothers, of the Country of the *Allobroges*, that contended for the Crown, says, that the younger had least Right but most Power. In *Trogus Pompeius*,⁴ *Artabazanes, who was the eldest, laid Claim to the Crown by a Prerogative of Age; a Prerogative which Birth and Nature give amongst all Nations;* and this he elsewhere⁵ styles *The Law of Nations*: As⁶ *Livy*, who terms it the *Order of Age and Nature*; but this is only to be understood where nothing to the contrary has been ordered by the Father, as was done by^a *Ptolemy* in the same *Trogus*. But whoever comes to a Crown in this Manner, is obliged, if, and as far as it can be done, to give those who would be his Co-heirs, if the Kingdom were divided, the Value of what their Portion would amount to.

XIII. If such Kingdoms are not to be divided the Eldest is to be preferred.

XIV. But as for those Kingdoms which are no otherwise hereditary than by the free Consent of the People, the Succession is in this Case to be settled in that Manner only, as may be presumed the People shall most readily agree to; now it is supposed that the People will always consent to whatever shall appear to be for the publick Advantage. And hence our first Inference is, that a Kingdom should always remain undivided, unless the Laws or Custom of the Place be against it;

XIV. In Case of any Dispute, the Kingdom that is no otherwise hereditary than by the People's Consent must not be divided. (as

MEN. *Hist. Eccles.* Cap. CVI. HELMOLD, *Slavic.* Lib. I. Cap. LI. and LII. And *Michael*, a natural Son, the lawful Issue failing, succeeded *Michael*, Prince of *Thessaly*; GREGORY, B. II. And he also was succeeded in part by his natural Son, GREGORY, B. IV. See *SERVIVS* upon the third *Æneid*, about *Moleffus*, *Pyrrhus's* bastard Son. GROTIUS.

^a *Cassiod.* in Chron. *Paul. Diac.* De gest. Langobard. Lib. VI.

⁷ Which (*Paphlagonia*) came into his Father's Hands, not by Force or Conquest, but by Adoption, and on the Demise of Domestick Princes. JUSTIN, Lib. XXXVIII. Cap. V. Num. 4.

XIII. (1) Concerning the *Swedes*, see BRIGITT, IV. 3. the *Danes*, SAXO, XII. and XIII. APPIAN, *Mithridatic.* Διακρίνα τὸ πρεσβύτερον ἀρχεῖν, *Thinking it just that the Elder should enjoy the Crown.* NICETAS CHONIATES, in his Life of *John Comnenus*, Ἡ φύσις τοῖς ἀρχαιότεροις, &c. *Nature, following her own Order, uses to give the chiefest Honour in Favour of the First-born.* But GOD does not think fit, in the greatest Prerogatives, always to observe this Rule. And in his Life of *Manuel*, speaking of *Isaacius*, ἀπὸ γενέσεως ἐκ τῆς ἀρχαιότητος τῆς βασιλείας κατέμεινεν, *Called by Birth-Right to the Succession of the Crown.* And *Antipater*, in *JOSEPHUS*, said, that *The Kingdom was Hyrcanus's, as being eldest.* See LEUNCLAVIUS, *Turcic.* XVI. GROTIUS.

² Lib. VII. Cap. II.

³ Lib. XXI. Cap. XXXI. Num. 6.

⁴ JUSTIN, Lib. II. Cap. X. Num. 2.

⁵ Lib. XXXIV. Cap. III. Num. 7.

⁶ Lib. XL. Cap. XI. Num. 7.

^a JUSTIN, Lib. XVI. Cap. II. Num. 7.

⁷ See PUFENDORF, B. VII. Chap. VII. § II.

XIV. (1) *Dardanus* and *Jasius* sat jointly on the Throne of *Troy*. *SERVIVS* upon this Passage of the third *Æneid*: *Sociique Penates.* In *Crete*, *Minos*, and *Rhadamanthus*; *JULIAN* against the Christians. At *Alba*, *Numitor*, and *Amulius*, as says the Writer Of the *Lives of illustrious Men*. For others relate, that *Numitor* had the Money, and *Amulius* the Crown: Of this Number is *PLUTARCH*: In the same Manner as some have reported, that the Kingdom of *Thebes* fell to *Eteocles's* Share; and to *Polynices*, in the Lieu of that, *Hermione's* Necklace. Thus in *Norway*, one has the Crown and another the Shipping, and the Advantage arising from Sea Expeditions. GROTIUS.

What our Author says of *Eteocles* and *Polynices* is probably taken from the Scholiast on *EURIPIDES*, who relates it on the Authority of *HELLANICUS*. *Hellanicus*, says he, tells us that *Polynices*, according to Agreement, gave up the Kingdom to *Eteocles*, and that *Eteocles* gave him his Choice whether he would accept of the Kingdom, or take part of the Effects, and live in another City: That *Polynices* took *Harmonia's* (not *Hermione's*) Necklace and Gown, and retired to *Argos*. In *Phaniff.* ver. 71. Concerning that Necklace, see *APOLLODORUS*, *Biblioth.* Lib. III. Cap. IV. § 2. And *STATIUS*, *Thebaid.* Lib. II. v. 265, &c. I know not who these *Norwegian* Princes, mentioned by our Author, are; but I find in an anonymous and compendious History of the Kings of *Denmark*, that *Olaus I.* having two Sons, *Harold* and *Froibo*,
3 O left

(as at *Thebes* in *Bæotia*, the Government was divided amongst the male Heirs, as appears by the History ² of *Amphion* and *Zethus*, and also by that of the Sons of *OEdipus*; and the antient *Attica* ³ was parted among the Children of *Pandion*; and the Country about *Rhodes* between the Brothers, *Camirus*, *Jalyfus*, and *Lindus*, and the Kingdom of *Argos* ⁴ among *Perseus's* four Sons,) for, that it should remain entire, is certainly more expedient, not only for the Preservation and Security of the Kingdom, but also the maintaining the Concord and Unanimity of the

Cap. 1. n. 1, 2.

Subjects. Accordingly it is observed by *Justin*, B. xxi. *It was their Opinion that the Government would be more secure under the Dominion of one Man, than if it were parcelled out among all the Sons into several Shares.*

XV. Such Crowns continue hereditary no longer than there are Descendants of the first Prince living.

XV. Another Inference is, that the Succession should be continued in the first King's Family; for that Family is supposed to be elected on the Account of its Nobility and Figure; and therefore, whenever it becomes extinct, the Sovereignty should return to the People as before. So *Curtius*, B. x. ¹ says, *That the Crown should remain in the same House and Family; that the Blood Royal should have an hereditary Right to it; that they used to respect and reverence the very Name (of Philip) and that none took the Name who was not born to Reign.*

XVI. Natural Children have no Right to these Crowns.

XVI. The Third, That no Persons should be admitted to the Succession, but such only as were born according to the Laws of the Country; no natural Sons, because they are not only exposed to Contempt, on Account of their Father's not marrying their Mother, but because it is not altogether so certain whose Children they are; whereas it is of the last Importance, that Subjects have all the Assurance possible of their Prince's Birth, to avoid all Disputes that may hereafter arise on that Subject: And for this Reason it was, that the *Macedonians* thought the Crown belonged more to *Demetrius* the younger, than to *Perseus* who was elder ¹; because *Demetrius* was born in good and lawful Wedlock. And we read in *Ovid* ²,

*At nec nupta quidem, Tedaq; accepta jugali:
Cur nisi ne caperes Regna Paterna Notbus?*

*Unwedded too — — in Spight,
To bastardize and rob thee of thy Right.*

Otway.

Nor ought adopted Sons to be admitted here, because People not only entertain higher Hopes of, but have also a greater Veneration for, a Person of Royal Extraction.

*In Brutes we see what Strength and Fire
Come from a bold and gen'rous Sire. ^a*

XVII. In such Kingdoms Males are preferred before Females in the same Degree of Blood.

XVII. Fourthly, That even of those who have the same Pretensions, either as they are Relations of the same Degree, or by Representation, ¹ the male Issue must certainly

left the Empire of the Sea to the former, and the Kingdom to the latter. *Descript. Danicæ*. p. 177. *apud. Elziv.* 1629.

² EURIPIDES, *Hercul. furen.* (ver. 29, 30.)

Τῷ λευκοπάλῳ πρὸν τυραννῆσαι χθονὸς,
Ἀμφίων ἡδὲ Ζῆθον ἐκλένω Δίῳ.

Before *Amphion* and *Zethus*,
Jove's great Off-spring rul'd. GROTIVS.

See also APOLLODORUS, *Biblioth.* Lib. III. Cap. V. § 5.

³ The Division of the antient Kingdom of *Athens* regarded only the Lands, and not the Jurisdiction, which remained entire in the Hands of one, as our Author himself has already said, *Chap.* III. of this Book, § 4. *Note* 5. where I have quoted

the very Words of APOLLODORUS, from whence he takes this Fact. As to the Division between *Camirus*, *Jalyfus*, and *Lindus*, he undoubtedly alleges that Example from PINDAR, *Olymp.* VII. v. 135, &c.

⁴ The antient Authors are not agreed in this: Most of them make the Sons of *Perseus* reign successively, not at *Argos* but at *Mycenæ*. Nothing is more uncertain or confused in general, than the Succession and Chronology of the Kings of that Time, the History of which is very much mixed with Fables.

XV. (1) *Cap.* VII. *Num.* 15.

XVI. (1) *LIVY*, *Lib.* XXXIX. *Cap.* LIII. *Num.* 3.

² *Ep. Phædræ ad Hippolyt.* v. 121, 122.

^a *Hor.* *Lib.* IV. *Od.* IV. ver. 40, &c.

XVII. (1) See NICETAS CHONIA-
TES,

certainly be preferred to the female, as ² being thought more proper for the Burthen and Fatigue of War, and better qualified for discharging all the other Offices of a Sovereign.

XVIII. 1. *Fifthly*, That not only amongst the male Issue, but also among those of the other Sex, in Default of Males, the ¹ Preference must always be given to the eldest; it being presumed that the elder has, or, however, that he will sooner have, more Judgment and Conduct than the younger. So *Cyrus* in *Xenophon*, τὸ πρῶτον, &c. ² *I bequeath my Crown to my eldest Son, as having, it is very likely, a greater Knowledge of the World.* But because this Prerogative of Age is only a ³ transient Advantage, but that of the Sex perpetual; therefore is the Prerogative of Sex much more considerable than that of Years. So *Herodotus*, when he had related that *Andromeda's* Son *Perses* succeeded *Cepheus* in the Kingdom, assigns this Reason, ἐτύχανε, &c. ⁴ *For Cepheus had no male Issue.* And, *Having no Sons*, ἀπαις ὧν ἀρρένων, &c. as *Diodorus* informs us, *Teuthras* left the Crown of *Myfia* to his Daughter *Argiope*. So *Trogus* tells us, ⁵ that the Empire of the *Medes* belonged to his Daughter, because *Astyages* had no male Heir. So doth *Cyaxares* in *Xenophon* declare, that the Crown of *Media* was his Daughter's, εἰς τὴν γὰρ ἐστὶν, &c. ⁶ *For*, says he, *I have no Son who is legitimate.* And *Virgil*, speaking of King *Latinius*,

XVIII. Among Males the eldest to be preferred.

Lib. iv.

Æn. l. 7. v. 50.

Filius huic fato, &c.

*But this old peaceful Prince, as Heav'n decreed,
Was blest'd with no male Issue to succeed:
His Sons in blooming Youth were snatch'd by Fate;
One only Daughter heir'd the Royal State.*

Dryden.

So before the Reigns of the *Heraclidæ*, *Sparte*, his Daughter, or her Children, succeeded *Eurotas* in *Laconia*, as *Helena's* Children did *Tyndareus*, because there were no Males: And his Uncle *Atreus* succeeded *Eurystheus*, in the Kingdom of *Myce-*

Pauf. l. 3.

TES, in his Life of *Manuel*, B. IV. GROTIUS.

Cap. IV. where *Andronicus* says, that if the Emperor *Manuel Comnenus* should have Sons, the Oath which obliged his Subjects to acknowledge his Daughter *Mary*, as Empress after his Demise, would be null, and of no Effect.

2 Mr. THOMASius, in his Notes on HUBER, *De Jure Civitatis*, Lib. I. Sect. VII. Cap. VII. § 10. p. 281. maintains, that this Reason proves Women ought to be entirely excluded the Succession to the Crown; unless they are admitted to it by Custom, or an express Clause in the Act which regulates the Succession.

XVIII. HOMER, speaking of the Crown of *Crete*, *Iliad* XIII. ver. 354, 355.

Ἦ μὲν δ' ἀμφότεροι σὺν γένει. ἦ δ' ἴα πάτερ.
Ἄλλὰ Ζεὺς πρότερος γένονε καὶ πλεονα ἦδη.

*Our Family's the same, our Country too,
But Jove's the elder, and therefore sure must know,
Much more than I can.*

Where HOMER very likely, as indeed he usually does, assigns the Reason why the elder are preferred to the Throne, a Reason that generally holds good, and that is sufficient in such Cases as these, τὸ νόμιμον τῷ πρεσβύτέρῳ τῷ βασιλείῳ παύσαντι τὴν ἐξουσίαν τῷ ὄντι τῷ ἡγεμονίῳ, *The Law giving the entire Sovereignty to the elder of the King's Sons*, says ZOSIMUS, B. II. talking of a Law of the *Persians*. *Periander* succeeded his Father in the Kingdom of

Corinth, καὶ ἀπὸ πρεσβείων, by the Right of Eldership. So NICOLAUS DAMASCENUS informs us, in the Collections we have by the Favour of that excellent Man NICOLAUS PEIRESIUS. GROTIUS.

Mr. THOMASius makes Use of another Method for proving the Eldest ought to succeed. It is the Will of the People, says he, that the Kingdom should be indivisible, and at the same Time successive. Now, supposing the deceased King leaves more than one Son, if the younger attempts to succeed him, to the Prejudice of the elder; either he will pretend to make himself Master of the Crown by Right of prior Occupancy, in which he would be manifestly in the wrong, because the Crown is not one of those Things which belong to nobody; or he will make Use of this Pretence, that he is better qualified than his Brother for governing the State; and then it is his Business to prove the Assertion. But who shall be Judge in this Case? Shall Foreigners? This would expose the State to great Troubles, and other fatal Inconveniencies. Shall the People? The Kingdom would then cease to be successive, and become elective. Not. in HUBER, *De Jure Civitatis*, Lib. I. Sect. VII. Cap. VII. Num. 11. p. 281.

2 *Cyropæd.* Lib. VIII. Cap. VII. § 3. p. 543. Edit. Oxon.

3 For the younger will, some Years hence, be as old as the eldest is at present; and consequently, may then have as much Understanding and Conduct.

4 Lib. VII. Cap. LXI.

5 JUSTIN, Lib. I. Cap. IV. Num. 7.

6 *Cyropæd.* Lib. VIII. Cap. V. § 9.

na,

Lib. ii.

næ, as *Thucydides* observes. By the same Right, the Crown of *Athens* devolved⁷ on *Creusa*, and that of *Thebes* on *Antigone*, for Want of male Issue. And the Crown of *Argos* upon *Argus*, *Phoroneus's*⁸ Grandson by his Daughter.

2. From whence too we are to understand, that tho' Children do in some Degree supply the Places of their Parents before-deceased, yet this is only to be allowed of, when they are as capable to succeed as any of the Rest; and here too, where Persons are thus capable, first the Prerogative of Sex, and then that of Age, must always be regarded and maintained. For the Quality both of Sex and Age, as it is looked upon in this Case by the People, is so fixed and inherent in the Person, as not to be separated from it.

XIX. Whether
such a Crown
be Part of the
Inheritance.

XIX. Here it may be asked, Whether a Crown, thus conveyed, be a Part of the Inheritance? The more probable Opinion is, that it is¹ a Kind of an Inheritance itself, but distinct from that of the other Effects. Such peculiar Inheritances there are in² some Fiefs in a³ Copyhold Estate, in the⁴ Rights

⁷ See EURIPIDES, in his *Ione*, (v. 72, 73, 578). GROTIVS.

⁸ And had *Orestes* died without Issue, *Electra* had succeeded him in the same Kingdom of *Argos*, as we learn from EURIPIDES's *Taurica Iphigenia*, (v. 681, 682, 695.) So the Crown of *Calydon* came to *Andraemon*, *Oeneus's* Son-in-Law, *Asterius's* Crown to his Son-in Law *Minos*, as APOLLODORUS tells us, and subjoins this Reason for it, because there was no male Issue. GROTIVS.

Our Author says the Kingdom of *Thebes* fell to *Antigone*, the Daughter of *OEdipus*; but it is not certain whether he means, that that Princess actually inherited the Crown, or only, that it of Right devolved to her. The former is not agreeable to antient History; for we know that *Creon* seized on the Kingdom after the Death of *Eteocles*, and the Exile of *OEdipus*. The latter may be grounded on the Words of EURIPIDES, where the Poet introduces *Creon* saying to *OEdipus*, after the Death of *Eteocles* and *Polynices*, that *Eteocles* had given him the Sovereignty of that Country, as a Portion with *Antigone*, who was to marry *Hemon*, the Son of *Creon*. Phœniss. v. 1580, &c. See also v. 764, &c. I know not in Virtue of what *Creon* himself took Possession of the Government, which on that Foot ought rather to have belonged to his Son, who was certainly then at Age. As for the rest, I have one general Observation to make on the Examples here and elsewhere alledged by our Author, and taken from fabulous History, viz. that they make as much to his Purpose as those taken from true History: For, beside that the antient Fables are only so many Histories mingled with fabulous Circumstances, and consequently, the Facts quoted from them may be true; yet, even supposing them false, it may still be concluded that they are conformable to the Notions and Practice of those Times; which is sufficient in Regard to the Application made of them by our Author.

XIX. (1) *Innocent the Third* was of Opinion, that the Succession to such a Crown might be lost by him who did not take Care to execute the last Will of the Deceased. C. licet. de voto. GROTIVS.

The Author might very well have spared this Decision, which goes farther than he pretends; as appears from the Subject there considered, and from the very Words of the Pope. They are addressed to *Andrew II.* King of *Hungary*, who refused to go in the Crusade to the *Holy Land*, in Performance of a Vow made by his Father, the Execution of which he enjoined him at his Death. But without enquiring in this Place, whether the Pope had thus a Right to dispose of Crowns by his own Authority, under such a Pretext; and whether a Prince, on

failing to execute the last Will of the Deceased, forfeits his Right to the Succession, when the Deceased has not appointed him Heir on that Condition, which doth not appear in this Case. Without making these Enquiries, I say, it is sufficient to observe, that the Succession in Question depending on the Will of the People, and not at all on that of the King, as our Author supposes; a Neglect in the Execution of the last Orders of the Deceased, can never prejudice the lawful Successor, but in what relates to the private Estate, of which he had the full and entire Disposal.

2 Most Fiefs pass only to the Males, the Females have no Share in them, though they may be equally Heirs to all the other Goods of their common Father. When the Vassal dies without Issue, or leaves only Daughters, the Fief passes to the collateral paternal Relations; tho' they have no Right of inheriting the other Goods; provided they be in the Line of Descendants from him who had the first Investiture. And according to the Feodal Law, a Son indeed ought necessarily either to refuse or accept of both the Inheritances; but the collateral Relation, (*adgnatus*) who succeeds on the Default of Issue, may retain the Fief, and refuse the Inheritance of the other Goods, Lib. II. Tit. XLV. *An adgnatus, vel Filius possit retinere Feudum, repudiata hereditate.* (IV. 54. Edit. Cujac.) See CUIJAS on that Title; as also GIPHANIUS, *Antinom. Jur. Feud. Disp. V. Num. 46, &c.* TREUTLER, *Vol. II. Disp. XII. Thes. IV.* ANTHONY CONTIUS, *Method. de Feudis*, Cap. VIII. § 7, &c. COVARRUVIAS, *Var. Resol. Lib. II. Cap. XVIII. Num. 4, &c.*

3 Concerning the Nature and Origin of the Right to a Lease, see PUFENDORF, B. IV. Chap. IX. § 3. As this Right is founded on a private Agreement made between the Proprietor of the Lands and the Lessee; when the Lessee has taken them, *for himself and his Children*, they succeed by Virtue of the Agreement, not as Heirs to their Father. So that they may keep the Succession, even tho' they decline the Inheritance of the other Goods. This is the Case in Question, and the Foundation of the Decision of those whose Opinion our Author follows, as GAILLUS, *Obsev. Lib. II. Cap. XXVIII. Num. 17.* But the contrary Opinion seems better grounded, according to the Principles of the Civil Law, as ANTHONY FAURE proves, *De Error. Pragmaticorum. Decad. XXIII. Err. 10.* In which he is followed even by BACHOVIVS, (*Not. & Animadv. in TREUTLER, Vol. II. Disp. XII. Thes. IV.*) who on all other Occasions inveighs against him with the utmost Fury; but he takes Care not to quote him here. Were we to judge of the Matter by the Law of Nature alone

⁴ Rights of Patronages, and in what we call a ⁵ *Preciput*. Whence it follows, that the Crown may belong to him who, if he will, may be Heir too of the other Effects; yet so, that he may enjoy the Crown without the other Effects, and their Incumbrances. ⁶ The Reason is, because it is supposed that the People would have the Crown descend in the most advantageous Manner to the Successor. Neither is it any Thing at all to them, whether the Prince accepts of the Inheritance of the private Estate or not, since it was not upon this Account that they made choice of an hereditary Order in Succession, but that his Title might be beyond Dispute, and he the more revered in Regard to his Royal Blood; and that from his Family and Education, something particularly great and noble might be expected in him, and that the Prince himself in Possession might be the more careful of his Kingdom, and defend it with the greater Courage and Resolution, knowing that he was to leave it to them, whom he highly esteemed, either out of ⁷ Gratitude or Affection:

. XX. But where the Custom of Succession is different as to ¹ Freeholds and Copyholds, if the Kingdom be not feudatary, (held of another in Fee) or was not so at first, tho' Homage hath been since done for it, yet shall the Succession ² pass in

XX. It is to be presumed that the Succession to the Crown is such as was usual in Successions to other Estates, at the Time when that Kingdom first began; whether the Crown was Freehold.

alone, it is certain, that the Proprietor treated only with the first Purchaser of the Lease, and that he had no Thoughts of granting the Lessee's Children a Right independent of that of the Deceased. The Clause, *For him and his Children*, is inserted in the Contract in Favour of the Proprietor, that, the Children dying, the Estate may return to him; whereas otherwise it would pass to the collateral Relations, and even to other Heirs, according to the Practice and Custom of granting Leases. But, as such Persons would have no Right but as Heirs, so the Children can only in that Quality pretend to any Thing by Virtue of the said Clause, which makes no Alteration in the Essence of the Contract. And this is likewise conformable to the Proprietor's Intention, who designed that the Estate should return to him as soon as possible. But if the Lessee had intended to get the Lease for his Children, whether his Heirs or not, he ought to have seen the Clause so worded; otherwise there is Room to believe that he submitted to the Sense required by the Nature of the Thing.

⁴ The Patron, or former Master of a freed Man, might give one of his Children in particular the Right of Patronage, which otherwise was divided among them all. This was called *Adsignatio Liberti*. But he, who thus became sole Heir of the Right of Patronage, could not confer it on another; and if he died without Children, this Right reverted to the Patron's other Children. Tho' a Son was disinherited by his Father, this did not hinder the Father from assigning him the Right of Patronage, and even, tho' this was done after such Assignment, the Donation was not always thereby annulled. *Digest. Lib. XXXVIII. Tit. IV. De assignandis libertis*, Leg. VIII. and Leg. I. § 6, 7. See the Interpreters on the *Institutes*, Lib. III. Tit. IX. whence it appears, that the Right of Patronage was considered as distinct from the Inheritance of the other Goods. The same may be said of Ecclesiastical Patronages, which resemble those of the Roman Law only in Name.

⁵ *Fus præcipui*, as it is termed by the Lawyers, and antient Latin Authors. See BRISSON's Law Dictionary. It is when one of the Coheirs has a Legacy, which he may take before the Division of the Estate. According to the Roman Law, such a Coheir may renounce his Share in the Inheritance, without quitting his *Preciput*. *Digest. Lib. XXX. De Legatis & Fidei commissis*. I. Leg. XVII. § 2. and Leg. LXXXVII. See CUVAS on this Law, in PAPINIAN. p. 481, &c. Tom. IV. Opp. Edit. Fa-

brott. and a Dissertation by the late Mr. HERTIUS, *De Prælegatis*, § 15. p. 321, &c. Tom. II. of his *Comment. & Opusc.*

⁶ See my fourth Note on PUFENDORF, B. VII. Chap. VII. § 12.

⁷ Our Author cannot here speak of the Ascendants of the Deceased, as may at first Sight be imagined; for the Succession to a Kingdom doth not ascend, like private Inheritances. But he is talking of Brothers, in whose Person the Deceased is supposed to testify his Gratitude to their common Father, as has been said, § 9. *Num. 3*. It must be acknowledged, however, not only that the Expression is obscure, but that even the natural Order of the Words is reversed in the Original, where *ob acceptum beneficium* are placed before *ob caritatem*; for the Succession founded on a Duty of Gratitude usually takes Place only on Default of Children, who are the first Object of natural Affection.

N. B. Here Mr. BARBEYRAC adds, that his Version may remedy this Want of Exactness, *Et [ut] Regni Possessor, &c. Comme aussi pour avoir lieu de se promettre que le Prince regnant auroit plus de soin de son Royaume, & le defendroit avec plus d'Ardeur, dans l'Esperance de le laisser aux Personnes qui lui sont les plus chères, ou par la Tendresse naturelle, qu'il a pour elles, ou par un Motif de Reconnoissance. Which may be thus englished, As also that they may have Room to promise themselves, that the Prince on the Throne will be more careful of his Kingdom, and defend it with more Vigour, in Hopes of leaving it to Persons who are most dear to him, either by natural Affection, or on a Motive of Gratitude.*

XX. (1) *Allodium*. This Word signifies an Estate possessed without acknowledging any Lord, to whom the Proprietor owes any Service, Rent, &c. or to whom the Estate ought to revert in certain Cases. In a Word, *Allodium* is opposed to *Feudum*. See Mr. THOMASIVS's *Selecta capita Historiæ Juris Feudalis*, § 4, &c.

² An Infeoffment doth not in itself imply a Change in the Order of Succession. It is sufficient that the succeeding Kings pay Homage to the Prince to whom the Kingdom is become feudatary; and that the Crown falls to him in Case of Felony, or on Default of Heirs. Persons who enter into burthenome Engagements, like this, are, and ought to be, supposed to subject themselves as little as is possible; and it is incumbent on the other Party to see every Thing clearly expressed, which doth not necessarily follow from the Nature of the Thing

the same Manner as that of Freeholds did, at the first Establishment of the Kingdom.

XXI. Or held
in Fee.

XXI. But in those Kingdoms that were at first given to be held in Fee, by him who was full Proprietor, the Order of the Succession¹ shall be the same as in Copyholds, not always indeed according to that of the *Lombards*, which we have in Writing, but what was received in every Nation at the first Investiture. For the *Goths, Vandals, Germans, Franks, Burgundians, English, Saxons*, and all the *German Nations*, which by War possessed themselves of the best Parts of the *Roman Empire*, have every one of them their own Laws and Customs concerning Things held in Fee, as well as the *Lombards*.

XXII. What a
lineal Succession
is, and how the
Right is in
that Case
transmitted.

XXII. 1. But there is another Kind of Succession much used in some Kingdoms, not hereditary, but what they call¹ *Lineal*, in which is observed,² not that Right which is termed Representative, but a Right of transmitting the future Succession, as tho' it were already descended; and this by a Law grounded on Prospect and Expectation only, which Prospect and Expectation can naturally, and of itself, do nothing; but does, however, in this Case, occasion a Sort of real Right; such a Right as one has³ to Things due from a conditional Stipulation, so that this very Right necessarily passes to the Descendants of the first King, but in an Order that is fixed and certain; and therefore, in the first Place, the Children of the last Possessor of the first Degree, as well those who are alive, as those who are dead, are to be admitted, with Respect had, as well among the living as the dead, to the Sex first, and then to the Age. And if the Right of Succession be in the Deceased, it shall pass to such as are descended from them, observing again

Thing itself; of which Sort is the Order of Succession, which may, and really doth, vary, according to the Difference of Places, or the Contracts between the Lord and the Vassal who received the first Investiture.

XXI. (1) That is, even when the Kingdom ceases to be a Fief. For here again no Necessity appears of altering the Succession. This would only serve to create Confusion, and occasion Quarrels. Besides, we ought here to suppose, that when the Kingdom was delivered from the Infeoffment, the People made no Regulation concerning the Order of the future Succession; for in that Case they must abide by the new Regulation, and the Question is superfluous. Now by leaving the Kingdom hereditary, and making no Regulation concerning the Order of the Succession, they have tacitly approved of that which took Place before; because some one is necessary. In a Word, the Order once established ought to subsist, except it be manifestly changed by those whose Business it is to do it; and consequently, in Case of a Doubt, the Presumption is in favour of the old Manner of succeeding, whatever it be.

XXII. (1) See Cardinal T u s c h u s, *Præf. Concl. LXXXVIII. Verb. Regni Successio*. WILIAM DE MONTERRAT, *De Succession. Reg.* His Book is in the *Ocean. Juris*. PEREGRINUS, *De Jure Fisci*, Lib. I. Tit. XI. Num. 44. and Lib. V. Tit. I. Num. 109. See Instances of such a Succession in the Kingdom of *Norway*, in that learned and most exact Author JOHN PONTAN, *Hist. Danic. IX. Consuet. Norman de Propinquo. Hæred.* JOHN SERRAN. in *Lodov. Groff. super, contr. BONON. ARGENTRÆUS, Hist. Brit. Lib. VI. Cap. IV.* "In Successions, the Children of the eldest Son, whether Males or Females; and in Case these eldest die without Issue of their own Bodies begotten, then the Issue of the next elder do in a Succession to Fees, by Right of *Primogeniture*, represent the Persons of their Fathers, and come to such Rights of Succession and *Primogeniture*, in the same Manner as their Fathers would do, were they living, by excluding their Uncles both by the Father and Mother's

"Side, according to a general and known Custom observed, as well in Successions by the Right Line, as by the Collateral: And from the aforesaid Use and Custom, a Daughter succeeds in Fees, whether Duchies, Earldoms, Peerages, or Baronies, how great and noble soever; and this is what was practised too in *Artois, Champagne, Thoulouse, and Bretagne.*" Such an Order of Succession was prescribed the Marquisate of *Mantua*, by the Emperor *Sigismund*, Anno 1432, and by the Emperor *Charles V.* and *Philip II.* in their respective Kingdoms and Principalities, Anno 1554 and 1594. GROTIUS.

2 For the Right of Representation, properly so called, can only make the Grandson, for Example, be considered as being in the same Degree with the Uncle, so that then the Age gives the Preference. Whereas in the lineal Succession under Consideration, the Deceased is supposed to have already excluded his Brother by Right of Eldership, and thus to have transferred the Crown to his Descendants. See § 30.

3 As it is in Legacies, *Quorum dies cessit, non venit.* GROTIUS.

By these Legacies the *Roman Law* understands such as, tho' due, are not to be paid but at the End of a certain Time; this takes Place when the Thing is bequeathed either purely and simply, or within a Time fixed; for then the Right being already acquired, passes to the Heir; whereas, when the Legacy is conditional, as before the Accomplishment of the Condition, *Dies Legati non cedit*, if the Legatee dies, he transfers nothing to his Heirs. *Digest. Lib. XXXVI. Tit. II. Quando dies Legatorum vel Fidei commissorum cedat, Leg. V. Princ. & § 2.* See likewise *ULPIAN, Tit. XXIV. § 31.* with Mr. SCHULTING's Notes. In Regard to the Difference between Legacies left on Condition, and conditional Stipulations, see *CUJAS* on Law LVII. of the Title of the *Digest. De verborum obligationibus*, p. 1233, 1234. Tom. I. and *Observ. XIV. 32. XVIII. 1.* as also Mr. JOSEPH AVERANI's *Interpretationes Juris Civil. Lib. II. Cap. XVI.*

the Prerogative of Sex, and then of Age; always transmitting the Right of the Dead to the Living, and of the Living to the Dead. Upon Failure of Children, then, it descends to those who are either nearest related, or if they had lived, would have been so, observing still the same Transmission, and among Equals of the same Line, the same Distinction of Sex and Age, but so as not to pass from one Line to another, on the Account of Sex and Age. And consequently, the Daughter of a Son should be preferred before the Son of a Daughter; and the Brother's Daughter before the Sister's Son; an elder Brother's Son before a younger Brother, and so on. This was the Order of Succession to the Crown of ^a *Castile*, and so is the Right of Majorazgo in ⁴ that Kingdom settled too.

2. But the Proof of this lineal Succession, if there were neither Law nor Example for it, might be taken from the Order that is observed ⁵ in publick Assemblies. For if Regard be had there to lineal Descents, it is an Evidence that Hope and Expectation only, is by Law quickened into a just Right, and that this Right does pass from the Dead to the Living. Now this lineal Succession is called likewise *Cognatick*, because the Females, and their Children, are not excluded, but only postponed in the same Line, so that if in Case the nearer Relations, or the Males, who are in other Respects equally related, or the Descendants of those Males should fail, then the Succession returns to them. The Foundation of this Succession, as it differs from an hereditary one, is the Hope and Expectation of the People, that those who have the justest Pretensions to the Crown, will have the best Education; such as those whose Parents would have succeeded, if they had lived.

XXIII. There is also another lineal Succession, called the *Agnatic*, a Succession of Males only, who are descended of Males, which from a Custom of the illustrious Kingdom of *France*, is therefore commonly called ¹ the *French* Succession. This differs from the *Cognatic* Succession, in that it was principally designed to exclude Females, to prevent the Crown's passing into a strange Family by the Marriage of the Daughters. In both these lineal Successions, all are admitted who are related, tho' in the most remote Degrees from the last Possessor, if they are but descended from the first King. But ² in some Places also, where the Succession in the Male Line fails, they allow that of the Female in its Room.

XXIV. ¹ Other Methods of Succession may also be introduced, either at the Pleasure of the People, or of him who holds the Kingdom by such a patrimonial Right, that he may alienate it if he will; as for Example, he may so settle it, ² that they who are nearest related to himself, at any Time whatever, may succeed

XXIII. What the lineal Agnatic Succession is.

XXIV. A Succession that always regards the nearest in Blood to the first King.

^a Covar. T. 2. Pract. Qu. Cap. 38. Num. 5. Molin. De primogen. Hisp. Cap. 8.

⁴ See Chap. IV. of this Book, § 10. Note 8.

⁵ That is, in the publick Bodies or Councils, where the Places are hereditary; as in *England*, where the Peers, who compose the upper House of Parliament, transmit their Right of Sitting there, with their Dignity, to their male Children.

XXIII. (1) An antient Testimony of the *French* Custom you have in *Agathias*, B. XI. And after *Solomon*, the Succession of *David's* Family was the same. See 2 *Chron.* xxiii. 3. GROTIUS.

After *Solomon*, we find *Abijam* succeeding *Rehobam*, though not the eldest of his Sons. See § 25. Note 3.

² As in the Province of *Narbonne*. See SER-RANUS in his Life of *Charles VI.* 'Twas by such a Law I presume that *Theuderick* dying without Issue, his Sister's Son *Atbalarick* succeeded him. And I am apt to think, that this did formerly obtain in *Ar-ragon*. GROTIUS.

XXIV. (1) In *Æthiopia* formerly Sisters Sons succeeded their Princes, as NICOLAUS DAMAS-CENUS reports. BEDA observes, that the same was customary with the *Pi&ts*, and that the Relations by the Woman's Side did always succeed. And TACITUS speaking of the *Germans*, Sisters Sons had

the same Regard from their Uncle, as they had from their own Father. And some look upon this to be a more sacred and stricter Tye of Blood. OSORIUS and several others inform us that 'tis so among some of the *Indian* People. GROTIUS.

² This by *Gizerich's* Will prevail'd in *Africa*. PROCOPIUS, *Vandal* I. χρόνον ὃ ὀλίγον Γίξερχος, &c. A little while after, *Gizerich*, pretty much advanced in Years, died leaving a Will behind him, in which among other things, he charged the *Vandals* to take Care that the Crown of the *Vandals* should always go to him, who being in the Male Line nearest related to him the said *Gizerich*, was also the eldest of all the rest in the same Degree. JORNANDES: *Gizerich* reigning a long time, just before his Death, called his Sons about him and enjoined them not to quarrel about the Crown, but that each should in his Turn and Degree succeed the other, that is, the eldest Son should be succeeded by him who is the next elder, and then he who is next to him should be his Successor. VICTOR UTI-CENS. Lib. XI. To whom of all the Grand-sons, as being the eldest of them, the Crown, according to King *Gizerich's* Constitution, did principally belong. Here, it is he, who first obtain'd the Kingdom, and not he who last filled the Throne, that is all along regarded. Now it is a Question whether *Gizerich* took this way of Succession from *Africa* itself; where

ceed in the Kingdom ; as it was formerly among the *Numidians*, where for the same Reason the Brothers of the last King were preferred before his own Children. The same was practised in *Arabia Felix*, as we find in ³ *Strabo* ; and the Modern Writers ⁴ tell us the same of *Taurica Cherfonefus* ; neither is it long since ⁵ the *African* Kings of *Fez* and *Morocco* did so. And that this Order is what we must observe, in a Doubt, without Respect to a ⁶ Feoffment of Trust, left to a Family, is the more likely Opinion, and agreeable to the ⁷ *Roman* Laws, tho' some Interpreters wrest them otherwise. These things being well understood, it will be easy to decide all Controversies concerning the Right of Crowns, which the different Judgments of Lawyers have made so intricate and difficult.

XXV.
Whether the
Son may be so
disinherited, as
not to succeed in
his Fathers
Kingdom.

XXV. The first Question is, whether a Father may disinherit his Son, so that he shall not succeed in his Kingdom. Here we must distinguish between Crowns which are alienable, that is, patrimonial, and such as are not alienable. For in ¹ alienable ones, no doubt of it, disinheriting is valid, because such Crowns do not differ ² from other Goods and Chattels ; and therefore what is established by Law or Custom in Regard to Disinheriton, ought to be observed with Respect to a Prince disinherited by his Father ; and though there were no Law or Custom to countenance it, yet it is naturally lawful for a Father to exclude a Son from all but bare Maintenance, and even that too, if he has committed any Capital Crime ; or has any otherwise notoriously offended, provided he has any other Method of subsisting. Thus was

where we told you in the Text, that it was in force, or whether from some of our Northern People. For among the *Lombards*, though King *Vaaces* had left Sons behind him, yet none of them was to succeed him, but *Risulphus* his Nephew ; as is testify'd by *PROCOPIUS*, *Goth. III.* And *NICETAS CHONIATES de Reb. MANUEL*, *Lib. IV.* says that when *Jatra* was dead, not his Children but his Brother, had a Right to the Crown of *Hungary*. I do not know whether the Method of Succession used by the *Patzinacitæ*, and obscurely proposed by *CONSTANTINE PORPHYROGEN. de Administrat. Imperii*, *Cap. XXXVII.* may be referred hither too. *CRANTZIUS*, *Danic. IV.* and *Suedic. V.* reports, that the same was observed in *Denmark*. So *Iulus*, immediately descended of *Ascanius*, *Æneas's* eldest Son, did not succeed *Æneas* in *Alba*, but *Sylvius* another of *Æneas's* Sons. *GROTIUS*.

The Fact last mentioned is recorded by *DIONYSIUS* of *Halicarnassus*, who says, *The People decided in Favour of Silvius, chiefly because his Mother (Lavinia, Æneas's second Wife) was Heiress to the Kingdom*, *Antiq. Roman. Lib. I. Cap. LXX. p. 55, 56. Edit. Oxon.* See also the Treatise, *De Origine Gentis Romanæ*, ascribed to *AURELIUS VICTOR*, *Cap. XVII.* In another Part of this Note, where our Author speaks of the Succession to the Kingdom of *Hungary*, he has written *Jatra* instead of *Geiza* or *Geicza* ; for the Historian there quoted means him. Besides, the Example is not quite to the Purpose ; it being well known that the Kingdom of *Hungary* is not Successive, but Elective.

³ That Author says, That in *Arabia Felix*, Brothers are preferred to Children on account of their Age ; and that those of the (Royal) Race reign and are invested with the other publick Offices. *Geograph. Lib. XVI. p. 1129. Edit. Amst. (783. Paris.)*

⁴ See *M. DE THOU*, *Lib. LXVII. Tom. II. p. 199. Edit. Francof.* It is the Country of *Prekop* or *Krim*, in the lesser *Tartary*.

⁵ *LIVIUS*, of *Mafiniffa* : *Whilst he was engaged in War for the Carthaginians in Spain, his Father dies : (his Name was Gala) The Crown went to Oefalces, the King's Brother, 'tis the Custom in Numidia.* See *MARIANA*, *Lib. XXIX.* who says the same of *Mauritania*. From hence among the *Saracens*, who were come from *Africa* into *Spain*, Brothers were preferred to Sons till *Abderamen's* Time, *RODERICUS TOLET. Hist. Arab. Cap. VI. THUA-*

nus, Hist. Lib. LXV. in Ann. 1578. speaking of *Hamet*. He was by his Father's Will called in his Turn after his Brothers to the Crown, their Children being quite excluded. And I observe from the Histories of those Places, that this kind of Succession prevailed in the Kingdoms of *Mexico* and *Peru*. *GROTIUS*.

As to what concerns *Mexico*, see *LOPEZ DE GOMARA*, *Gen. History of the West Indies, B. II. Chap. LXXXVI.* and *B. III. Chap. XXII.* The same Author speaks of *Peru*, *B. V. Chap. LXXXVII.* as doth *GRACILLASSO DE LAVEGA*, *B. IV. Chap. X.*

⁶ That is, if the Deceased leaves several Children, or several Relations in the same Degree, the Feoffment of Trust ought to pass from one to the other, and not to the Children of him who had it first.

⁷ According to the Law, quoted by our Author in the Margin, in the Affair of a Feoffment of Trust, left to a Family, those who are named (by the Testator) may be admitted to demand it : Or after the Death of all such Persons, those who bore the Name of the Testator at the Time of his Decease ; allowing always the Preference to the nearest Relations, unless the Testator has expressly extended his Will to those in a more remote Degree. *Digest. De Legatis & Fidei, Com. II. Lib. XXXI. Leg. XXXII. § 6.* See *CUJAS* on this Law, *Recit. in Digest. Tom. VIII. Opp. Edit. Fabrott. p. 1206, 1207.* and *ANTHONY FAURE, De Errorib. Pragmatic, Decad. LVI. Err. VII.*

XXV. (1) It is of such a Kingdom we are to understand what *BALDUS* says, *Procem. Decretal. Gregor.* That a King may chuse which of his Children he pleases for a Successor. We have also an Instance of this Kind in the History of *Mexico*. *GROTIUS*.

² That is, in Regard to the Power of alienating ; for in other Respects there is a wide Difference. A Kingdom, how Patrimonial soever, is still a State, that is a Society of Men subject to one and the same Government, for their own Advantage : The King therefore cannot absolutely dispose of the Kingdom, at Pleasure, so as to ruin the People, or make them fall into the Hands of one, from whom they may have Reason to fear ill Treatment ; which is not even allowable, according to the Law of Nature, to a Master in Regard to his Slave.

Reuben

Reuben for his Misdemeanor³ deprived by *Jacob* of his Birth-Right; and *Adonijah* by *David* of the Crown⁴. Nay, whoever has done any enormous Crime against his Father, unless there shall be manifest Signs that he has forgiven him,⁵ he shall be reputed as one tacitly disinherited. But in Crowns not Alienable, tho' they are Hereditary, it is otherwise, because the Hereditary way is indeed of the People's own chusing; but then it is⁶ so Hereditary as not to be disposed of by Will.⁷ Much less shall disinheriting be allowed in a Lineal Succession, because here is nothing like the Order of Successions purely Hereditary, but the Crown by the People's Original Donation, passes from one to another, in the Order prescribed.

XXVI. Another Question is, whether a Prince may abdicate his Kingdom, or renounce his Right of Succession? There is no doubt but a Person may renounce for

XXVI.
Whether a
Prince may
for himself and
his Children
abdicate and
renounce all
Title to the
Crown.

³ He had defiled *Bilhab*, his Father's Concubine. See *Gen.* xxxv. 22. xlix. 4.

⁴ This was not the Cause of *Adonijah's* Exclusion from the Crown. Before he attempted to ascend the Throne, *David* had promised *Bathsheba* on Oath, to chuse her Son *Salomon* for his Successor; as it appears from *1 Kings* i. 17. and GOD himself had already declared his Will in that Particular, *2 Chron.* xxii. 9, 10, 11. Besides, we find in the whole Sacred History that the Kings named their Successors during their own Life, or even invested them with the Royal Dignity, with very little Regard to the Order of their Birth. And our Author, in a Note on this Place, observes that the Kingdom of *David* was as it were Patrimonial, not by Right of War, but by Virtue of a Donation from GOD himself.

⁵ The Commentators have Reason to disapprove of this Opinion. However the Son may have behaved himself, it would be hard to look on him as deprived of his Right to the Crown, when his Father has not expressly disinherited him. Even though it does not appear that his Father has pardon'd him, that alone does not ground a sufficient Presumption of disinheriting him. It was in the Father's Power to punish his Son in another Manner; and, while the thing remains doubtful, paternal Tenderness ought always to incline Conjecture toward the more favourable Side. Our Author, in the Margin, quotes two Laws of the *Digest*, which speaks of Cases very different from this. The first supposes a Man, *Who, two Years before his Death, dismisses two of his Freed-Men, discontinues their usual Maintenance, and afterwards makes a Will, in which he orders his Heir to allow all his freed Men, both those whom he before had, and those whom he from that Time gives their Liberty, a certain monthly Allowance. Whereupon it is enquired, whether a Fessment in Trust is due to the two Persons before specified. To which it is answer'd, that they have no Claim unless they can plainly prove the Patron had changed his Mind in their Favour, at the Time of making the said Will.* Lib. XXXI. *De Legat. & Fidei Com.* II. Leg. LXXXVIII. § 11. In the other Law, we have this Case and Question proposed. *A Woman left her Son in Law a certain Sum by Will. After which the Son in Law accuses the Testatrix of engaging Men to kill her Husband, the Legatee's Father. She died before the Judges gave their Opinion, who pronounced her innocent. But while the Cause was depending, she made a Codicil, in which she did not revoke the Legacy left to her Son in Law. It is enquired, if her Heirs are obliged to pay that Legacy?* *SCÆVOLA*, the Lawyer, answers in the Negative. Lib. XXXIV. Tit. IV. *De adi-mendis vel transferendis legatis.* Leg. XXXI. § 2. Here *OBRECHT* says, that the Consequence drawn from this tacit Revocation of the Legacy, in the Cases last mentioned, to the tacit disinheriting, supposed in that of a Son, whom it doth not appear that the King, his Father, has pardoned the Crime committed against him, is not just; because the Legacy

is a mere Gift. Whereas, by the Civil Law, Children have some Right to the Goods of their Fathers, even during the Life of their Fathers. But something more precise must be added, for shewing the Difference of the Cases in Question. I say therefore, that the Patron, by dismissing the two freed Men, and discontinuing their Maintenance, plainly expressed his Disposition of leaving them nothing for their Maintenance, and excluding them from the Number of those, whom he design'd an Allowance. See *CUJAS*, *Recit. in Digest.* Tom. VII. p. 1366. and in *Resp. Scævole*, Tom. V. Part II. p. 150, 151. So that, while no Proof of the Change of his Mind appears, what he has done in their Regard is in its self sufficient for founding a Presumption; that, how general soever the Expressions of his Will are, they are by no Means included in it. Whereas the King, as our Author supposes, has done nothing of this Nature; he has only testified his being angry with his Son: And it does not follow from that alone, that he had an Intention to disinherit him, especially in Regard to his Succession to the Crown. As to the Mother-in-Law, the Legacy she had left to her Son-in-Law, became null of its self, from the Moment such a heinous Accusation was brought; and that by Vertue of a Presumption, authorized by the Laws; which suppose a Testator must necessarily change his Mind in Regard to the Legatee, when some Cause of great Enmity arises, after the Will is made. *Digest. Lib. XXXIV. Tit. IV. De adi-m. vel transfer. legatis.* &c. Leg. III. §. 11. This Presumption is grounded on what usually happens; for there are few, who in such a Case, would not revoke a Legacy bequeathed to one, who shews himself so unworthy of their Liberality. So that, though no express Revocation appears, there is Reason to believe that the Testator either had not an Opportunity of making it, that he did not think of it, or thought it would be understood of Course. But the Case is not the same with a Father in Regard to disinheriting. How much soever he may be incensed against his Son, he does not commonly proceed to that Extremity without great Difficulty. Thus the bare Want of an evident Reconciliation, or Pardon, does not imply a tacit disinheriting. Here an express Declaration is necessary. On this Principle, the *Roman* Laws require that a Father, who designs to disinherit his Son, should expressly declare such his Intention. *Institut. Lib. II. Tit. XII. De exheredatione liberorum.*

⁶ So that, he can neither dispose of by Will, nor leave the Crown to an adopted Child. See *MARIANA. Hist. Lib. XI. (Cap. XX.)* concerning the Kingdom of *Naples*. *GROTIUS.*

⁷ Mr. *VITRIARIUS, Inst. Jur. Nat. & Gent. Lib. II. Cap. VII. Num. 58.* makes a Restriction in this Case, after other Authors, *viz.* When the Publick good requires it; as when the King's Son is engaged in a Conspiracy to the Prejudice of the State; in which Case it is easily presumed that the People consent to his being excluded from the Succession.

¹ himself; but whether he can for his Children, is not so easily determined, but this too is answer'd by one and the same Distinction. For in Crowns that are Hereditary, he who gives up all his Right cannot transfer any thing to his Children. But in a Lineal Succession the Father's Act cannot hurt his Children who are already born, because as soon as ever the Children are come into the World, they acquire a Right of their own by Law; neither can it affect those that are *to be born*, because the Right entailed upon them by the People's Donation, must in its due time belong to them. Neither does what I have said already concerning Transmission contradict this: For that Transmission is, as to the Parents, of Necessity, and not left to their Will and Discretion. The Difference between the Children born before the Abdication, and those who were born after, is this, those who were born after had not then acquired their Right; and therefore it might be taken from them by the Will of ² the People, if the Parents too, whose Interest it is that that Right should pass to their Children, shall consent to part with it: To this Purpose is what I advanced above concerning Dereliction.

Chap. vi. § 10
of this Book.
XXVII. Neither Prince nor People have a Right to pass an Absolute and Peremptory Judgment on the Succession to the Crown.

XXVII. 1. There is also another Question, who shall judge of the Right of Succession to a Crown? Whether the Prince then reigning, or the People, either by themselves, or by Judges deputed for them? If you mean a Judgment by way of Authority and Absolute Decision, neither of them have any Right to judge? For such an Authority cannot be but in a Superior, and here Regard must be had not only to the Person, but to the Matter in hand also, which is to be consider'd with all its Circumstances. ¹ Now the Affair of the Succession does not depend on the present King; which appears from hence, that the King now reigning can by no Law ² oblige his Successor. For the Succession to the Crown is not under the Power of the Crown, and therefore Disputes on that Head are to be decided as in the State of Nature, in which there was no Jurisdiction.

2. Yet if the Right of Succession be disputed, those who lay a Claim to it would do prudently and well to agree upon Arbitrators, of which we shall treat in another Place; but as for the People ³ who have transferred all their Right of Jurisdiction to the

XXVI. (1) On Condition he does not take this Step at an unreasonable Time, as when the Kingdom would fall into the Hands of a Minor, especially if it is threatened with a War, &c. This is the judicious Remark of Mr. VITRIARIUS, *ibid.* Num. 59. which likewise he makes after others.

2 The Right comes originally from the Will of the People; and the present People are, and ought to be reckon'd the same as those, who formerly regulated the Order of the Succession. The publick Interest requires that such Renunciations should be valid; and that the Persons interested should not attempt to annul them. For at some Times, and in some Circumstances they are necessary for the Good of the State; so that if those with whom one has to do, are of Opinion that the Renunciation will be afterwards disregarded, they will not sit down contented with that alone.

Besides, this must unavoidably give Birth to bloody Wars, to which it is not probable the People would expose themselves, for preserving a Right of Succession in Favour of Princes, not yet born. Farther, the Necessity of Contracts between different Nations, none of which is obliged to conform to the Civil or Publick Law of the others, seems to require that, in certain Cases, even Princes already born should lose the Right of succeeding, by the Renunciation of their Father. See a Book intitled, *Entretiens, dans lesquels on traite des Entreprises de l'Espagne*, &c. Printed at the Hague in 1719.

XXVII. (1) In Regard to the Kingdom of France, see M. DE THOU, *Hist.* Lib. CV. at the Year 1593. See also GUICCIARDINI. GROTIUS.

2 That is, he cannot impose a Necessity on his Successor to follow his Orders, and confirm what he has done, in Regard to Things in which no Man has

acquired a real and perpetual Right. For the learned GRONOVIUS trifles here, when he pretends that our Author allows the Successor a Power of maintaining no Alliance, no Treaty, no Contract, in which his Predecessor engaged. The contrary evidently appears from what he says, Chap. XIV. of this Book, § 12, 13.

3 But as PUFFENDORF observes, *B. VII. Chap. VII. § 15*. The Business of a Dispute concerning the Succession to the Kingdom does not belong to those Things which depend on this Jurisdiction, which the People has transferred on the King. I heartily agree with Mr. BOHMER (*Introduc. ad jus Public. Univers.* Part. Spec. Lib. III. Cap. IV. § 20.) who maintains that the People have a Right to pronounce absolutely in such Contests. It is supposed, says he, that neither of the Pretenders is in actual Possession of the Crown. Now on that Foot, neither of them is yet Sovereign: They only both aspire at becoming such. So that the People actually depend on neither of them; but then return by Accident and *Interim* to an Independence, till the Affair is decided; and consequently may, during that Time, judge definitively. Besides, this Dispute is to be decided on the Presumptions that may be form'd concerning the Will of the People, who originally established the Order of the Succession. But who can judge better of that than the People themselves? For, as our Author acknowledges, the People who now live are reckon'd the same as those who lived formerly. But if we will not stand by the Decision of the People, or of those who represent them, as the States or Grandees of the Kingdom; the Difference can be ended only by Force and Arms; which is very contrary to the Good of Civil Society. As for the rest, the People, when they pronounce on such Disputes,

the Prince and the Royal Family, whilst that Family continues they cannot pretend to any Remains of it. I am speaking of a true King, and not of one that is only Prince or Head of the State. But if any Question rise of the primary Will of the People, it would not be amiss to take the Advice of the ⁴ People now in Being; for they may be judged to be the same as those who lived formerly, unless it does plainly appear that the People who lived formerly, and by Vertue of whose Will this Right was obtained, were directly of another Mind. Thus did King *Euphaes* ⁵ permit the *Messenians* to determine which of the Royal Family of the *Epytidæ* had the best Title to the Throne; and the Dispute between *Xerxes* and *Artabazanes* was debated before, and determined ⁶ by the People.

XXVIII. To proceed to other Questions; that he who was born ¹ before his Father's Accession to the Throne, ought in a Kingdom that is indivisible, in any kind of Succession whatever, to be preferred to him who was not born 'till his Father came to the Crown, is a substantial and certain Truth. For that he would have his Share in a divisible Kingdom there can be no doubt of it, as well as in other Goods and Effects, concerning which it signifies nothing when they were got. He then, who

XXVIII. *The Son born before his Father's coming to the Crown to be preferred before one born after.*

Hotom. Ill. *Quest. ii. and Tiraquel. de primog. p. 31.*

Disputes, do not arrogate to themselves the Right of Election, which they have renounced by establishing an Order of Succession: They only determine which of the two Pretenders of the Royal Family has the better Right. Sometimes the People have even expressly reserved to themselves a Right of judging in such Cases, by a fundamental Law, which then removes all Doubt on the Subject. This is the Sentiment of the Author just quoted. He adds, however, that, if either of the Pretenders has seized on the Crown, and forced them to take the Oath of Allegiance; the People have no longer a Right of judging, because they then depend on the Possessor of the Crown. But I can never come into this Way of thinking; for if the People have a Right of judging, nothing but their Judgment can authorize the Possession of either Pretender: Otherwise that Right would be very useless. And a forced Consent cannot be considered as the Judgment of the People. Besides, in Order to make the bare taking Possession an apparent Title in this Case, there ought at least to be very specious and almost equal Reasons on both Sides; which does not often happen. The Right of one of the Pretenders may easily be pretty clear; if therefore the other, whose Pretensions are grounded only on frivolous Reasons, finds Means to form a Party in his Favour, and seize on the Crown; why should it not be in the People's Power, if they have an Opportunity, to dispossess the Usurper, after they have deliberately examined and discovered the Right of the other Pretender? In fine, as to the Substance of the Question, I think the Author ought to have decided it as we do, for the same Reason which he elsewhere gives why the People should have the Regency of the Kingdom in the *Interim*, while their King is detain'd a Prisoner. See B. III. Chap. XX. § 3. Num. 2.

⁴ Either in a General Assembly of the States of a Kingdom, as is practised in *England* and *Scotland*. See CAMDEN on the Years 1571, 1572. or by Deputies, as was done in the Kingdom of *Aragon*, according to MARIANA, *Hist.* Lib. XX. GROTIUS.

⁵ The Latin Translator hath *Regnum populi arbitrio permittit*. And I find that the learned Mr. BOVIN, in a Dissertation written professedly for examining what pass'd on Occasion of that Election, has not even suspected any Fault in the common Version; for thus he expresses the Sense of the Greek Historian in French. *Comme Euphaes ne laissoit point d'enfans, il choisit pour son Successeur celui qui seroit élu par le Peuple Messénien.* [As Euphaes left no Children, he appointed the Person, whom the Messenians should chuse, for his Successor.] Dissert. sur un Fragment de DIODORE de Sicile, p. 138. Tom. III. of the

Memoires de Literature de l'Academie Royale des Belles Lettres, Edit. Amst. But I am much mistaken if the Greek does not give us a very different Idea. The Words are these: *Ευφαῖ δὲ ἐκ ὄντων παιδίων, τὸν αἰρεθέντα ὑπὸ τοῦ δήμου κατελείπετο ἔχειν τὴν ἀρχήν.* That is: *As Euphaes had not Children, it was the People's Business to chuse him a Successor.* Lib. IV. Cap. X. It is evident from the Sequel of the Discourse, that the Historian speaks of what pass'd after the Demise of *Euphaes*. Besides, the very Construction of the Words will not allow of our Author's Translation. The Mistake arises from not observing this Way of speaking: *κατελείπετο τὸν αἰρεθέντα, &c. ἔχειν τὴν ἀρχήν: Reliquum erat, ut electus à Populo haberet Imperium.* [It remain'd that the Person chosen by the People should have the Crown.] CICERO and CÆSAR have said *Relinquitur, ut, &c.* in the same Sense, as might be shewn, if we were disposed to criticize, and the Fault was not plain enough. It must be said then that King *Euphaes* did not leave the Choice of a Successor to the *Messenians*; but that the People made use of their Right in this Case. Thus the Example is nothing to the Purpose.

⁶ Our Author here follows PLUTARCH, whom he quotes in the Margin, *De Amore fraterno*, p. 488. Tom. II. Edit. Wech. But JUSTIN, whom he likewise quotes, says that *Xerxes* and *Artimenes* (for so *Artabazanes* is called by others) referred the Decision of the Matter to their Uncle *Artaphernes*. Lib. II. Cap. II. Num. 9. And, as the learned GRONOVIVS observes, according to HERODOTUS, Lib. VII. Cap. II. *Darius* himself determined the Dispute between his Children: So that here are several Variations, which will not allow us to lay any Stress on this Example.

XXVIII. (1) The Question may be understood of the Children of a King, who was the first of his Family that was chosen to reign in a State, where the Crown is successive; or of the Children of a Prince of the Royal Family, born before he actually ascended the Throne in the Order of Succession. Our Author certainly speaks of both Cases; at least his Decision is just in both; and the former admits of less Difficulty, than the latter. For when the People give the Crown to a Prince, and his Descendants, if at that Time he has Children, they without doubt are considered as his first Successors, and not those who may be born after, but whose Birth is uncertain. So that, unless there is an express Clause in the fundamental Law of the Succession, importing that it belongs to the future Children of the Prince elected; they can have no Right to the Crown, but after the others. See HUBER, *De jure Civit.* Lib. I. Sect. VII. Chap. VII. § 24. &c.

in a divisible Kingdom would have his Share, must surely in that which is indivisible be preferred by the Prerogative of his Birth; and for this Reason it is, that a Fief goes to that Son who was born before the first Investiture. So too, in a lineal Succession, as soon as ever the Crown is obtained, the Children who were born before immediately entertain Hopes of one Day or other succeeding to it; for, suppose there were none born after, no body will say that those who were born before should be excluded. But in this kind of Succession, an Hope once entertained creates a Right; neither does it cease by any after Fact, unless in a cognatic Succession, where it may be for a time suspended by the Privilege of the Male Sex. This we are talking of was a Maxim that obtained in *Persia*, between *Cyrus* and *Arfica*; ² in *Judea*, between ³ *Antipater* the Son of *Herod the Great*, and his Brothers; in *Hungary* when *Geissa* ⁴ began his Reign, and in *Germany* (tho' not without War) ⁵ between *Otho* I. and *Henry*.

XXIX. Unless it appears that the Crown was conferred on some other Condition.

XXIX. But that, as we read, it was otherwise in *Sparta*, is owing to the peculiar Law of that People, which ¹ gave the Preference to the Children that were born when their Father was on the Throne, because of their more exact and nicer Education. The same also may happen in Consequence of a Clause of the first Investiture. If, for Instance, the Sovereignty be granted in Fee to a Vassal, and to the Heirs of his Body that shall hereafter be born. Upon the Strength of this Argument it was, that ² *Lewis Sforza* did chiefly rely in the Dispute between him and his Brother *Galeati* about the Dutchy of *Milan*. For as to *Persia*, ³ that *Xerxes* obtain'd the Crown to the Prejudice of *Artabazanes*, was, as *Herodotus* observes, ow-

² Who was afterwards called *Artaxerxes Mnemon*. See *PLUTARCH*, *Vit. Artax.* (p. 1012. Tom. I.) *GROTIUS*.

³ *Herod the Great*, their Father, having obtain'd the Emperor *Augustus's* Permission for naming which of his Sons he pleas'd, for Successor, or even for dividing the Kingdom of *Judea* among them; declared that, after his Demise, the Crown should devolve first to *Antipater*, his eldest Son, who was born when he was a private Man: Then to *Alexander* and *Aristobulus*, his Sons by *Mariamne*, born after his Accession to the Throne. This is the Account given by *JOSEPHUS*, *Antiq. Jud.* Lib. XVII. Cap. VI. and VII.

⁴ See *FLAVIUS BLONDUS*, *Hist. Decad.* II. Lib. VI. and *MICHAEL RITIUS*, *de reb. Hungar.* Lib. II. as quoted by *HOTMAN*, *Geissa*, or *Geicza*, of whom I have already spoken, *Note 2.* on § 24. was the second of that Name. He acceded to the Throne in 1141. on the Demise of *Bela* II. his Father, surnamed the *Blind*.

⁵ See *SIGEBERT* (*in Chron.*) and the Notes of *HENRY MEIBOMIUS* on the third Book of *WITTKIND's Annals*. In the *Turkish Empire*, *Bajazet* and *Gémes* disputed the Succession, the former was the Elder; but *Gémes* was born in his Father's Reign. *Bajazet* carried his Point. *MARIANA*, *Hist.* Lib. XXIV. *Constantine Ducas* left the Empire to his three Sons, two of whom, *Michaël* and *Andronicus*, were born of *Eudofia* before he was Emperor; and *Constantine*, the third, was born in the Purple, *πορφυρογέννητος*. [For which Reason he invested him with the most splendid Marks of the Imperial Dignity.] *ZONARAS* (Tom. III. *in Vit. Constant. Duc.*) See *CORSET*, *De Prole Regal.* Part III. Quæst. XXVI. *GROTIUS*.

To the Examples given in this Paragraph, our Author might have added a Decision of the Roman Law, which, though it has no Relation to the Succession of Princes, may yet serve to illustrate the Matter, because it regards a publick Dignity. The Words are these: *We ought to receive the Son of a Senator, whether natural or adopted.*—Nor is any Difference to be made, whether he was born after his Father was invested with the senatorial Dignity, or before. *Digest.* Lib. I. Tit. IX. *De Senatorib.*

Leg. V. See also *PAUL's Receptæ Sententiæ*, Lib. I. Tit. II. *Ad Municipal.* § 6. and Mr. *SCHULTING* on the Place, p. 215. As likewise his *Enarratio*, Part I. *Digest.* on Tit. II. *De Senatorib.* § 4. Where he quotes *JAMES GODEFROY*, on the *Theodosian Code*, Lib. VI. Tit. II. p. 9. Tom. II. To which may be added *DUAREN. Disp. Anniverf.* Lib. II. Cap. XXII.

XXIX. (1) This Example was employ'd by *Demaratus*, when banished the Kingdom of *Sparta*, as a Hint for *Darius* in the Dispute with *Artabazanes* about the Succession to the Crown of *Persia*. Lib. VII. Cap. III. See *Note (7)* on the following Paragraph. But I am surprized that this considerable Circumstance of the Order of Succession to the Throne of *Lacedæmonia* is entirely omitted by *NICOLAS CRAGIUS*, *De Republ. Laced.* Lib. II. Cap. II. And by *UBBO EMMIUS*, who has treated on that Subject after him. *Vet. Græc.* Tom. III. p. 118. &c.

² *JOHN GALEATI* had been in Possession of the Dutchy of *Milan*; but *Lewis Sforza* pretended that his Brother had not thereby any Right to it to his Prejudice; and therefore seiz'd on the Government, tho' his Brother had left a Son. But he alledged other Pretexts for the Support of his Claim. See *GUICCIARDINI*, Lib. I. *Fol. 17. Ver. Tom. I.* of the old French Translation, by *JEROM CHOMÉDÉY*, printed at Geneva in 1593. And *PAULUS JOVIUS*, Lib. II. *Fol. 37. Ver. Tom. I. Strasbourg Edit. 1556.*

³ *Xerxes* himself associated *Artaxerxes Longimanus* to the Kingdom, not *Darius* or *Hystaspes* who were both elder than the other, but born before their Father's Accession to the Throne. [See *PETAU*, *De Doctrinâ temp.* Lib. X. Cap. XXV. And *Rationar.* Part II. Lib. III. Cap. X.] But perhaps the Succession to the Crown of *Persia* really depended on the Suffrages of the People, yet so that they were obliged to bestow it on one of the Royal Family. For *AMM. MARCELLIN.* says this Regulation took Place in Regard to the *Arfacides*, a Parthian Family, the *Persians* being for some time subject to that People. Lib. XXIII. (Cap. VI. p. 397. *Edit. Vales. Gron.*) *ZONARAS* in *Justin* says the same of the *Persian Kings*, who succeeded the *Parthians*. *GROTIUS*.

ing more to the Power of *Atossa* ⁴ his Mother, than to the Justice of his Cause. For in the same *Persia*, when a like Dispute arose between *Artaxerxes Mnemon* and *Cyrus*, the Sons of *Darius* and *Parisatis*, *Artaxerxes* as the elder, tho' born when his Father was a private Person, was yet declared King.

XXX. 1. It has been no less a Dispute, both by Wars and ¹ single Combats, ² whether the Son of the elder Brother should be preferred before a younger Brother; but this in a lineal Succession admits of no Difficulty; for there the Dead are reputed as the Living, in that they are able to transfer a Right to their Children; and therefore in such a Succession, the Son of the Deceased shall certainly be preferred without any Objection to his Age; nay, where the Succession is cognatic, the eldest Son's Daughter; because neither Age nor Sex can be a Plea for going out of the Line. But in hereditary Kingdoms that are divisible, each shall have a Share, unless in those Countries where the Right of Representation ³ is not observed, ³ as formerly among most Nations in *Germany*; for it is but of late Days that Grandchildren have been admitted to Succession as well as Sons. However, in any Case of Doubt, it is to be presumed that this Vice-Succession takes Place, as being the more agreeable to Nature, as we said before, [§ 6.]

XXX. Whether the Grandchild by the elder Son is to be preferred before a younger Son; this explained by a Distinction.

Hot. Ill. q. 3. Tiraq. de prim. q. 40. Molin. de prim. l. 3. c. 6.

2. And where by the Civil Laws of a Country, the Representation is formally authorised, there it shall be in Force, tho' there be a particular Mention made in any Law of the next of Kin, as called to the Succession. The Reasons produced from the *Roman* Law for this, are not very conclusive, as will appear to any one that looks well into them. But the best Reason is this, That in a ⁴ favourable Subject, the Sense of Words must be extended to whatever they can signify, not only according to common Use, but also according to the Use of Arts; so that under the Name of Sons may be comprehended adopted ones; and under that of Death may be included a civil Death, (*those that are dead in Law*) for the Laws generally speak thus. Wherefore he may thus be justly called the next of Kin, whom the Law puts into the Degree of the next of Kin. But in hereditary Kingdoms that are indivisible, and where this Right of Representation is not excluded, neither is the Grandson always, nor always the younger Son preferred, but as amongst Equals, because ⁵ by an Effect of the Law they are put in the same Degree, he will have the best Title who is the eldest. For as I said before, in hereditary Kingdoms the Prerogative of Age doth not pass from one Person to another. Among the *Corinthians*, *ὁ ἀριστοβουλὸς αἰεὶ τὸ ἐκλειπὼν*, *The eldest of the deceased King's Children succeeded in the Throne*, as *George the Monk* has proved out of the sixth Book of *Diodorus Siculus*. So among the *Vandals*, it being ordered, that he who was next in Blood, and the eldest, should be Heir; ^b the

⁴ HERODOTUS gives it as his Opinion, that Tho' *Darius* had not declared for *Xerxes*, he would have reigned; because *Atossa* was in Condition of doing what she pleased. Lib. VII. Cap. III.

XXX. (1) About the Year 942, a great Dispute arose on this Question in *Germany*. The Emperor *Otho* I. assembled the States of the Empire, in Order to decide it. As they could come to no Agreement, the Decision was put on the Issue of a Duel. The Conqueror was he who maintained that the Right of Representation took Place, and therefore the Nephews ought to divide the Succession equally with their Uncle. WITTIKIND, *Hist.* Lib. II. SIGEBERT, *Chron.* *Otho* I. at the Year 942, as quoted by HOTOMAN, in the Place specified in the Margin.

2 See REGIN. CHOPPIN, *De Dominio*, Lib. II. THOMAS GRAMMATICUS, *Decif. Neapol.* I. JOANNES LE CIRIER, *De Primogenit.* in *Ocean. Juris*. (Tom. X.) MARIANA, *Hist.* Lib. XX. XXVI. CROMER, *Hist. Polon.* Lib. XXX. GROTIUS.

^a Wittik. Sax. Hist. 2. Molin. de prim. Lib. 3. Cap. 8.

³ See § 11. Note 1. For which Reason formerly in the *Palatinate*, *Rupert* the younger Bro-

ther was preferred to another of the same Name, descended of an elder Brother. See REINKING, Lib. I. Class IV. Cap. XVII. Num. 35. GROTIUS.

⁴ See Chap. XVI. of this Book, § 10, 12. But this Distinction is of no Use here; and our Author's Explanation is very well grounded, independently of any Support from the Right of Representation, considered in itself. For wherever that Right is established by the Laws of the Country, the Person who represents his Father is the nearest Relation; because, by Vertue of the Law, he is reckoned the same Person as his Father, so that as his Father, if alive, would have been the nearest Relation, he is so too.

⁵ I own, they are not in the same Degree, if we consider natural Proximity; for the Grandson is one Degree farther removed from the deceased King than the younger Son. But by Vertue of the Right of Representation, authorised by the Laws, the Grandson, who represents his Father, is thereby reckoned the same Person, as is before observed; and thus he is in the same Degree with his Uncle.

^b Procop. Bell. Va. Lib. I. Cap. 7, 8.

younger Son was, on the Account of his greater Age, ⁶ preferred to the Eldest's Son. So in *Sicily*, *Robert* ^c was preferred before his elder Brother *Martel's* Son, not properly, for the Reason supposed by *Bartolus*, because *Sicily* was held in Fee, but because the Crown was hereditary.

3. There is an old Instance of such a Succession in the Kingdom of *France*, in the Person of ^d *Guntran*; but that happened rather from the Choice of the People, which at that Time was not entirely left off. But since that Kingdom ceased to be elective, and a lineal agnatic Succession has been established, the Matter is past dispute; as formerly among the ^e *Lacedemonians*, when the Crown descending on the *Heraclidæ*, they made the Succession like this, agnatic. And therefore *Areus*, the Son of the elder Brother *Cleonymus*, was preferred before his Uncle ^f *Cleonymus*. And so in the lineal cognatic Succession the Grandson shall be preferred. As in *England*, ^g *John*, King *Edward's* Grandchild by his eldest Son, was preferred before *Hemon* and *Thomas*, the other Sons of that *Edward*. And this was also settled by Law in the Kingdom of *Castile*.

Pauf. 1. 3.

XXXI. So likewise whether the King's surviving younger Brother is to be preferred before his elder Brother's Son.

XXXI. By the same Distinction we may answer another Question, between the last King's younger Brother, and the elder Brother's Son; only we must observe, that in many Places, where among Children the Living are in the Right Line allowed to succeed the Dead, they are not allowed it in the collateral one. But where the Right does not plainly and directly appear, we ought to incline rather to that Side which substitutes the Child in his Father's Room; because natural Equity ¹ leads us to this, I mean as to Estates that come by Ancestors. Neither is it any Objection, that *Justinian* calls this Right of Brother's Children, *προνόμιον*, ² *A Privilege*: For this he does, not in Respect to natural Equity, but to ³ the ancient

Roman

⁶ It was *Honoric*, (or *Heuneric*) Son of *Genzon*, who was preferred to *Gondamond*. See the Notes on § 24. on Occasion of such an Order of Succession. GROTIUS.

In the Text *Henricus* is put instead of *Honoricus*, or *Heunericus*; which was certainly a Fault in the Impression. But our Author makes more than one Mistake in this Place. First, *Honoric*, or *Heuneric*, was *Genzon's* younger Brother, not his Son, and died before him. Secondly, *Gondamond*, on the contrary, was *Genzon's* Son. Thirdly, It ought therefore to have been said, conformably to the Truth of History, and to make the Example to the Purpose, that *Honoric*, *Gizeric's* younger Son, was preferred to *Gondamond*, the Son of *Genzon* his elder Brother. *BODIN*, *De Repub.* Lib. VI. Cap. V. p. 1145, is also mistaken in making *Honoric*, Grandson to *Gizeric*, where he treats on this Subject. Our Author seems to have had him in View; for that Writer, like him, is wrong in quoting *PROCOPIUS*, Lib. II. *Bell. Vandal.*

^c *Con. Vicerius*, Vit. Hen. VII.

^d *Aym.* Lib. 3. Cap. 62.

^e *Plut. Lyc. Just.* Lib. 3. Cap. 2.

⁷ The learned GRONOVIVS says, that this Preference was not made in Consequence of any fundamental Law relating to the Succession, but because the *Lacedemonians* finding *Cleonymus* a Man of too violent a Temper, and inclined to Tyranny, would not allow him to reign; by Way of Revenge, he engaged *Pyrrhus* to declare War with them. PLUTARCH indeed seems to insinuate this, in the Life of *Pyrrhus*, p. 400. Tom. I. *Edit. Wech.* But PAUSANIAS, in the Place mentioned by our Author in the Margin, tells us in plain Terms, that, on the contrary, *Cleonymus* was excluded, and *Areus* promoted to the Throne, because it was his Right in the Order of Succession. And that, according to the Laws, the Son of an elder Brother deceased succeeded, preferably to his Uncle, appears from what PLUTARCH himself says, in the Passage quoted by our Author, viz. that *Lycurgus*, who had it in his Power to appropriate the

Crown to himself, declared it belonged to his Nephew *Charilas*. GRONOVIVS farther accuses our Author of contradicting what he himself had said in the preceding Paragraph, concerning the Preference made by the *Lacedemonians*, according to their Laws, in Favour of a younger Brother, born after his Father's Accession to the Throne; which does not agree with a lineal agnatic Succession, such as GROTIUS supposes was established in *Lacedemonia*. But this only proves, that our Author designs to speak here of an irregular lineal Succession; as he insinuates both in this and the foregoing Paragraph.

⁸ See DE SERRES, *Invent. de l'Hist. de France*, in the History of *Charles V.* surnamed *The Wise*. And MARIANA, *Hist.* Lib. XVIII. where he says that *Edward's* Sons did not dispute the Crown with their Nephews. The same Writer having in *B. XIV.* treated of the Contest between *Sanchez*, Son of *Alphonso*, King of *Castile* and *Leon*, and his Grandson, tells us, that the States decided in Favour of the former; we do not know, says he, whether this was done unjustly or not. GROTIUS.

Our Author in the Text puts *John* instead of *Richard*; for the Historians by him quoted speak of the latter. See DE SERRES, p. 196. *John* is the Name of one of *Richard's* Uncles; and the other was called *Edmond*, and not *Hemon*. See POLYDORE VIRGIL, *Hist. Ang.* Lib. XX. and the Extract of *The publick Acts of England*, in the *Bibliothèque Choise*, Tom. XXVI. p. 1, &c.

XXXI. (1) See DE SERRES, *Invent. de l'Hist. de France*, in the Life of *Philip Augustus*, where he speaks of the Dispute between *John* and *Artus*, concerning the Succession to the Crown of *England*, (p. 118.) The same Historian gives an Account of a like Decision in Favour of the lineal Succession, in Regard to the Dutchy of *Bretagne*. *Vies de Philippe de Valois*, & de *Charles VIII.* (p. 165, 166, 422.) GROTIUS.

² *Novel.* CXVIII. Cap. III.

³ According to the old *Roman* Law, Nephews succeeded

Roman Law. Let us now run over the other Questions proposed by *Emanuel Costa*.

XXXII. He says, that the Son, or even the Daughter, of the deceased Brother, is to be preferred before the King's Uncle; which is true, not only in a lineal Succession, but even in an hereditary one in such Kingdoms, where the Right of Representation is admitted; but not in Kingdoms, which in express Words have Respect to the natural Degree; for in those the Person who has the Advantage of Sex and Age is to be preferred.

XXXIII. He adds, that a Grandson by the Son, is to be preferred before a Daughter. It is true, upon the Account of his Sex; but with this Exception, unless it be in a Country which regards among Children only the Degree.

XXXIV. He also adds, that the younger Grandchild by a Son, is to be preferred before the elder by a Daughter; which is true in the lineal cognatic Succession, but not in the hereditary, unless authorized by some special Law. Neither is the Reason alledged for this sufficient, *Because the Father of the one would have excluded the Mother of the other*; for this Exclusion would have been on the Account of a Prerogative merely personal, which passes no farther.

XXXV. As for what he subjoins, as appearing to him the more likely Opinion, that the Grand-daughter by the elder Son sets aside a younger Son, is not allowable in hereditary Kingdoms, tho' the representative Succession be admitted there; for this only puts her into a Capacity of succeeding; but among those who are capable of succeeding, the Prerogative of the Sex must carry it.

XXXVI. And therefore in the Kingdom of *Arragon*, the Sister's Son was preferred before the Brother's Daughter.

XXXVII. And after the same Manner, in hereditary Kingdoms, the Daughter of the eldest Brother must yield to the King's younger Brother.

succeeded only when there was no Brother nor Sister of the Deceased remaining. See *Code, De legitim. heredib. Leg. III. and Leg. XIV. § 1.*

XXXII. (1) For the Uncle of the Deceased was already excluded by the Proximity of the Line of the Deceased, in which the Deceased's Nephew is, in Case of a lineal Succession. And he is excluded by the Proximity of the Degree, if the Succession is hereditary, and the Right of Representation takes Place: For then the Nephew is reckoned in the same Degree with the Deceased.

^a *Dig. Lib. 26. Tit. 3. De legit. Tutor. Leg. 3. § 5.*

XXXIV. (1) *MARIANA, Hist. Hisp. Lib. XXVI.* decides, that this ought to take Place in *Portugal*. He tells us however, that contrary to this Maxim, *Emanuel* was preferred to the Emperor *Maximilian*, by the People's Favour. The same Historian says, *Lib. XII.* that if, in the Kingdom of *Castile*, *Ferdinand*, the Son of *Berengere*, younger Sister to King *Henry* deceased, was preferred to *Blanche*, the said King's elder Sister; it was done

out of Hatred to *France*, because *Blanche* was married to a *French Prince*.

XXXVI. (1) *ILLESCAS, Hist. Pontif. Lib. VI. Cap. XIX. Afflic. Cap. I. Col. V. De Natura succed. Aguirr. Apolog. Num. 82.*

2 In that Country, according to *MARIANA*, it was formerly thought that a Brother ought to succeed, to the Exclusion of the Daughter of the deceased King. They afterwards stuck so close to the lineal Succession, that a Sister's Son was preferred to those who descended from the Brother, but in a more remote Degree. *Hist. Lib. XV. 13. XIX. 21. XX. 2, 8.* The same Historian, speaking of *Alphonso*, says, *He ordered that his Grandsons should succeed to the Kingdom of Arragon, preferably to the Sons of Ferdinand; and that even his Grandsons by his Daughter should be preferred to the Daughters of Ferdinand in Case of a Failure of male Heirs. Lib. XXIV.* Thus, he adds, the Right of the Crown is frequently altered, according to the Fancy of Kings. See the same Writer, *XXVII. 3. GROTIUS.*

XXXII. Whether the King's Brother's Son is to be preferred before the King's Uncle.

XXXIII. Whether the Grandson by the Son is to be preferred before a Daughter.

XXXIV. Whether the younger Grandson by the Son is to be preferred before the elder by the Daughter.

XXXV. Whether the Granddaughter by the elder Son is to be preferred before the younger Son.

XXXVI. Whether the Sister's Son is to be preferred before the Brother's Daughter.

XXXVII. Whether the elder Brother's Daughter is to be preferred before the younger Brother.

C H A P. VIII.

Of such Properties as are commonly called Acquisitions by the Right of Nations.

I. I. THE Order of our Subject has now brought us to treat of that Acquisition or Property, which is, by the Law of Nations, distinct from the Law of Nature, which we have above called the *Voluntary Law of Nations*. Such

I. Many Things are said to be by the Right of Nations which properly speaking are not so.

is that Acquisition which is obtained by the Right of War; but of this we shall speak more seasonably hereafter, where the Effects of War are explained. The *Roman* Lawyers, when they treat of the acquiring the Property of Things, reckon up many Methods, which, they say, are according to the Right of Nations. But a diligent Examiner will find that all of them, except that gained by the Right of War, do no Ways belong to that ¹ Right of Nations, which we are now treating of: But are either to be referred to the Law of Nature, not indeed to that which flows purely and simply from Nature, but to that which takes Place in Consequence of an established Property, and before all civil Law; or, they are such as may be referred to the Civil Law itself, not only that of the People of *Rome*, but of ² many other Nations round about them; which I rather believe, because those Laws or Customs came originally from the *Greeks*, whose Institutions, as *Dionysius Halicarnassensis* and others observe, all *Italy*, and the neighbouring Nations followed.

2. But this is not the Law of Nations, properly so called, because it ³ does not belong or contribute to the mutual Society of Nations amongst themselves; but rather regards the Peace and Tranquillity of each particular People; and therefore might be altered by any one People, without consulting the others; and it may also happen, that in some other Places, and at some other Times, a very different common Custom, and so another Law of Nations, improperly so called, might be introduced; which we find was really done, when the *German* Nations invaded almost all *Europe*. For as formerly the *Grecian* Laws, so then the *German*, were generally received, and are as yet in Force. Now the first Way of acquiring a Thing by the Right of Nations, as the *Roman* Lawyers call it, is the ⁴ Seizure or Possession of Things that have no Owner: Which Way is certainly according to the Law of Nature, in the Sense I mentioned, now Property is established, and as long as no Law hath determined any Thing to the contrary; for the Civil Law too can entitle us to a Property.

II. *Fish in Ponds and Beasts in Parks, are by the Law of Nature one's own peculiar Property, notwithstanding whatever the Roman Laws have declar'd to the contrary.*

II. And to this Head, in the first Place, is referred the Catching of Beasts, Birds, and Fish. But how long all these may be said to be no Body's, admits of some Dispute. *Nerva*, ¹ the Son, was of Opinion, that Fish in a Pond were our

I. (1) That is, to that arbitrary Law, established by a tacit Consent of Nations, which our Author supposes, without any Foundation. See *B. I. Chap. I. § 14. Note 3.* But, as has been observed, the *Roman* Lawyers understand no more by the Law of Nations, than what the modern Interpreters call *Jus Naturale secundarium*. See what I have said on *PUFENDORF, B. II. Chap. III. § 23. Note 3.* of the second Edition; and *Mr. NOODT's* Commentary on the first Part of the *Digest. p. 6, &c.* It appears from the very Title, which contains the Subjects which our Author proposes to handle, that this was the Notion of the antient Lawyers. *For we acquire the Dominion of some Things by the Law of Nature, which as we said is called the Law of Nations; and of some by the Civil Law. Institut. De Divisione rerum, &c. Lib. II. Tit. I. § 11.* So that our Author's Criticism is just, only as it shews that certain Decisions of the *Roman* Lawyers are not founded on the true Principles of the Right of Nature common to all Nations; tho' they give them as such.

2 Nations agree, tho' we know not certainly whence this Agreement arises, about other Customs, which have no Relation to Law. *PLINY* gives us several Instances of this Sort; as that the Bodies of Children who had no Teeth should not be burnt, [at the Time when it was the general Custom of paying the last Duties to the Dead in this Manner]. *Hist. Nat. Lib. VII. Cap. XVI.* that the *Ionian* Characters should be used in Writing. *Ibid. Cap. LVII.* He speaks also of the Use of Barbers, as of a Thing in which the Nations agreed. *Cap. LIX.* of the Distinction of the Hours. *Cap. LX.* of the religious Respect paid to the

Knees of a Person, *Lib. XI. Cap. XLV.* and the Custom of adoring Lightning with Clapping of the Hands, or a certain Motion of the Tongue, *Lib. XXVIII. Cap. XLV.* *GROTIUS.*

3 The original Words are, *Neque enim pertinet ad mutuam Gentium inter se Societatem.* The Author expresses himself in Terms still more clear and strong, at the Close of the Chapter, *Ab his (Juribus) quæ Societatis humanæ vinculum continent.* I make this Observation to shew that his Ideas of the Nature of his Law of Nations, are not very clear, nor very certain. He defines it an arbitrary Law; but what is necessary for maintaining Society among all Nations, is not an arbitrary Thing; they are indispensibly obliged to observe it, by Vertue of the Law of Nature, whether they are willing or not.

4 *Wild Beasts, Birds, and Fishes; that is, all Animals which are produced in the Sea, in the Air, and on the Earth, as soon as they are caught by any one, immediately begin to be his by the Law of Nations. For what before was no Man's Property, is granted to the Occupant by natural Reason.* *Instit. Lib. II. Tit. I. De divisione rerum, &c. § 12.* We may here observe, that *Jus gentium*, and *Naturalis Ratio*, are the same Thing, according to the *Roman* Lawyers.

II. (1) *Digest. Lib. XLI. Tit. II. De adquir. vel amittenda possessione. Leg. III. § 14. Quæ in Sylvis circumseptis vagantur.* But we ought to read, *in Sylvis non circumseptis*; which makes a Sense directly contrary to what is commonly found in the Words, and such a one as is agreeable to our Author's Opinion. See *Note I.* on *PUFENDORF, B. IV. Chap. IV. § 11.*

own, but not those in a great Lake; and wild Beasts inclosed in a Park, but not those that had the Liberty to range in Forests, tho' those Forests were fenced in. Whereas Fish is no less inclosed in a private Lake than in a Pond, and Forests which are fenced in, do secure Beasts as well as any of the Parks, which the Greeks call *ονελοσφοεια*, *Places to breed up Beasts in*. Nor is there any other difference between them, than that the one is the closer, the other the larger Confinement. And therefore now-a-Days the contrary Opinion does more justly obtain, that as we have the Possession of, so have we too a Property in, not only Beasts in private Forests, but Fish inclosed in Lakes.

III. The Roman Lawyers say, that we lose our Property ¹ in wild Beasts, as soon as ever they recover their natural Liberty; but in all other Things the Property acquired by Possession ² does not cease with the loss of Possession; nay, it gives us a Right even to claim and recover our Possession. And whether they be taken away from us by another, or get away of themselves, as a ³ fugitive Slave, it is all one. Wherefore it is more reasonable to say, that our Property is not lost merely because the wild Beasts have made their Escape, but from a probable Conjecture, that by Reason of the difficulty of pursuing and recovering them, we may have abandoned them, especially if we cannot tell which are ours from others. But this Conjecture may be destroyed by other Conjectures, as by putting *γυαλομοσα*, *Marks* ⁴, or *Crepundia*, Bells, upon them, as has been often done to Stags and Hawks, whereby they have been known, and restored to their Owners. Now to gain a Property in Things, it is requisite that we should have ⁵ a corporal Possession, and therefore it is not enough to have ⁶ wounded the Beast, as it was ⁷ rightly decided against *Trebatius*. Hence comes the Proverb, *Aliis leporem excitasti*. ⁸ *You have started the Hare, but others run away with it*. And *Ovid* tells us, in his fifth Book of *Metamorphoses*, that ⁹ *It is one Thing to know where a Thing is, and another to find it*.

IV. Now this corporal Possession may be gained not only with our Hands, but with Instruments, such as Traps, Nets, Gins, &c. provided that these two

III. *Wild Beasts that get away cease not to be the first Owner's, if they can know them again.*

See Ch. 4. § 5. of this Book,

IV. *Whether Possession may be gained by Instruments, and how.*

III. (1) *Institut. Lib. II. Tit. II. De divisione rerum*, § 12. See PUFENDORF, *B. IV. Chap. VI.* § 12. and the Notes on that Place.

² See what I have said on PUFENDORF, in the Chapter last quoted, § 1. Note 1. It must be observed, with OBRECHT, that the Roman Lawyers admitted of the Presumption on which our Author grounds this tacit abandoning of a wild Beast. This appears from the last Words of the Paragraph of the *Institutes*, referred to in the foregoing Note, *It is presumed to recover its natural Liberty, when either it is out of your Sight; or, tho' still in your View, cannot be pursued without Difficulty*. But I do not find they say any Thing (as they ought to do in Order to reason conclusively) concerning the Exception of a stronger Presumption, founded on Marks set on a wild Beast, from which there is Reason to conclude, that the Proprietor hopes to be able to recover his Beast, after it has made its Escape. And in Reality this is not impossible, especially when the wild Beast is grown a little tame. So that it is a vain Pretence of ZIEGLER, that from the single Consideration of the Beast being wild, it is supposed that the Proprietor, who cannot be unacquainted with the Nature of the Animal, designs to keep the Property of it only as long as he has Possession of it.

³ *Digest. Lib. XLI. Tit. II. De adquir. vel amitt. posses.* Leg. XIII.

⁴ Which the Grecians call *γυαλομοσα*, and the Latins, *Crepundia*. The former of these Words occurs in DONATUS, the Grammarian, who speaks of the Marks or Tokens with which Children were exposed. *Monumenta sunt quæ Græci dicunt. γυαλομοσα, & σπαρανα*. On *TERENCE's Eunuch*, Act. IV. Scen. VI. (ver. 15.) *APULEIUS* uses the

Word *Crepundia* in the same Sense. *Apolog.* (p. 64. Edit. *Pricæi*.) GROTIUS.

⁵ See the Notes on PUFENDORF, *B. IV. Chap. VI.* § 2, 9, 10.

⁶ *HARMENOPULUS* says, that he who has wounded a Beast does not become Master of it till he catches it. *Lib. II. Tit. I. (Num. 26. Edit. Gothofr.)* GROTIUS.

⁷ The Question was proposed, whether a wild Beast, which is so wounded that it may be taken, is immediately understood to be our Property? *Trebatius* declared in the Affirmative. — Most were of Opinion that it did not become our Property till we took it; because several Accidents may prevent our taking it, which is true. *Digest. Lib. XLI. Tit. I. De adquir. rerum Dominio.* Leg. V. § 1.

⁸ In *PETRONIUS ARBITER* we have this Expression, *Vides, quod aliis Leporem excitavi? Do you observe that I have started a Hare for the Use of others?* (Cap. CXXXI.) *OVID* alludes to this proverbial Way of speaking (in *De Art. amat.* Lib. III. ver. 660, 661.)

*Credula si fueras, alia tua gaudia carpent,
Et lepus hic aliis exagitatus erit.*

By the Laws of the Lombards, whoever killed, or found a Beast which had been wounded by another, had a Claim to a Shoulder and seven Ribs of it; the Remainder belonged to the Person who had wounded it, provided it was not more than twenty-four Hours since the Wound was received, (*Lib. I. Tit. XXII. Leg. IV. VI.*) GROTIUS.

⁹ *Metamorph.* Lib. V. ver. 320. But the Poet is there speaking of a different Thing, as I have observed on PUFENDORF, *B. IV. Chap. VI.* § 8. Note 1.

Circumstances go along with it. First, That those Instruments ¹ be in our own Power; and Secondly, that the Beast be so secured as that it cannot get away. And thus must we decide the Case of ² *the Boar in the Toil*.

V. It is not against the Law of Nations that all wild Beasts should belong to the Crown.

V. These Things are then only to take Place, where no Civil Law intervenes; wherefore our Modern ² Lawyers are very much mistaken, who think those Rights to be so natural, as that they cannot be changed; for they are not purely, and simply natural, but only with Regard to a certain state of Things, that is, if it be not otherwise provided. Thus the People of *Germany* consulting about making some Allowances to their Princes and Kings to support their Dignities, ¹ very wisely thought it proper to begin ² with such Things as might be given without Damage to any one; such are those which no Person could lay particular Claim to; which I find that the *Egyptians* also practised: For there the King's Intendant, ³ whom they called ἰδιὸν λόγον, seized on all such Things to the Use of the Crown. The Law indeed could of it self transfer a Property in those Things before Possession, ^b since the Law alone is sufficient to create a Right of Property.

VI. How the Possession of other Things that have no Owner may be gained.

VI. After the same manner as wild Beasts become our own, so do also ¹ other ἀδῆσπα, Things that have no Owner. For Nature consider'd in itself gives all these to him who finds, and lays hold on them first. Thus was the Desert ² City of *Acanthos* adjudged to the *Chalcidians*, who first enter'd it, not to the *Andrians* who had first thrown a Dart into it. For the beginning of Possession is joining Body to Body, and this in Moveables is done usually by the Hands; but in Immoveables, by our Feet. To know where a Thing is, is not finding it, as we have it in *Ovid Metam.* Lib. V.

VII. To whom Money found does naturally belong; and the Variety of Laws about it.

VII. Among Things that have no Owner, are reckoned Treasures, that is, Money, whose Owner is not known; ¹ for what appears not, is, as if it were not. Wherefore such Treasures naturally belong to the Finder, that is, to him who moves them from the Place, and secures them; yet not so, but that ² Laws or Customs may order it otherwise. *Plato* ³ would have Notice given to the Magistrates, and the Ora-

IV. (1) That is, not that they be always our own Property; for we may make use of such as we borrow, with the Proprietor's Consent; but that there is no Impediment to our using them where they are placed. Consequently, the Place must either belong to the Person who would hunt in it, or it must be publick; or, if it be an Estate belonging to another, it is necessary that the Proprietor should consent to the Action.

² See *Digest.* Lib. XLI. Tit. I. *De adquir. rerum Dom.* Leg. LV. and Note 2. on PUFENDORF, B. IV. Chap. VI. § 9.

^a Host. & alii in C. *Non est: De decimis.* *Jafon*, conf. 119.

V. (1) See what JOHN of Salisbury says in his *Policrat.* (Lib. I. Cap. IV.) concerning the Abuses of this Law. GROTIUS.

² See PUFENDORF, B. IV. Chap. VI. § 5, 6, 7.

³ The Person mentioned by STRABO, as quoted by our Author in the Margin, was not an Intendant of the old Kings of *Egypt*, but an Intendant of the Roman Emperors, established after that Country was reduced to the Form of a Province. The Geographer calls that Office, ἰδιὸν λόγον, and CASAUBON judiciously observes, he was the same as the *Digest.* calls *Procurator Cæsaris*, or *Rationalis*. See that learned Man's Commentary on LAMPRI- DIUS, *Alex. Sever.* Cap. XLV. and on CAPITOLINUS, *Maximin. duob.* Cap. XIV. What led our Author into this Mistake was, that it is said a little lower, that *These Magistrates were the same, even under the Kings*. But he did not observe, that this relates only to the Magistrates of the Country, τῶν δ' ὑπάρχων ἀρχόντων, spoken of just before, who are clearly distinguished from the Officers established by the Roman Emperor. The Passage in Question stands thus, *There is another Officer,*

called ἰδιὸν λόγον, whose Business it was to demand such Things as had no Master, and consequently ought to fall to Cæsar. Lib. XVII. p. 1148. Edit. *Amst.* (797. *Parif.*) So that when *Egypt* was governed by its own Laws, the Kings might not have had the same Right over Things which had no Master, as the Roman Emperors since had.

^b Covar. in C. *peccatum.* part 2. § 8.

VI. (1) In *Portugal* the Whales that come ashore belong to the King. GEORG. DE GABEDO, *Decis. Lusitan.* Part II. Decad. XLVIII. GROTIUS.

² The Author makes an Island of this *Macedonian* City, which lies near the Sea, toward the Gulf of *Strymon*. The Fact is related by PLUTARCH, *Quæst. Græc.* XXIX. p. 298. Tom. II.

VII. (1) See PUFENDORF, B. IV. Chap. VI. § 13.

² The People of *Biblos* had a Law, forbidding the carrying off what had not been put in the Place where it was found. APOLLONIUS of *Tyana* approved of this Maxim, as we are told by PHILOSTRATUS, in the Life of that Philosopher. GROTIUS.

The Law mentioned by our Author belonged to the *Stagirites*. See ÆLIAN, *Var. Hist.* Lib. III. Cap. XLVI. The same Author relates indeed, that the People of *Byblos*, a City of *Phœnicia*, followed this Maxim in Practice, Lib. IV. Cap. I. p. 302. Edit. *Perizon.* But says nothing of a Law among them for it. As to what is observed in Regard to APOLLONIUS, I do not know that PHILOSTRATUS says any more than what will be presently mentioned in Note 4, and which relates to a very particular Case.

³ *De Legib.* Lib. XI. p. 913, 914. Edit. H. Steph.

cle consulted. And *Apollonius* looking upon a Treasure that was found as a particular Kindness of God, ⁴ adjudg'd it to the best Man. The *Hebrews* ⁵ gave it to the Owner of the Ground wherein it was found, ⁶ as may be gather'd from Christ's Parable, *Matt.* xiii. 44. And that the *Syrians* did the same, I infer from a Story in *Philostratus*, Book VI. Chap. XVI. The Laws of the *Roman Emperors* are very various upon this Subject, as appears partly from ⁷ their Constitutions, and partly from the Histories ⁸ of *Lampridius*, *Zonaras* and *Cedrenus*. The *Germans* awarded those Treasures, and indeed all other ἀδικοῦσα, Things without an Owner, to their Prince, which now is grown so common, that it may pass for a Law of Nations. For it is now observed in *Germany*, *France*, *England*, *Spain* and *Denmark*. We have already sufficiently ⁹ shewn why this cannot be charged with Injustice.

In Adr. and Sever.

VIII. Let us now proceed to Additions of Lands, which are made when a River retires or changes its Course, of which the old Lawyers ¹ have left us several stated Cases; and the Modern furnish us with whole Treatises. But what they have writ upon this Subject, is for the most part grounded not on the Law of Nature, but on the Usages of some Nations, though they often put them off under that Name. For most of their Decisions are built upon this Foundation, that ² *The Banks of the River belong to him who possesses the adjoining Lands*; and ³ that even the Channel, ³ when it is forsaken by its Waters, is also his, and consequently that the Islands cast up in the River are ⁴ so too. They likewise distinguish one Inundation from another; a small one does not take away the Property, but a ^b great one does; yet so, that if the Flood retires all of a sudden, the Land so overflowed shall, by the drawing off of the Waters, as if by ⁵ Postliminy, return to its antient Proprietor, but if it Decreases by little and little only, ⁶ it is another Thing; it goes to them who own the neighbouring

VIII. That what is delivered us by the Roman Laws concerning Islands and Alluvions is neither natural, nor from the Right of Nations.

⁴ The Question turns on a Dispute between a Seller and a Buyer, who had found a Treasure in the Field he had purchased. The Philosopher on that Occasion says, that *The Characters of the two contending Parties were to be examined*; and declares it his Opinion, that *The Gods would not have permitted the Seller to dispossess himself of the Land, or have given the Treasure into the Hands of the Purchaser, had not the latter been a Man of better Morals than the former*. Vit. Apoll. Tyan. Lib. II. Cap. XXXIX. Edit. Olear. To which the Author adds, that his Decision was received, and the Treasure disposed of accordingly. A Decision which shews that Philosopher's theological Notions were not more just than those he entertained in Regard to the Law of Nature.

⁵ This seems to have been practised at *Rome*, in *PLAUTUS's* Time; who in one of his Comedies makes *Callicles* say, that *He bought a House in which he knew there was a Treasure, with a View of delivering it safe to his Friend, who had deposited it there, being sensible It would be judged to belong to the Purchaser of the House*. (Trinum. Act. I. Scen. II. ver. 141, &c.) See also Act. V. Scen. II. ver. 22. GROTIUS.

⁶ This is not certain. See my second Note on *PUFENDORF*, B. V. Chap. III. § 3.

⁷ See the *Institutes*, Lib. II. Tit. II. De rer. Divisione, &c. § 39. And the Commentators on the Place; as also *JAMES GODEFROY* on the *Theodosian Code*, Lib. X. Tit. XVIII. De thesauris, Tom. III. p. 485, &c.

⁸ See what *TACITUS* relates, *Annal.* Lib. XVI. (Cap. I. &c.) concerning the Treasures said to be found in *Africa*, which *Nero* devoured in Imagination, on the false News he had received of that Affair. See likewise *PHILOSTRATUS*, where he speaks of *Atticus* the Rhetorician. Vit. Sophist. (Lib. II. Cap. I. § 2. Edit. Olear.) GROTIUS.

⁹ See the *Speculum Saxonicum*, Cap. XXXV. Constitut. Sicul. Frideric. Lib. I. Tit. LVIII. and CIII. The same was practised among the *Goths*. King *Theoderick* says, in *CASSIADORE*, that *It can-*

not be called Covetousness to take what no Proprietor complains he has lost. Var. Lib. IV. Cap. XXXIV. The same Prince elsewhere gives the following Directions to his Officers, *Let those deposited Moneys, which by Length of Time have lost their competent Masters, be, by your Care and Diligence, thrown into our Treasuries; as we permit all our Subjects to remain in quiet Possession of what is their own, they ought cheerfully to leave to us what is no Man's Property. For he sustains no Damage by not possessing what is lost, who doth not lose his own Goods*. Lib. VI. Cap. VIII. GROTIUS.

VIII. (1) See *BARTOL.* in Traët. Tyberiad. *BAPTIST AYMUS*, De Alluvionum jure. *CONNANUS*, Com. Jur. Civ. Lib. III. Cap. V. *JOHN BOREO*, *ANTHONY MARSA*: *JOHN GRYPHIANDER* (De Insulis. Cap. XVIII.) And several others. GROTIUS.

^a Dig. Lib. 41. Tit. I. De adquir. rer. Dom. Leg. 7.

² They hold that the Banks and the Rivers themselves are of publick Use; so that it is free for every one to land, to tie their Boats to the Trees that grow on the Banks, and unload there. But then they pretend, that *The Property of such Banks belongs to the Owners of the adjacent Lands; and consequently the Trees growing on them, are likewise the Property of the same Persons*. Institut. Lib. II. Tit. I. De divisione rerum, &c. § 4.

³ Ibid. § 23. The *Roman* Lawyers suppose that the People took Possession of the River only as such; and as necessary for publick Use. Digest. Lib. XLI. Tit. I. De adquir. rerum dominio, Leg. XXX. § 1.

⁴ Institut. as above quoted, § 22.

^b Dig. ubi sup. § 5. & eod. Tit. Leg. 30. Leg. 38.

⁵ See B. III. Chap. IX.

⁶ Because at that Time, the Land was consider'd as having changed its Form, and being become the Bed or Channel of the River, *ibid.* § 23, 24. See Mr. *NOODT's Probabilia Juris*, Lib. I. Cap. I. and his Treatise, De usu fructu, Lib. II. Cap. XI. p. 631, &c.

Estate.

Estate. Now I do not deny, but all this might be introduced by the Civil Laws, and with the advantageous Prospect of making People more careful in securing their Banks; but that it is so by natural Right, (as they seem to imagine) I can by no Means allow.

IX. That an Island in a River and a dried up Channel are naturally his to whom the River, or that Part of the River belongs, that is, they are the Publick's. See Ch. 3. of this Book, § 19.

IX. 1. For if we Regard what ¹ generally happens, the Body of the People took Possession of the whole Extent of a Country, both as to the Jurisdiction and Property, before the Lands were parcel'd out to private and particular Persons. *What we, says Seneca, ² call the Country of the Athenians, or the Campani, are such Lands as the Inhabitants do afterwards among themselves distinguish by certain Boundaries. And so Cicero, ³ There's no Man can say that he has any Thing of his own by a Right of Nature; but either by prior Occupancy, as those, who first planted uninhabited Countries; or by Conquest, as those who have got Things by the Right of the Sword; or else by some Law, Compact, Condition or Lot. It is by some of these Means, that the People inhabiting Arpinum and Tusculum came to have those Lands which are now called theirs; and the same may be said as to private Mens Estates. And Dion Pruseensis, πολλά ἐστὶν εὐρεῖν, &c. ⁴ There are many Things to be found, that the Publick does in general claim for its own, tho' parcelled out into particular Shares. Thus too Tacitus of the Germans, The Lands ⁵ (per Vicos occupantur, it is a Mistake to read it Vices) are possess'd in common by Villages, in Proportion to the Number of Hands to improve them; and then they are divided amongst them, with Regard to every Man's Quality and Circumstances. And therefore whatever was thus at first possess'd by the Publick, and not afterwards divided, must be suppos'd to be still the Property of the Publick; and as in a River that belongs to a private Person, any Island that shall be cast up, or the Channel that shall be left dry, becomes that private Person's: So in a River that belongs to the Publick, both of these are the Publick's, or his to whom the Publick has granted them.*

2. What we have here been saying of the Channel, ⁶ holds good also as to the Bank, which is nothing but the utmost Part of the Channel, that is, of the Passage where the Stream of the River naturally runs. And thus it is every where taken. In *Holland*, and the neighbouring Countries, many such Disputes did formerly arise, by Reason of the Lowness of their Lands, the Greatness of the Rivers, and the Nearness of the Sea, receiving Mud and Dirt in one Place, and carrying it back to another by the Ebbs and Flows of successive Tides: Those that were really Islands, were always reckoned Part of the publick Demain or Patrimony; as were also the Channels of the *Rhine* and the *Maese* intirely left by the Waters, as has been often adjudged, and grounded ⁷ upon very good Reasons.

3. For

⁷ See a Passage of CASSIUS, in AGGENUS URBICUS (*Comment. in Frontin.* and in BOETIUS. (*De Geometr. Lib. II.*) GROTIUS.

The Passage, to which our Author refers, is in CASSIUS LONGINUS a famous Lawyer, whose Opinion concerning Alluvions pass'd into a Law. The Question was propos'd on Occasion of the frequent Inundations of the *Po*, and the Disputes occasioned by them among the Proprietors of the adjacent Lands; which he solv'd in this Manner, on a Supposition that the imperceptible swelling of the Side of a River is frequently occasioned by the Negligence of the Proprietors of the Lands on the other Side; whereas when the Water overflows on a sudden, such Inundations are the Effect of a Violence, which they could not prevent, p. 56, 57. *Auct. Rei Agrar.* Edit. Goes. See also SICULUS FLACCUS, *De conditionib. Agrar.* p. 13.

IX. (1) See my first Note on PUFENDORF, B. IV. Chap. VII. § 12. And that whole Paragraph.

² *De Benefic. Lib. VII. Cap. IV.*

³ *De Offic. Lib. I. Cap. VII.*

⁴ *Orat. Rhodia.*

⁵ *Per vicos (&c non per vices).* The Emendation here propos'd by our Author, had been made by CURTIUS PICHENA, and reciev'd by others. The learned GRONOVIVS does not think it necessary.

But this Piece of Criticism is of small Importance in Regard to the Application of the Passage to the Question in Hand. The Words here quoted are in the Treatise, *De marib. German. Cap. XXVI. Num. 2.*

⁶ This is practis'd in *France*. See the Book intitled, *Sanction des Eaux, & Forêts.* B. II. Chap. I. GROTIUS.

⁷ Our Author here, in the Margin, quotes some Laws of the *Digest*, which he thinks founded on his Principles, and consequently not conformable to the Principles of the *Roman* Lawyers. In one of them it is said: *If what is form'd in, or built on a publick Place, belongs to the Publick; an Island, form'd in a publick River, ought in like manner to belong to the Publick.* Lib. XLI. Tit. I. *De adquir. rerum dominio.* Leg. LXV. § 4. In § 1. PAUL, the Lawyer, maintains that even the Banks of an Island, belonging to a particular Person, are publick; in the same Manner as the Sea Shore and the Banks of a River, which border on Lands on the Continent. In the other Law, it is determined that the new Channel, made by a River (in Lands belonging to particular Persons) thereby becomes publick; it being impossible that a Bed made by a publick River should not belong to the Publick. Lib. XLIII. Tit. XII. *De Fluminib. &c.* Leg. I. § 7. MR. VAN DE WATER, in his *Observat. Jur. Rom.* Lib. I. Cap. VII. finding

3. For the *Roman* Lawyers themselves do allow, ⁸ that an Island ⁹ which floats in a River, held up perhaps by some Shrubs growing there, belongs to the State; because, ¹⁰ say they, whoever has a Title to the River, must needs have as good a Title to the Island that is in it. And there is the same Reason for the Channel, as for the River itself, not only upon that Account which the *Roman* Lawyers alledge, because the Channel is covered by the River, but for the Reason already mentioned, because they were both originally possessed by the People, and had never been assigned as the Property of any private Person. Nor do we allow what they urge to be natural, ¹¹ that if the Lands were ¹² limited, the Island would belong to the prior Occupant. This indeed would be so, if neither the River nor the Channel with it had ¹³ been in the Possession of the Publick, as an Island formed in the Sea belongs to him who shall first seize on it.

X. 1. Neither

ing the Law, first mentioned in this Note, ascribed to LABEO, makes it appear, in my Opinion, that we ought to read PAULUS, and join the last Words of that Paragraph to the beginning of the preceding Paragraph; because otherwise those two Lawyers would reason in a Manner directly opposite to what they had both laid down. He is also of Opinion that PAUL's Observation is no more than a Confirmation of that made, § 3. and is to be understood only of floating Islands. But this does not appear so certain. For, *First*, On that Foot, the Observation would not be opposite to the preceding Decision, viz. *If an Island form'd in a River is any Man's private Property, no Part of it belongs to the Publick*; which relates to a particular Case; whereas the Objection is general. *Secondly*, there is no Insinuation, that the Lawyer speaks only of floating Islands; the very Terms clearly express *all Sorts of Islands form'd in a publick River*. And the preceding Paragraph, with which probably this is connected, speaks of an Island fixt to the Bottom of the Bed of the River. *Thirdly*, The Lawyer's Comparison with Buildings raised in a publick Place, shews that the Islands, of which he speaks, are not of the floating Kind; for Buildings are not raised in the Air. *Fourthly*, The Argument seems to require that we here understand all Sorts of Islands, form'd in a publick River. It comes to this. Whatever is found in a publick Place, whether it is naturally formed, or is raised there, as a Building, ought, according to Law, to be of the same Nature with the Place itself: But the Islands in a publick River, of what Sort soever they be, are formed in a publick Place: Therefore they ought also to belong to the Publick, and not to particular Persons, in Possession of the adjacent Lands. This is an Objection made by PAUL against LABEO's Opinion, or rather against the received Opinion of the antient Lawyers; and when consider'd in itself, according to the Principles of the Law of Nature, it was well grounded. But as the Lawyer's Intention was to bring an Argument *Ad hominem*, in that Respect it may be looked on as one of those Cavils, which he is accused of using frequently, when he undertakes to censure LABEO. The major, or first Proposition of this Syllogism, is not generally true, as it ought to be, according to the Principles of the antient Lawyers. For Things, which are formed naturally (*innata*) in a publick Place were indeed consider'd as publick; such as Trees, Plants, Minerals, &c. but not Buildings, the Use of which was not publick. Whence it appears how much they are mistaken, who, with ACCURSIUS and CUJAS, are of Opinion that Islands are here called Publick, only in Regard to the Use of them, while the Property is supposed to remain in the Hands of private Persons; for on that Foot, the Conclusion would be different from the Premises. It is more for the Honour of PAUL to say he reason'd on a Principle

partly false; and the Compilers of the *Roman* Law ought not to have forgot to add the Answer, which might easily have been made. For, as Mr. VAN DE WATER justly maintains, according to the receiv'd Notions of the *Roman* Lawyers, the Bed of a publick River, consider'd in itself, is reckon'd part of the Banks; so that as soon as the River leaves it, and it thus ceases to be necessary for publick Use, the Masters of the adjacent Lands, to whom the Banks belong, only enter into Possession of their own. Hence it follows that the Islands also, which are form'd in the Bed of the River, belong to them; for then the Case is the same in Regard to those Islands, as if the River had left its Bed, and only the Use of the Banks in publick, in the same manner as it is in Regard to those which touch the Lands bordering on the River. Whence it appears farther that in the Paragraph under Consideration, the Lawyer cannot speak of the Use only of an Island lately form'd in a River, because both his Argument and his Words relate to the whole Island, and not a Part of it, or the Banks which alone were of publick Use.

8 *Digest. Lib. XLI. Tit. I. De adquir. rerum. domin. Leg. LXV. § 2.* The Exception made by the *Roman* Lawyers of this Sort of Islands, separated from the Bed of the River, confirms what was said in the foregoing Note.

9 We have a Description of those floating Islands in SENECA, *Nat. Quæst. Lib. III. Cap. XXV.* PLINY, *Hist. Nat. Lib. II. Cap. XCV.* MACROBIUS *Saturnal. Lib. I. Cap. VII.* PLINY the younger, *Epist. Lib. VIII. Cap. XX.* gives an agreeable Description of such Islands in the Lake of *Vadimon* in *Tuscany*, as CHIFFLET does of those in *Flanders*, in a Book which deserves to be read. GROTIUS.

10 See Note 7 on this Paragraph.

11 *Digest. Lib. XLIII. Tit. XII. De Fluminibus, &c. Leg. I. § 6.* See also *Lib. XLI. Tit. I. De adquir. Rei domin. Leg. XVI.* And what Mr. VANDER GOES says on that Law, in his Notes on the *Auctores Rei Agrariæ*, p. 197.

12 See Chap. III. of this Book, where the Nature of such Lands and others is explain'd.

13 When the *Romans* distributed any Lands to a Colony, or Number of People, if there was a River, it sometimes made Part of the Extent assigned to such and such Persons: Sometimes the River was reckoned among those Pieces that remain'd, after the Lands had been measured and divided into Acres, and was then said to be *subsecivus*; and sometimes it was expressly reserved to the *Roman* People; as we learn from SICULUS FLACCUS, *De conditione agror. (p. 18, 19. Edit. Goes.)* See the excellent Remarks of SALMASIUS concerning these *Subseciva*, in his *Exercit. in Solinum*. [To which add those of Mr. VANDER GOES, in his *Antiquitates Agrariæ*, where he has examined these Things better.] Con-

X. That a Flood does not, according to Nature, take away a Property in Land.

X. i. Neither is that more to be allowed, which they talk of a greater Flood, if we respect only natural Reason. For suppose the Surface of the overflowed Land were turned into Sand, yet the lower Parts of it remain firm and solid; and tho' some of the Quality be changed, yet the Substance is not changed at all, no more than that Part of a Field is, that is devoured by a Lake, the Property whereof, as the Roman² Lawyers with Reason acknowledge, is not changed. Nor is that by any Means natural which³ they say, that Rivers, like the antient⁴ Receivers of Land Taxes, sometimes take from the Publick to give to private Persons, and sometimes from private Persons to give to the Publick. Much better did the Egyptians understand and manage this Matter, as Strabo reports of them, Ἐδέρσε γὰρ τὸ ἐπ' ἀναγκῆς, &c.⁵ They are obliged to be particularly exact and nice in the Division of their Lands, because of the frequent Confusion of Boundaries, which the Nile by its Overflowings occasions, taking from one Part and adding to another, changing the very Form and Look of Places, and entirely concealing all those Marks that should distinguish one Man's Property from another's. And therefore there is a Necessity for their often making new Surveys⁶.

2: Hereunto agrees what the Roman Lawyers have delivered us, that⁷ what is ours, ceases not to be ours, but by our own Fact; add, or by Vertue of some Law. Now under Things done are comprehended, as we told you above, Things not done, as far as we can guess by them at another's Will and Inclinations. Wherefore we grant, where the Flood is very great, and no visible Signs of the Owner's Intention to retain his Property, it may well be presumed, that he abandons his Land. Which Presumption, as it is naturally uncertain and undeterminable, by Reason of the variety of Circumstances, and therefore to be referred to the Judgment of some honest Man, it is usual to have it decided by the Civil Laws. As in Holland that Land is consider'd as abandoned, which has been under Water for ten Years, if there appear no Signs that the Possession is still continued, in which Case it is our Custom, and that not an unreasonable one, tho' the Roman⁸ Lawyers reject it, to suppose the Owner retains his Possession by only fishing there, if he can no otherwise signify the keeping of his Title. But Princes used to fix a certain Time, within which the antient Owners of the Lands were to drain their Grounds, which if they did not, then they who had the Mortgage of them were to be warned to it, and after them, those who had a Jurisdiction over them, either merely Civil, or Civil and Criminal; and if they also delayed to perform it, then all the Right and Title to them devolved on the Prince, who either drained the Lands himself, and so united them to his own Domain, or gave them others to drain, and only reserved a Share of them to himself.

Ch. 4. of this Book, § 5.

cerning Rivers and Additions made by them in general consult ROSENTHAL. *De Jure Feudorum*, Cap. V. Coroll. XXIII. SIXTINUS, *De Regalibus*, Lib. II. Cap. III. CÆPOLLÀ, *De Servitutib. rusticor. prædior.* Cap. XXXI. &c. GROTIUS.

X. (1) Nor do the Roman Lawyers make the Change of Lands overflowed, and the Difference of the Inundation consist in this; for they acknowledge that tho' the Earth which covers a Farm be removed, and other Earth laid on it, it does not thereby cease to be the Property of its old Master. Digest. Lib. VII. Tit. IV. *Quibus modis usus fructus, &c.* Leg. XXIV. § 2. But they reason on this Principle, that the River having left its former Bed, has open'd itself another in the Lands overflowed, which thus become the Channel of the River; whereas, when the River remaining in its Bed, only overflows its Banks, the Bed being still the same, the Lands covered with the Water, are also reckoned to remain the same. Sec § 8. Note 6. And the following Note.

2 This is founded on the Principle mentioned in the foregoing Note. See Digest. Lib. XLI. Tit. I. *De adquir. rerum dominio.* Leg. XII. Lib. XXXIX. Tit. III. *De aqua, & aquæ pluvie arcendæ*, Leg. XXIV. § 3. See also Lib. XVIII. Tit. I. *De contrah. emptione*, Leg. LXIX.

3 Digest. Lib. XLI. Tit. I. *De adquir. rerum dominio.* Leg. XXX. § 3. This is to be understood also, according to the Hypothesis mentioned, Note 1. on this Paragraph.

4 CASSIODORUS says that the Measurers of Lands, like a great River, take from one, and give to another. (Var. Lib. III. Cap. LII.) GROTIUS.

5 STRABO, *Geograph.* Lib. XVII. p. 1136. Edit. Amst. (787. Paris.)

6 There is nothing in this contrary to the Principles of the Roman Lawyers, as OBRECHT very well observes; for they reason thus: A Bank is thus justly defined, whatever bounds, or keeps in a River, and stops the natural Impetuosity of its Course. But when a River swells for a Time by the fall of Rain, by the flowing in of the Sea, or any other Means, it does not change its Banks: No Man ever said that the Nile, which overflows the Country of Egypt, thereby changes or enlarges its Banks; for when that River returns to its former Measure the Banks are to be repaired and secured. Digest. Lib. XLIII. Tit. XII. *De Flaminib. &c.* Leg. I. § 5.

7 Digest. Lib. L. Tit. XVII. *De Divers. regul. Juris*, Leg. XI.

^a L. si ager. 23. D. quibus modis ususfr. amitt.

XI. 1. Whatever Improvements the Floods make; that is, whatever little Parcels and Bits of Land may be added, which, because¹ it is not known whence they came, can be claimed by no Body, (for otherwise the Property could not² naturally be changed) must certainly belong to the Publick, provided the Publick has the Property of the River, which is always to be supposed in a doubtful Case; if not, they belong to the prior Occupant.

XI. Improvements made by Floods, if in Dispute, belong to the Publick.

XII. 1. But the Publick have Power to grant them, as to others, so also to those who own the Lands next adjoining; and they are supposed to do so, if those Lands have no other Bounds on that Side but the natural ones; that is, the River itself. And here that Distinction which the *Roman* Lawyers make between Lands bounded and Lands¹ measured, may be proper, but yet both of them have in this Case an equal Right. For what we have said before, concerning the Extent of a Territory, when we treated of the Possession of it, the same is of Force in private Lands, but with this Difference, that the Bounds of a State (if in Dispute) are presumed to be (*Arcifinious*) bounded by Hills, Woods, or Waters, because most agreeable to the Nature of a Territory: But private Lands are rather supposed to be limited, or² contained in a certain Measure, as most suitable to their Nature.

XII. But they seem to be granted to those whose Lands have no other Bounds but the River.

2. But yet we do not deny, but that the People may assign their Land, with the same Right as they themselves enjoy it, that is, as far as to the very River; which if so, then is any Addition that shall be made in this Manner, theirs also, as it was adjudged in *Holland*, some Ages since, of Lands bordering upon the Rivers *Iffel* and *Maese*; because both by the Deeds of Purchase, and by the Books of Rate, they were always mentioned, as reaching to the River. And tho' in the Sale of these Lands, somewhat of the Measure be expressed; yet if they be sold by the Great, and not by Acres, they retain their Nature, and the Right of Alluvion; which is also³ mentioned in the *Roman* Laws, and generally practised.

Ch. 3. of this Book, § 16, &c.

XIII. What

XI. (1) *Dig. Lib. XLI. Tit. I. De adquir. rerum dom. Leg. VII. § 1.*

2 The *Roman* Lawyers say that when the Force of a Stream carries a Piece of Land from one Field, and lays it on another, it still belongs to the Master of the Field, from which it was taken; unless it remains so long on the other that the Trees, which it brought with it, have taken root, in which Case it is acquired to the Proprietor of the Field, where it is fix'd, *Digest. Lib. XLI. Tit. I. De adquir. rer. dominio. Leg. VII. § 2.* And elsewhere: *What is carried away by the Force of Rivers may be claimed at Law. Lib. XII. Tit. I. De rebus creditis, si certum petatur, &c. Leg. IV. § 2.*

Our Author quotes these two Laws in his Margin. In Regard to the latter, in which there is some Difficulty in Relation to the *Roman* Laws, see *CUJAS, Recit. in Digest. Tom. VII. Opp. Edit. Fabrott. p. 674.* And *ANTHONY FAURE, Rational. Tom. III. p. 12, 13.*

XII. (1) See an Account of such Lands, *Chap. III. § 16. Note 4, 5.*

2 Our Author here says, *certâ mensurâ terminati*, instead of *comprehensi*, as he expresses himself a little before and elsewhere; which however amounts to the same; for Lands inclosed in a certain Measure, are bounded by that Measure. So that Mr. *VANDER GOES* had no Reason for accusing him of distinguishing a fourth Sort of Lands, *Not. in Aust. Rei Agrar. p. 196.* The same Critic reproaches him with advancing, contrary to the Opinion of *FLORENTIN* the Lawyer, in Law XVI. of the Title, *De adquir. rerum domin.* that in Case of Alluvions the Lands inclosed in a certain Measure, have no more Right than limited Lands. But our Author does not here speak of what took Place at that Time; he only says what ought to take Place in a conclusive Way of reasoning; as Mr. *GOES* himself owns, in the preceding Page; where he observes that, if the Emperor *Antoninus Pius* had been to

give Decision expressly in Regard to Lands given in gross, and enclosed by a certain Measure, he would undoubtedly have pronounced in the same Manner as he did in Regard to limited Lands.

3 *Digest. Lib. XIX. Tit. I. De actionib. empti & venditi. Leg. XIII. § 14.* This Law, which our Author quotes in the Margin, proves indirectly what he infers from it. The Case is this: A Man sells a Piece of Land for a certain Sum of Money, assuring the Purchaser that it contains a hundred Acres; on which the latter depends, as on a Clause of the Contract. The Land, however, is but ninety Acres; but before the Extent of it is measured, the neighbouring River, by retiring from it, makes an Addition of ten Acres; and thus the whole Number of Acres is complete. It is asked whether the Seller is thereby excused from indemnifying the Buyer, on the Account of giving a false Account of the Extent of the Land sold; an Indemnification, which, according to the old *Roman* Laws, arose to twice as much as was to be abated of the Price, in Proportion to what the Buyer says less than is found. (See the *Receptæ Sententiæ* of *JULIUS PAULUS, Lib. I. Tit. XIX. § 1.* and *Lib. II. Tit. XVII. § 4.*) But *JUSTINIAN* reduced it to the same Sum, as is concluded from Law II. of the Title, *De actionib. Empti & Venditi.* The Difficulty is founded on this, that, though the Purchaser has a hundred Acres, according to the Terms of the Contract, the ten, which make the Number complete, accrue to him, according to the Principles of the *Roman* Law. (*Digest. Lib. XVIII. Tit. VI. De pericul. & commod. rei venditæ. Leg. VII.*) Which, as appears, supposes that though a certain Measure was stipulated, this Limitation makes no Alteration in the Right of Alluvion; because the Land was not sold at so much an Acre, but in gross, on Condition, however, that it contain'd no less than a hundred Acres. Whereupon the Lawyer distinguishes whether the Seller sincerely believed his Land contain'd a hundred

XIII. *The same may be said of the Shore that the River leaves, or of any Part of the Channel that is dried up.*

XIII. What we have said of an Alluvion, does also hold good of that Part of the Shore or Channel which the River forsakes; for where there is no Owner, the first Possessor has the best Title: In Rivers that are theirs, it belongs to the People, or to them to whom they themselves, or such as are impowered by them, have assigned the Lands next adjoining, as extending to the River, without other Bounds.

XIV. *What is to be reckoned a Flood-Addition only, and what an Island.*

XIV. But since, as we said, there is a Difference between the Acquisition of Islands formed in a River, ¹ and the Acquisition of Alluvions, Disputes often arise, by which of the Names to call that little rising Ground, which is joined to the Lands adjacent, but yet so that the Waters cover the Space between. This is what we often see in our Provinces, where the Ground is uneven. Nor do our Customs in this Affair always agree; for in *Gelderland*, if a loaded Cart can pass, it belongs to the Owner of the Estate adjoining, provided he shews his taking Possession of it. So it is also in the District of *Putte*, if a Man on Foot ² can with his Sword's Point touch the rising Ground. But it is most natural, that if the Passage over be generally by Boat, it should be looked upon to be entirely separate, and therefore belonging to the Publick.

XV. *When the Alluvions belong to Vassals.*

XV. 1. Another Question as frequently arises between a Prince invested with sovereign Power, and his Vassals, who have a Power inferior to, and dependent on his. But it is a very plain Case, that the bare Grant of such a Power does not entitle the Person so impowered to all the Additions made by Rivers. We must observe however, that some Vassals invested with these limited Governments, do, together with them, receive all the Lands in general, saving the Right of each private Person to his own Estate; because those Lands were antiently either the People's or the Prince's, or at least drained by the Prince; and if so, then without Doubt, to whatever the Prince or the People did enjoy, those Vassals have as good a Right. Thus we see in *Zealand*, that even those Vassals who establish Judges only for Civil Matters, pay a Tax for the whole Bulk of their Lands, which they afterwards levy upon each particular Person, in Proportion to the Value and Bigness of his Estate; And these, without any Disturbance, take to themselves the Alluvions. There are some to whom the River itself is granted, who may therefore justly claim the Islands thereunto belonging, whether such Islands are formed of Mud, or of the Soil of the Channel, being left uncovered by the Waters, which separate, and afterwards join together again.

2. There are also others, in whose Grants neither the one nor the other is comprehended, and these have an ill Cause to defend against the publick Exchequer, unless the Custom of the Country favours them; or a long uninterrupted Possession, with all requisite Circumstances, gives them a Right.

3. But if the Lands, without the Jurisdiction, be held in Fee, we must see what the Nature of the Land is, as I said before [§ 12.] For if it be *Arcifinious*, then the Right of Alluvion is granted with the Land, not from the peculiar Right of the Prince, but the Quality of the Land; for in such a Case a mere usufructuary ¹ would have the same Advantage.

XVI. *The Arguments with which the Roman Lawyers would prove their Rights to be as it were the Rights of Nature, answered.*

XVI. The Roman Lawyers, in order to prove the Laws used by them to be those of Nature, often ¹ alledge this Saying, That it is most agreeable to Nature, that

a hundred Acres, or whether, knowing it did not, he design'd to deceive the Purchaser. But this is nothing to our Purpose. See *Cujas, Recit. in Digest. Tom. VI. Opp. p. 813.* As also *ANTHONY FAURE, Rational, Tom. V. p. 485.*

XIV. (1) The Difference, which our Author has not expressed, consists in this, that the Islands, according to him, belong to the People in Possession of the River; whereas the Case is not the same in Regard to the Alluvions. See Paragraphs 9, 11, 12.

2 This Practice is derived from a very antient Custom among the *Germanic Nations*. *PAUL WARNEFRID*, speaking of *Autharis*, King of the *Lombards*, tells us, that Prince, being on Horseback, pass'd on to a Pillar in the Sea, and touching it

with the Point of his Sword, said: *Here shall be the Bounds of the Country of the Lombards.* *SAXO*, the *Grammarian*, Lib. X. and other Authors, give us a Story of the like Nature concerning *Otho* the Emperor, who threw a Lance into the Sea, to mark the Boundaries of the Empire, in the *Baltic Gulph*. *GROTIUS*. *Saxo*, the *Grammarian*, does not say that *Otho* threw a Lance into the Sea, with a Design of marking the Boundaries of the Empire in the *Baltick Gulph*, but of leaving a Monument of his Expedition. See p. 164. of that Historian, *Edit. Francof. 1576.*

XV. (1) *Digest. Lib. VII. Tit. I. De usu fructu, &c. Leg. IX. § 4.*

XVI. (1) This is indeed one of their Maxims, *Digest. Lib. L. Tit. XVII. De diversis Regulis Juris.*

that he should have the Profit of any Thing who has also the Disadvantage of it; wherefore, since the River does often wash away Part of my Land, it is but reasonable, that whensoever it makes any Addition it should be mine. But this Rule does not hold, unless where the Benefit arises from what is my own, but here it arises from the River, which belongs to another. ² And it is natural, that whatever Loss there is, ³ the Owner should bear it. Besides, what they alledge is not universal, as may appear by the ⁴ Exception of limited Lands. Not to insist upon what often happens, that a River makes some Persons rich and others poor, according to *Lucan* ⁵,

*Illos Terra fugit Dominos, his Rura colonis
Accedunt donante Pado.*

*Some gain, some lose, just as the inconstant Po
Thinks fit to leave, or to overflow their Lands.*

XVII. But as to what they say, that a publick Road does no Ways hinder ¹ the Right to such Alluvions, it has nothing of natural Reason in it; unless the Ground belongs to some private Person who is obliged to provide such a Way.

XVIII. Among those Means of Acquisition, which are called Means that the Right of Nations allows of, ¹ one consists in the Breeding of Animals, wherein that which the ² Romans, and some other Nations, have decreed, that the Young should go along with its Dam, is not natural, as I have said already, but only as the Sire is generally unknown. But if the Sire could by any probable Means be discovered, there can be no Reason given, why the Young should not belong to him as well as her; for it is certain, that whatever comes into the World, is Part of him that begets it. But whether the Male or Female contributes most to its Production, is not yet agreed upon amongst Naturalists. *Plutarch* speaks thus of it, *Ἡ φύσις μίσνυσι διὰ τῶν, &c.* ³ Nature does so mix our two Sexes, that taking a Part from each, and blending them together, she returns what is born common to both, in such a Manner that neither of them can distinguish or discern that which was theirs, from that which was the other's. And this is what the antient ⁴ Laws of the Franks and Lombards copied after.

XIX. If any Body had formed a Thing out of another's Materials, ¹ the Sabimians gave the Property to him whose the Materials were, but *Proculus* to him who had given the Form, because he gave to a Thing an Existence which it had

XVII. A Highway naturally binds any Advantage of Alluvions.

XVIII. That it is not natural that the Young should follow the Dam only. Ch. 5. § 29. of this Book.

XIX. That a Thing, according to Nature, becomes common as well by its Specification or Form, where the Matter is another's, as by Confusion or Mixture.

Juris. Leg. X. But they here reason on other Principles; as is evident from what was said, § 8. Note 3. § 9. Note 7. § 10. Note 1. So that our Author confounds the antient Lawyers with the modern Interpreters, who advance this Reason.

² On the Supposition that the River belongs to the People, the Proprietors, who have acquired the Lands adjacent to the River, may justly apprehend they may receive Damage by Inundations, without Hope of being indemnified by the Alluvions; besides, they themselves may often be faulty in this Case, not having been careful to keep up the Banks of the River.

³ The Roman Lawyers elsewhere reason on this Principle. See *Code*, Lib. IV. Tit. XXIV. *De pignoratitia actio*. Leg. V. VI. VIII. IX. and Tit. LXV. *De locato & conducto*. Leg. XII.

⁴ See § 9. Note. II.

⁵ *Pharsal*. Lib. VI. ver. 277, 278.

XVII. (1) *Digest*. Lib. XLI. Tit. I. *De adquir. rerum Domin.* Leg. XXXVIII. On this Law see *HUGH DONELL. Comment. Jur. Civil.* Lib. IV. Cap. XXVIII. *JOHN GRYPHIANDE*, *De Insulis*, Cap. XXXVII. § 37. &c. *REINH. BACHOVIVS*, in *Treutler*. Vol. II. *Disp. XX. Thes. V. Lit. F.* p. M. 104.

XVIII. (1) *Institut.* Lib. II. Tit. I. *De divis. rerum*, &c. § 19. See Chap. V. of this Book, § 29. Note 1. and *PUFENDORF*, B. IV. Chap. VII. § 4.

² Charles the Bald follows their Decision, Cap. XXXI. *Edit. Pistens.* GROTIUS.

³ (*Conjugal. Præcept.* p. 146. Tom. II. *Edit. Wech.*) See a Passage in *GALEN* very much to the Purpose, *Lib. II. De Semine*. *ST. CHRYSOSTOM* says, *The Child is formed by the Mixture of both Seeds*. In Cap. V. *Ephef.* GROTIUS.

⁴ The late Mr. *COCCEJUS*, in a Dissertation, *De Jure Seminis*, Sect. I. § 10. says, it is quite the contrary, and that according to the Laws of the antient Franks and Lombards, as well as according to the Roman Law, the Fruit followed the Venter. For this he quotes *Lib. II. Leg. LONGOARD. C. 14. Specul. SUEVIC. Part. I. C. 61, 62. Edit. THEODORICI, Reg. C. 65, 66*. But there is something after the last Quotation, from which our Author might have inferred, that those antient People did not always follow the Principle of the Roman Lawyers: For *Theodorick* there orders, that the Master of one of those Slaves which were called *Originarii*, or *Adscriptitii*, should have two Thirds of the Slaves born to that Slave by a Woman of the same Condition; and in that Case the Mother's Master had much the smaller Share, viz. one Third, Cap. LXVII. In the Dissertation before quoted, our Author is opposed on the Substance of the Question; but with Reasons not always very solid.

XIX. (1) *Institut.* Lib. II. Tit. I. *De adquir. rer. dom.* § 25.

B. iii. Ch. 6.

not before. At last a middle Opinion was taken up, that if the Matter could be put into its first State, the Thing newly produced should belong to the Owner of the Matter; if that could not be done, then it should be his who gave it its Form. But *Commanus* does not like this, and is for having us consider, whether the Work or the Matter was worth most, that so that which was of the greater Value, might carry the other of less Value; an Argument fetched from what the *Roman Lawyers* have said concerning an ² Accessory.

² But if we consider the true Principles of natural Right, as by ³ a Mixture of several Materials, there arises a common Title to the Thing so mixed, in Proportion to what each has in it, which also the *Roman Lawyers* approved of, because the Right to such a Mixture could not otherwise naturally be decided; so when a Thing is composed of a Matter and a Form, as of its Parts, if the Matter belongs to one, and the Form to another, then ⁴ must it naturally be common, in Proportion to the Value of each Part; for the Form is a Part of the Substance, and not the whole Substance; which *Ulpian* ⁵ saw when he said, that the Substance was almost lost by the Alteration of its Form.

XX. Nay, tho' by Unskilfulness or Design the Matter be spoiled.

XX. But, tho' it be not unjustly ordered, that he who takes, with a bad Intention, another Man's Materials, shall thereby ¹ lose his Labour, and forfeit all that

² What the *Roman Lawyers* call an *Accessory*, (*Accessio*) was not precisely the most valuable Thing, but what is considered as the Basis, whether the Accessory is worth more or less than the *Principal*, for they formally acknowledge that Purple, for Example, is the Accessory to a Garment on which it is worked, tho' the more valuable; and that a Jewel also is the Accessory to a Gold or Silver Vessel, in which it is set. *Digest. Lib. XLI. Tit. I. De acquir. rerum dom. Leg. XXVI. § 1. Lib. XXXIV. Tit. II. De Auro, Argentis, Mundo, &c. Leg. XIX. § 12. Lib. VI. Tit. I. De rei vindicatione, Leg. XXIII. § 2, 3, 4. And Institut. Lib. II. Tit. I. De divisione rerum, &c. § 26.* See the Notes of *THEODORE MARCILLY*, and *JANUS A COSTA*, on this last Paragraph. However, the Decisions of the *Roman Lawyers* do not seem to have been sufficiently clear and distinct on this Question; as *Mr. THOMASius* shews in his Dissertation, *De pretio adfectu in res fungibiles non cadente*, Cap. III. And we are not to be surprized at it; for Questions of this Kind ought not to be decided by physical, or metaphysical Ideas, nor even by the Design, Use, or Value of Things, mingled together; but by other Principles, concerning which see what I have said in the Notes of the second Edition of *PUFENDORF*, B. IV. Chap. VII. Of the Law of Nature and Nations; and particularly those on the Abridgment of *The Duties of a Man and a Citizen*, B. I. Chap. XII. § 7. Note 4. of the third and fourth Edition, where this Subject is treated with much more Exactness.

³ *Institut. Lib. II. Tit. I. De divisione rerum, &c. § 27.* See, on this Paragraph, the *Florum sparsis in Jus Justinianum*, by our Author, p. 28, &c. Edit. Amst.

⁴ The famous *Mr. SCHULTING* approves of our Author's Opinion, and explains it in the following Manner. Considering the Law of Nature alone, says he, if another Man's Goods, to which a new Form is given, thereby become worse, there seems to be no substantial Reason why the Proprietor should therefore lose his Right of Property; he only acquires a Right of demanding Satisfaction for the Damage, if done with a bad Intention, or by some Fault of the Author of such a Form, as undoubtedly is supposed. And if the Thing is not rendered less valuable than it was before, it does not appear why in that Case it ought to change its Mas-

ter. Farther, tho' it is made more valuable, this is not sufficient for depriving the Proprietor of his Right of Property, if he did not consent to this Melioration. All that can be said in that Case is, that the Person who has contributed toward raising the Value of the Thing, ought on that Account to have a larger Share in the Work, or Composition resulting from the Matter and the Form, *Not. in CAJI. Instit. Lib. II. Tit. I. § 5. p. 82, 83. Jurisprud. Ante Justin.* Very well; but the Question is, who ought to have the Thing, when they either will not or cannot possess it in common. Some, as *OBRECHT*, even say, that the Rules laid down by the antient Lawyers are made for that Case only. But they are mistaken. The Lawyers admitted of no Community in what is called *Specificatio*, as *Mr. SCHULTING* acknowledges; nor in most of the other Questions relating to Acquisition by accessory Right. They held that the Property passed of Right to one or the other, by Vertue of certain Things on which they ground their Rules; and the Community which they formally establish in Case of a Mixture of Matters belonging to different Persons, makes an Exception, that evidently shews there was none in other Cases, according to their Principles.

⁵ *Digest. Lib. X. Tit. IV. Ad exhibendum, Leg. IX. § 3.*

XX. (1) The Author in his Margin quotes the following Law, *If any one shall make Wine with my Grapes, Oil with my Olives, or Garments with my Wool, knowing they are not his own, he shall be compelled by an Action to produce the said Wine, &c. because what is made out of our Goods belongs to us.* *Digest. Lib. X. Tit. IV. Ad exhibendum, Leg. XII. § 3.* From which it is inferred, that the Author of the new Form is obliged to restore purely and simply what he has made of a Matter belonging to another, without any Right of demanding any Thing for his Labour of the Proprietor of such Matter; so that in this Case the Form follows the Matter, on Account of the bad Intention of the former; whereas, when the Person has acted *bona fide*, the Matter follows the Form. But the Majority of the Interpreters of the *Roman Law* are now of Opinion, that the Badness of the Intention doth not hinder the Work from remaining in the Hands of the Author of the Form; the whole Difference, according to them, is, that then the Master of the Matter has a Right to demand a larger

that he would be otherwise entitled to, yet since ² this is a Penalty, it cannot be founded on any natural Right. For tho' it be natural that every Offender should be punished, yet Nature does not determine that Punishment, nor does she of herself take away any one's Property for his Offence.

XXI. And to say that the Thing of a lesser Value, must be carried by that which is of greater Worth, upon which *Connanus* builds, tho' it be natural in Respect of Fact, ¹ yet it is not so of Right. Wherefore he that has but the twentieth Part of an Estate, has as much Right in that Part as he who has the other nineteen has in his Parts. And therefore what the *Roman* Law has in some particular Cases decreed, or in some others may decree, concerning an Accessory, on the Account of superior Value, is not allowable by the Law of Nature, but only by the Civil Law, for the better Dispatch of Business; yet it is not repugnant to Nature, because the Civil Law has Power to confer a Right of Property. But there is scarce any one Question that relates to Right, about which the Opinions and Mistakes of Lawyers are so many and different as in this. For who can allow, that if Brass and Gold were mixed together they might not be separated, as *Ulpian* ² writes; or if Metals were foldred together they must needs be confounded, as ³ *Paulus*;

XXI. That it is not natural that a Thing of lesser Value should, on the Account of the other's greater Worth, go along with it; where also other Mistakes of the Roman Lawyers are taken Notice of.

larger Reparation of Damages, and may even indict the other of Theft; which in this Case would end in obliging the Offender to pay double the Value of the Matter. The Truth is, that, as the ancient Lawyers were not agreed on this whole Question, and the Notions of each different Party were not well connected, very plain Traces of them are extant in the Compilation of *TRIBONIAN*; and some modern Doctors ingenuously own it. We find the following Decision in the *Institutes*, *If any Man builds a House on another Man's Ground with his own Materials, the House becomes the Property of the Master of the Ground. In this Case the Master of the Materials loses his Property, because they are supposed to be voluntarily alienated, if he knew he built on another Man's Land; and therefore, tho' the House be demolished he cannot claim the Materials.* Lib. II. Tit. I. *De divisione rerum, &c.* § 30. See *Digest.* Lib. XLI. Tit. I. *De adquir. rerum dominio*, Leg. VII. § 12. If the Badness of Intention deprives such a Man of his own Goods, which he has mixed with those of another, why should he, who has only contributed his Labour, thereby acquire another Man's Goods, which he attempted to appropriate to himself unjustly? It is to no Purpose to say, that the Proprietor of the Matter may indemnify himself by the Actions which the Law allows him; for if we consider the Simplicity of the Law of Nature, which the Lawyers professed to follow in this Affair, such a Proprietor ought, at least, to be allowed the Choice of either retaking his Goods, which he cannot lawfully lose by another Man's unjust Act, or quitting them, and demanding the Value with Damages and Interest. See *MURET*, *MARCILLY*, and *JANUS A COSTA*, on the Paragraph of the *Institutes* last quoted, and those which precede it; as also the late Mr. *VOET*'s Commentary on the Title of the *Digest*, *De adquir. rerum dominio*, § 21.

² But, as *PUFENDORF* observes, (*B. IV. Chap. VII. § 10.*) it is not properly a Punishment or Penalty, to be deprived of all Profit resulting from an Act of Injustice. Besides, he who takes another Man's Goods, knowing them to be such, has then deliberately subjected himself to the Loss both of his Labour, and all he may have added of his own. The *Roman* Lawyers reason very well on this Principle, when they say, that *He who gathers another Man's Olives, Corn, or Grapes, when ripe, is not indeed obliged to make the Proprietor of them Satisfaction, because no Damage is done; nor can he demand any Thing for the Expence he has been at,*

because, by gathering what he had no Right to gather, he is supposed to have given the Charges of Gathering. *Digest.* Lib. IX. Tit. I. *Ad Leg. Aquil.* Leg. XXVII. § 25.

XXI. (1) That is, he, to whom the smaller of two Things joined together belongs, is commonly forced to submit to the Master of the larger; either because the latter is stronger, or because the former is not in a Condition of paying him the Value of his Part; because it would not be very advantageous to him, or because he cannot make the same Use of his Goods, as he might otherwise have done.

² *Digest.* Lib. VI. Tit. I. *De Rei vindicatione*, Leg. V. § 1. Some Expositors, as *JANUS A COSTA*, (in *Institut.* *De divisione rerum, &c.* § 26.) tell us, that in those Days Workmen were unacquainted with the Art of separating those two Metals; especially considering the *Aqua Regia* was not then invented. Another Law which belongs to *CALLISTRATUS*, is unreasonably alledged against this; for that Lawyer speaks only of *Silver* mix'd with *Brass*. *Digest.* Lib. XLI. Tit. I. *De adquir. rerum dominio*. Leg. XII. Now the Secret of separating *Silver* from *Brass* might be known, when that of separating *Gold* was not; which Metal, as appears from the Experience of later Ages, cannot be dissolved but by *Aqua Regia*. So that there is no Necessity of entering into the Opinion of some modern Expositors, who pretend that *ULPIAN* only meant, that *Gold* cannot be separated from *Brass* without destroying the *Brass*.

³ *Dicit enim* (*Cassius*) *si statuæ suæ ferruminationi junctum brachium sit, unitate majoris partis confundi: & quod semel alienum (factum) sit, etiamsi inde abruptum sit, redire ad priorem dominum non posse. Non idem in eo, quod ad plumbatum sit; quia ferruminatione per eandem materiam facit confusionem: plumbatura non idem efficit.* *Digest.* Lib. VI. Tit. I. *De rei vindicatione*, Leg. XXIII. § 5. The Lawyer here distinguishes two Sorts of Solder; one made with a Matter of the same Kind as the two Bodies solder'd together: The other of a Matter of a different Nature. He calls the former *Ferruminatione*, the latter *Plumbatura*. See on this Point the *Opuscula de Latinitate Juris consultorum veterum*, published in 1711, by Mr. *DUKER*, p. 238. &c. According to him the first Sort of Solder confounds the two Bodies solder'd together, so that the whole by accessory Right belongs to the Proprietor of the larger or more considerable Part, even tho' it should afterwards be separated from the less: As if an Arm solder'd to a Statue, be broken off. But if the two Parts were equal,

Paulus; or that there ⁴ is one Rule for Writing, another for a Picture, that *this* should carry away the Cloth, but that *that* should go along with the Paper.

XXII. By Planting, Sowing, or Building upon another Man's Ground; two Parties are naturally admitted Shareers.

XXII. That ¹ what is planted or sown should go along with the Soil, is also a Maxim of the Civil Law, for this Reason, because they are nourished by it. And therefore it is a Distinction about a Tree, ² whether it has taken Root or not; but the Nourishment of a Thing that existed before, makes only a Part of it; and therefore, as there is some Right due to the Owner of the Soil, on the Account of that Nourishment, so there certainly still remains a natural Right to the Owner of the Seed, Plant or Tree. So that in this Case too, Nature admits of Partnership; as likewise in a Building, of which the Ground and the Surface are Parts; for if it were moveable, the Owner of the Ground could have no Right, of which Opinion was *Scaevola* ³.

XXIII. He who has another Man's Things in Possession, cannot claim the Profits of them, but may charge him with all the Expences that he is at about them.

XXIII. Nor does Nature allow him, who has got another Man's Goods in his Possession, ¹ though it were honestly and without Fraud, to appropriate the Profits of them to himself, but only ² impowers him to charge the Cost he has been at, and the Pains he has bestowed upon them, and to deduct for these out of the Profits so arising. Yes, and to keep what he has still remaining by him, and not part with them at all, if ³ Satisfaction be not made him some other Way.

XXIV. And this he may do tho' he got them unjustly.

XXIV. The same, I think, ¹ may be said of him, who is unjustly possess'd of another Man's Goods, where no penal Law intervenes. ² It is kind and humane, (says *Paulus* the Lawyer) to have a Regard to the Expences, even of a Fellow who robs me; for he who demands his own, ought not to advantage himself by another's

XXV. That an actual Delivery is not required by Nature in the transferring of a Property.

Loss.

XXV. The last Way of acquiring a Property which is said to be by the Law of Nations, is ¹ a formal Delivery; but we have said above that a Delivery is not by

so that one could not be consider'd as an Accessory to the other; then neither of the Proprietors had a Right to appropriate the Whole to himself, but each remain'd Master of his own Part. This Decision is made in the *Digest*. Lib. XLI. Tit. I. *De acquir. rerum dominio*, Leg. XXVII. § 2. But when two Pieces of Silver, for Example, are folder'd together with Lead, or two Pieces of different Metals are folder'd together, which was term'd *Plumbatura*; the Laws held that in that Case there was no Mixture; and that therefore the two Bodies thus folder'd together still belong'd each to its own Master, whether one was more or less considerable than the other. We see no solid Foundation for this Distinction; for two Pieces of Silver folder'd together with Silver remain as really distinct one from the other, as if they were folder'd with Lead, or a Piece of Iron was folder'd to a Piece of Silver.

⁴ *Digest*. Lib. XLI. Tit. I. *De acquir. rerum domin.* Leg. IV. § 1, 2. See what I have said on PUFENDORF, B. IV. Chap. VII. § 7. Note (1).

XXII. (1) *Institut.* Lib. II. Tit. I. *De divis. rer. &c.* § 33. See the Chapter of PUFENDORF last quoted, § 5. with the Notes.

² *Cod.* Lib. III. Tit. XXXII. *De rei vindicat.* Leg. XI. See also the Titles of the *Institutes* so often quoted, § 31.

³ *Dig.* Lib. XLI. Tit. I. *De acquir. rer. domin.* Leg. LX.

XXIII. (1) *Institut.* Lib. II. Tit. I. *De rerum divis. &c.* § 35. See Mr. NOODT, *Probabil. Juris*. Lib. I. Cap. VII.

² But see what I have said on PUFENDORF, B. IV. Chap. XIII. § 3. Note 1. of the second Edition.

³ On this Question see the *Speculum Saxonicum*, II. 26:

XXIV. (1) I think not: Such a Possessor, barely by laying out his Money on the Improvement of what he knew was not his own, subjects himself to

lose what he has so expended. Besides, the Security of the Proprietors, and consequently the Design of Property and the Interest of human Society in general, require that no other Person should, by his own Authority, and without the Proprietor's Permission, detain his Goods from him, or dispose of them even tho' in such a Manner, as to improve them. Hence it follows that the unjust Detainer ought to have no Right to demand anything for his Expences, as he can alledge no plausible Reason for justifying his Pretensions. So that nothing but a Motive of pure Generosity can engage the true Proprietor to make him the least Satisfaction. If the Proprietor gains by the Matter, the Possessor deserved to lose; and this Gain may be consider'd as a just Indemnification for his being for some Time deprived of the Possession of his Goods by the Injustice of the Detainer. See § 20. Note 2.

² *Dig.* Lib. V. Tit. III. *De Hered. petitione*. Leg. XXXVIII.

XXV. (1) Those Things likewise, which become ours by the Delivery, are acquired by the Law of Nations; for nothing is so conformable to natural Equity, as that the Will of the Master, designing to transfer his Property to another, should be ratified: *Digest*. Lib. XLI. Tit. I. *De acquir. rerum Dominio*. Leg. IX. § 3. where we may observe that the Law of Nations, spoken of by the Roman Lawyers, is no other than the Law of Nature. Thus in the *Institutes*, *De rerum divisione*, § 40. we read. We likewise acquire Things by Delivery, by the Law of Nature. But, beside this Delivery there must be a lawful Title, which implies a real Alienation, of which the Act of Delivery is at the bottom only a Sign. For the bare Delivery never transfers the Dominion; which is done only when preceded by Sale or some just Cause. *Digest*. as above quoted, Leg. XXXI. See on this Subject PUFENDORF, B. IV. Chap. IX. § 5. &c.

the Law of Nature required ² in the transferring of a Property, which the *Roman* Lawyers themselves do own in some Cases; as when ³ the Thing it self is given away, but the Profits reserv'd, or when it is made over ⁴ to him, who has it already in his Possession, or ⁵ keeps it when he only borrow'd it; when a Thing is thrown ⁶ amongst a Multitude for the first that catches it. Nay, a Man may transfer his Property even before he is seiz'd of it himself, as an ⁷ Inheritance, ⁸ Legacy, ⁹ Things given to Churches or Places dedicated to pious Uses, or to Corporations, or ¹⁰ in

² It is not indeed requir'd. By the *Laws of the* Wisigoths a thing was looked on as delivered, when the Donee had in his Hands the Deed of Donation. *Lib. V. Tit. II. Cap. VI.* Among the antient *Romans*, the Goods called *Res Mancipi*, were fully and absolutely alienated, by the Formality of putting a Piece of Money in the Scales (*per æs & libram*). See *VARRO, De Ling. Lat. Lib. VI. (p. 82. Ed. III. H. Steph.)* *FESTUS POMPEIUS*, in the Word *Rodus*: *ULPIAN Instit. Tit. XIX.* *BOETHIUS, Ad Top. Cicer. GROTIVS.*

What the antient *Romans* called *Res Mancipi*, were Estates in Lands, Houses, and all other Possessions situated in *Italy*, or in some privileged Place of their Provinces, with the Rights of Servitude annexed to them; as also Slaves, and Beasts of Burthen. Every thing else was *Res non Mancipi*; though Pearls perh. p; were excepted. The *Res Mancipi*, which they consider'd as most useful and most considerable, could not be alienated with a full Effect of Right but among *Roman* Citizens, and with the Formality of the Scales; they were in a Manner subject to the Slavery of the *Roman* Citizens, who alone, according to the Laws, could acquire the entire and secure Property of them; whence they received their Name, as some learned Men pretend. Whereas the *Res non Mancipi*, in Regard to which the Formalities here mentioned, were not observed, were transferred indifferently to Citizens and Foreigners; but so that the Acquisition of them had not so much Force and Extent as that of *Res Mancipi*. See *Vindiciæ pro recepta de Mutui alienatione sententiâ*, by the late Mr. *VAN DER GOES*, printed at *Leyden* in 1646, p. 61, &c. where he confutes several Opinions of the famous *SALMASIUS* on this Subject; as also Mr. *SCHULTING*, on the Title of *ULPIAN*, quoted by our Author; but more particularly the illustrious Mr. *BYNKERSHOEK*, who has lately published a Treatise on this Subject, in his *Opuscula varii Argumenti*, printed in 1719, but who seems not to have seen, or neglected to consult, the Book last mentioned; at least I do not find he any where quotes it. To this may be added, that the Right acquired over the *Res Municipi*, regularly received, was called *Dominium Quiritarium*, or *Juris Quiritum*, or *Legitimum & Civile*; and that acquired over *Res non Mancipi*, and even over *Res Mancipi*, when the requisite Formalities were not observed at receiving them, was term'd *Dominium Bonitarium*, or *Naturale*, or *Juris Gentium*. The Word *dare*, to give, was commonly used for transferring the former; and that of *tradere*, to deliver, for transferring the latter; though both were performed by the same corporal Act, in Regard to the Thing alienated, and the whole Difference consisted in the Formalities to be observed for acquiring that full Right of Civil Property over the *Res Mancipi*. See the *Probabilia Juris*, by Mr. *NOODT*, *Lib. II. Cap. XII.* And hence it is that the *Roman* Lawyers say that if we consider the Law of Nature alone, the bare Delivery (*Traditio*) is sufficient for transferring the Property. This Distinction of *Res Mancipi*, and *non Mancipi* was abolished by the Em-

peror *Justinian*, as appears from the *Code*, *Lib. VII. Tit. XXV. De nudo jure Quiritum tollendo.*

³ This is a Constitution of *Theodosius the Younger*; on which see *JAMES GODEFROY*, in *Cod. Theodos.* *Lib. VIII. Tit. XII. Leg. IX. Tom. II. p. 621.*

⁴ *Dig. Lib. XLI. Tit. I. De adquir. rer. dom. Leg. XXI. § 1.*

⁵ This is the Decision of such antient Lawyers as were of Opinion that corporal Possession is absolutely necessary, according to the Law of Nature, for acquiring Property. See Mr. *NOODT's Probabilia Juris*, *Lib. II. Cap. VI. Num. 5.*

⁶ *Institut. Lib. II. Tit. I. De rerum divisione, &c. § 46.*

⁷ All the Rights of Inheritance are acquired the Moment the Heir acts as such, though he is not yet in Possession of the Goods, and though he is not consider'd as a Possessor in Regard to the Effects of Right resulting from the Possession. See, on the Law here quoted by our Author, the great *CUJAS*, *Recit. in Digest. Tom. VIII. Opp. p. 307, 308.*

⁸ *Because the Things bequeathed pass directly from the Person who bequeathed them, to the Person to whom they are bequeathed.* *Digest. Lib. XLVII. Tit. II. De Furtis. Leg. LXIV.* Hence it is that, if the Legatee dies, provided it be after the Death of the Testator, the Legacies pass to his Heirs, as if he had actually received them, *Digest. Lib. XXXVI. Tit. II. Quando dies Legat. vel Fideic. cedat. Leg. V. princ. & § 1.*

⁹ If therefore an Inheritance, a Legacy or Fief of Trust be left to the afore-mentioned, or a Donation or Sale has been made of whatever Things moveable, immoveable, or that move themselves, or shall be left or given for the Redemption of Captives; let the Claim of such Things be almost perpetual, and extend to a hundred Years. *Cod. Lib. I. Tit. II. De Sacrosanctis Ecclesiis, &c. Leg. XXIII.* In this Law, referred to by our Author in his Margin, it is evident that the Emperor lays down the same Rule in Regard to Sales, against the Regulations of the Civil Law. Some Doctors, however, as *WISSENBACH*, in *Cod. p. 7.* and in *Institut. Diff. X. § 36.* are of Opinion that *JUSTINIAN* grants only a personal Action for demanding such Things, and not a real Action, or a Right of recovering them, in whatever Hands they are lodged. But, to make this out, they are obliged to give an improper Sense to the Word *vindicatio* (Claim) and restrain the Generality of the following Terms: *In all these Cases we grant not only personal Actions, but even an Action for the Thing and the Pledge, &c.* which is not to be done without very strong Reasons, and here are none such. On the contrary I see a considerable one against taking that Liberty. The Constitution in Question is a Law made at the Request of the Ecclesiastics of *Emesa*, or *Emisa*, a City of *Syria*, who obtain'd it of *Justinian* by Surprize, as *SUIDAS* observes, and as the Emperor himself acknowledged by correcting the Term of the Prescription, which he reduced to forty Years instead of a Hundred. *Novell. IX. and CXI.* See my fifth Note on *PUFENDORF, B. IV. Chap. XII. § 2.* the Inference

¹⁰ in Consideration of a Maintenance, and ¹¹ Goods that we have agreed shall be shared and used in common.

XXVI. *The Design and Use of what has been hitherto said.*

XXVI. These Things we have thought fit to observe, lest a Man often finding the Term of Right of Nations, among the Authors of the *Roman Law*, should presently imagine it to be such a Right as is unalterable, but that he might distinguish Laws purely natural, from those that are natural only in some certain Circumstances; and such Laws as are common to several Nations separately, from those which oblige, and are the Bond of all human Society; we must also observe, that if either by this Right of Nations, improperly so called, or by the Law of any one People, a Method of acquiring a Property be established, without any Distinction between Natives and Strangers, ¹ there also Foreigners shall enjoy the same Right, and if they be hinder'd in the obtaining of it, it is such a Wrong as may give a just Occasion for a War.

is easily made. A Privilege thus granted, is not given by Halves, it is pushed as far as possible.

¹⁰ *If you make it appear, as you affirm, that the Donation was by you made to your Granddaughter, on Condition that she should allow you a certain Subsistence, you may have a good Claim in this Case, that is, an Action by which she shall be obliged to restore your former Property.* Cod. Lib. VIII. Tit. LV. *De donat.* &c. Leg. I. The Case set forth in this Law, quoted by our Author, stands thus. A Man gives a Person a Piece of Land, for Example, on Condition that he shall furnish him what is necessary for his Support. The Donee doth not discharge that Obligation: The Donor may then not only revoke the Donation, by bringing certain personal Actions, allowed by the *Roman Law*; but also redemand the Land, as having then recovered the

Property of it, though not in Possession of it, because he had alienated it on that Condition. So that it is a singular Case, in which some Emperors had made an Exception to the Regulations, in Favour of such as had a Right to a Support and Maintenance, as we find others of the like Nature on other Occasions. See *Cujas Recit. in Codic.* Tom. IX. *Opp.* p. 1401.

¹¹ *In a Partnership, all the Goods which belong to the Partners immediately become common; because, tho' no particular Delivery intervenes, a tacit one is supposed.* Dig. Lib. XVII. Tit. II. *pro socio*, Leg. I. § 1. and Leg. II.

XXVI. (1) But, in my Opinion, the same way of reasoning ought to be employed here, as was before used against our Author's Opinion, on Chap. II. of this Book, § 22.

CH A P. IX.

When Jurisdiction and Property cease.

¹ *That Property and Jurisdiction cease when he who had the Right dies and leaves no Successor.*

I. **H**OW the Right of Property, and that of Sovereignty, are originally acquired, and how they may be transferred, has been sufficiently declared; let us now see how they may entirely ¹ cease. And first, that they may cease, by being abandoned and deserted, has been by the Way already shewn; for *Where there is no Will, there is no Property.* But there is also another Manner of their ceasing, when the Subject in which the Jurisdiction or Property is, ceases to be, I mean, when this happens before any Alienation is made either expressly or tacitly, as in Successions to an Intestate. And therefore, ² if a Person dies without any Signification of his Will, and leaves no Relations behind him, all the Right that he has dies with him too, and then his Slaves (unless some human Laws ³ obstruct it)

I. (1) That is, so that the Right is extinct. For in all Cases, where the Thing itself over which we have such a Right, is not destroyed, it may hereafter belong to some other Person; but then this will not be by a Continuation of the same Right, but by Vertue of a new Title.

² See *PUFENDORF*, B. IV. Chap. VI. § 14. B. VI. Chap. III. § 11. and B. VIII. Chap. XI. § 1.

³ By the *Roman Law*, all the Goods of Persons dying intestate, and who had no legal Heir, belonged to the Treasury; and consequently Slaves, who were

reckoned among Goods. *Code*, Lib. X. *De bonis vacantibus*, &c. Leg. I. See also the *Digest*. Lib. XLIX. Tit. XIV. *De jure Fisci*, Leg. I. § 2. and *Cujas*, on the *Code*, Lib. VI. Tit. LI. *De Caducis tollendis*, with *FABROT's* Notes; as also those of Mr. *SCHULTING*, on *ULPIAN*. Tit. XXVIII. § 7. p. 673. But if the Master abandoned his Slave, he belonged to the first Occupant, according to the general Rule concerning Things abandoned. See *Digest*. Lib. XLI. Tit. VII. *Pro Derelicto*, Leg. I. and Leg. ult. Unless the Master thus deprived himself of his Right, by inhuman Avarice,

it) shall be free, and the People who were under his Government shall be at their own Disposal, because they are not in their Nature Things that may be possessed, unless they voluntarily part with their Liberty; but all other Things belong to the prior Occupant.

II. The same may be said, if a Family that had any Right, happens to be extinct.

III. 1. And the same is also to be understood if a People be extinct. *Isocrates*¹, and after him the Emperor ² *Julian*, said, that States were immortal; that is, they might possibly prove so. Because the People is one of those Kind of Bodies that consist indeed of ³ separate and distant Members, but are, however, united in Name, as having *ἕξιν μίαν*, one ⁴ Constitution only, according to *Plutarch*; *Spiritum unum*, one Spirit, as ⁵ *Paulus* speaks. ⁶ Now this Spirit or Constitution in the People, is a full and compleat Association for a political Life; and the first and immediate Effect of it is the sovereign Power, the Bond that holds the State together, the Breath of Life, which so many thousands breathe, as *Seneca* ⁷ expresses it. For these artificial Bodies are like the natural. The natural Body continues to be still the same, ⁸ tho' its Particles are perpetually upon an insensible Flux and

II. So does the Right of a Family cease, if that Family be extinct.

III. So does that of a People too, if they cease to be a People.

Avarice, because his Slave was afflicted with violent Sickneſs; for then ſuch a Slave was ſet at Liberty. *Digeſt*. Lib. XL. Tit. VIII. *Que ſine manumiffione*, &c. I know not why one of our Author's Commentators afferts that this Right of taking Poſſeſſion of a Slave thus abandon'd, was abrogated by *Novel XXII*. Cap. XII. For *JUSTINIAN* in that Place only confirms the Law before quoted, by ordering that if a Maſter abandons his ſick Slave of either Sex, his or her Marriage with a free Perſon ſhould be reputed valid, by Vertue of the Freedom acquired by ſuch a Slave, according to the Title of the *Digeſt*. *Pro Dereliſto*, to which we are referred; and thus *JULIAN* underſtands it in his Abridgment. See *Novel*. CLIII. Cap. I. The Expreſſions of that here produced are indeed perplexed; as they are through the whole Compilation; but it will appear on a proper Attention, that the Emperor only diſtinguiſhes two Manners of abandoning a ſick Slave; one by turning him out of the Houſe; the other by taking no Care of him, though he is kept.

4 Even though the Goods fall to the Sovereign, for the Sovereign becomes Maſter of them by Right of firſt Occupancy. The whole Difference is, that no other Perſon can then make Uſe of that Right.

II. (1) As that of *Denmark* was formerly, *CRANTZIUS*, *Vand*. VIII. 23. That of *Rugenlandt*, *CRANTZIUS*, *Vand*. VIII. 12. That of the *Pelaſgi* and the *Theſſalians*, *Gregor*. Lib. VII. That of the *Uſchanidiæ* in *Persia*, *Leunclav*. XVI. Add to theſe *Leo*, Lib. II. of the *Africans* of *Tarodent*; and if you pleaſe, *ERNEST COTHMAN*, *Conf*. XLI. Num. 1, &c.

III. (1) *States*, ſays he, being immortal, feel the Effects of human and divine Vengeance. *Orat*. de Pace. p. 183. *Ed*. H. Steph.

2 At the cloſe of his Letter in Favour of thoſe of *Argos*, p. 411. *Edit*. Spanheim.

3 *SENECA*, *Epiſt*. CII. Some Bodies are continual, or all of a Piece, as a Man: Some are compounded, as a Ship or an Houſe, and indeed all ſuch Things as have different Parts joined and united: Some conſiſt of Members that are always ſeparate and diſjoined, as an Army, a People, a Senate. This is taken out of *ACHILLES STATIUS*, whoſe Words on *Aratus* are theſe, from that *CONON*, who was the Inventor of *Berenice's* Hair, a Conſtellation at the Tail of *Leo*: *παρλήρησε ὁ Κόων*. &c. *CONON*, the Mathematician, obſerved, that ſuch Things are called Bodies, as are joined and kept entire, *πῶς μίᾱς ἕξεως*, by one Constitution, as Stone or Wood.

Now this *ἕξις* is that Spirit (or Principle of Union) which holds the Body together: That ſuch Things are ſaid to be compacted, as are not thus faſtened by any natural Cohæſion, as a Ship, or an Houſe, for the one conſiſts of ſeveral Planks, and the other of ſeveral Stones; that other Things, ſuch as a Chorus, are ſtiled *διεσῶτα*, diſtant and ſeparate. And of theſe laſt alſo, there are two different Sorts; for ſome are made up of Bodies, the Quality and Number of which are fixed and ſettled, as is a Chorus; others conſiſt of undetermined Bodies, as a Crowd, or a People. It is plain, that from hence are borrowed what *POMPONIUS* has, *L. rerum de Uſurp. & Uſucap.* And what *PAULUS* ſays, *Statuam uno Spiritu contineri*, that an Image is held together by one Spirit, or is all of one Piece, *L. in rem*. § item. Where he alſo makes the ſame Diſtinction of the different Sorts of Bodies. Some others too have uſed theſe Expreſſions, *PHILO*, *De Mundo*, *ἕξις ἐστὶ πνεῦμα ἀνάστροφον ἐφ' ἑαυτῷ*, Constitution is a Spirit circulating in itſelf, &c. And again, *ἕξις ἐστὶ πνευμαλικὸς τὸνός, δεσμὸς ἐν ἑρμηνείᾳ, ἀλλὰ μόνον δυο-διάλλῃ*. Constitution is a ſpiritual Contexture, a Tie not altogether incapable of being broken, but not to be broken without Difficulty. See alſo *BOETIUS*, 1 *Arithmet.* and pray obſerve, that when we ſpeak of a Constitution, or a Spirit, in Relation to a People, we don't take the Word in its Strictneſs, as *CONON* did, but analogically, by Way of Compariſon and Similitude, as we do indeed when we call the People a Body. *ALFENUS* terms this Spirit the Form of a Thing, in *L. proponebatur*, D. de judiciis. *GROTIUS*.

Moſt of the Remarks, here made by our Author, were before made by *CUJAS*, *Obſervat*. Lib. XV. Cap. XXXIII. To which may be added *SEXTUS EMPERICUS*, *Adverſus Mathem.* Lib. VII. § 102. and Lib. IX. § 78. with the Notes of Mr. *FABRICIUS*.

4 *ἕξις μίᾱ*. Our Author doth not tell us where this occurs. I am much miſtaken if he had not a Paſſage of the Treatiſe *De animæ procreat*. p. 1025. Tom. II. *Edit*. Wech. in View; where we read *μορφῇ* inſtead of *ἕξις*.

5 See the Law quoted in Note 3.

6 *ἡ πολιτεία βίος πολέως*, Government is the Life of the State. *ARISTOTLE*, *Polit*. IV. II. *GROTIUS*.

7 *De Clement*. Lib. I. Cap. IV.

8 *ALFENUS*, in the above cited Place, gives you an Inſtance in a Ship. And ſo does *ULPIAN*, in *L. quid*

and Change, whilst the same Form remains, as *Alphenus*,⁹ from the Philosophers, argues.

2. And therefore that of *Seneca*, [Ep. 58.] where he says, *No Man is the same when he is old as when he is young*, is best interpreted as spoken of the Matter only¹⁰. In the same Manner as¹¹ *Heraclitus* said, (*Plato* cites him in *Cratylus*, and *Seneca* in the abovesaid Place) *We cannot go down twice into the same River*; which *Seneca* very judiciously explains, *The Name of the River continues, tho' the Water is continually gliding along*. So *Aristotle*, [3 *Pol.* 3.] comparing a River to the People, said the River retains the same Name, tho' some Water is always coming and some going. Nor does the bare Name only remain, but also that Disposition, which *Conon* defines,¹² ἐξιν ὥμαλῳ συνεκλήν, *The Habit of the Body that keeps its Parts together*. *Philo*,¹³ πνευματικὸν συνέχον, *The spiritual Connection*; and the *Latins* call it, *The Spirit*. Thus then a People, (according to *Alphenus*, and *Plutarch*, in his Treatise *Of the late Vengeance of GOD*) are reputed at this Day the same as they were a hundred Years ago, tho' there is not one of them now in Being, μέχρ' ἂν ἡ πόλις ᾗ, &c. *As long as that Society which constitutes a People, and binds them together, still subsists*. Which are the very Words of *Plutarch* upon this Subject; and hence comes that Custom of Speech, that when we are addressing our Discourse to the People which are now living, we attribute to them what had happened to the same People many Ages before; as we may find both in profane Historians, and in the Holy Scriptures, *Mark* x. 3. *John* vi. 32. vii. 19, 22. *Acts* vii. 38. *Matt.* xxiii. 35. and *Acts* iii. 22. So in *Tacitus*, [Hist. Lib. 3.] *Antonius Primus*, serving under *Vespasian*, puts the Soldiers of the third Legion in mind, *That under M. Anthony they had beat the Parthians, and under Corbulo the Armenians*.

3. It was therefore more out of Passion than Truth, that *Piso*, in the same *Tacitus*,¹⁴ denies that the *Athenians* of his Time were really *Athenians*, because so many Slaughters had quite destroyed them, and says, that these were then only the Scum of other Nations. For that Conflux of Foreigners had perhaps diminished something of their antient Glory, but had not made them another People. Nor was he himself ignorant of this, when he objects against the same *Athenians*, how unsuccessful they had formerly been against the *Macedonians*, and how cruel and barbarous to the Subjects of their own State. But as an Alteration in small Parts does not make a People cease to be what they were a thousand Years ago, and above; so neither can it be denied, but that it is possible for a People to be ut-

L. quid tamen, D. quibus modis usus fructus amittatur. They say that the Ship is the same, tho' it has been refitted in all its Parts, provided the Repairs were done at several and distant Times; but the Case is quite otherwise, if it be pulled all to Pieces, and so rebuilt. *L. qui res, § arcam, D. de Solutionibus*. *PLUTARCH* in *Theseus*, τὸ ὃ πλοῖον ἐν, &c. *The Vessel with thirty Oars, in which he (Theseus) with some young Gentlemen, had made a Voyage, and returned in Safety, the Athenians preserved even to Demetrius Phalereus's Days, by taking out the old decayed Wood, and refitting it with such as was strong and new; insomuch that this Ship became a Precedent to Philosophers, when they were canvassing whether a Thing enlarged and repaired was still the same, some declaring that it was, others that it was not*. In this Case, so controverted by Philosophers, the Civilians have very judiciously preferred the affirmative Side. And *TERTULLIAN*, who perfectly understood the Law, in his Book, *De resurrectione Carnis*, *We have often seen a Ship torn by a Storm, or rotten with Worms, by having all its Parts refitted and mended, still the same as it was before, and even boasting on Account of its new Repairs*. But you must suppose, that the Keel or Bottom remains intire, which indeed the Word *Resoluta* in *PAULUS's* Expression does imply, *L. inter stipulantem. § Sacrom. D. de verb. oblig.* And this is confirmed by what precedes in *TERTULLIAN*,

and by what follows in *PAULUS. PHILO, De Munda*, εἰ γὰρ δὴ πᾶσιν, &c. *Not that whose Parts do by Degrees perish and decay, is itself perishable; but that whose Parts do all at one and the same Instant perish and drop to Pieces*. *GROTIUS*.

⁹ See the Law quoted in the Close of Note 3. on this Paragraph.

¹⁰ And *Epicharmus*, in *DIAGENES LAERTIUS*. *GROTIUS*.

See *DIAGENES LAERTIUS*, Lib. III. § 11. *Ed. Amst.*

¹¹ See *MENAGE*, on *DIAGENES LAERTIUS*, Lib. IX. § 8.

¹² Ἐξιν σώματος συνεκλήν. See the Passage at length in Note 3. on this Paragraph.

¹³ Πνευματικὸν συνέχον, says our Author. But I find in the *Jewish* Doctors two Treatises of the *Incorruptibility of the World*, only this Expression, Ἐξιν πνευματικῇ, which comes to the same. See p. 953, and 1165. *Edit. Paris.*

¹⁴ *JULIAN, Misopog.* says the contrary of these very *Athenians*. *GROTIUS*.

The Work. here quoted by our Author, is against the People of *Antioch*; and contains nothing like this concerning the *Athenians*. I imagine he was thinking of what that Emperor says in his Letter to the *Athenians*; p. 268. 269. *Edit. Spanheim.*

terly extinct. And this may be done two Ways, either when the Body of the People is destroyed, or when the Form or Spirit (which I mentioned) is intirely gone.

IV. The Body perishes either when all its Members, without which it cannot subsist, are at once destroyed; or when its ¹ Frame and Constitution is dissolved and broken. To the first we may refer those People who are swallowed up by the Sea, as the People of *Atlantica*, according to *Plato*; ² and some others, mentioned by *Tertullian*; and also those who have been devoured by an Earthquake, or by the Opening of the Earth: You have Instances of such in *Seneca*, ² and *Ammianus Marcellinus*, and in other Authors; and those who have voluntarily destroyed themselves, as the *Sidonians* and *Saguntines*. *Pliny* says there were fifty-three Nations of old *Latium* utterly lost, without the least Sign of them remaining. But what, if of such a People so few continue living, as that they cannot make up a People? Why in this Case they retain that Property which ³ that People had as private Persons; but not what belonged to them as a People: And this is also to be understood of any ⁴ Community.

IV. Which happens when its essential Parts are gone. De Pallio.

V. The Frame and Constitution of the Body is dissolved and broken, when the Subjects, either of their own Accord are disunited on the Account of a Pestilence, or a Sedition, ¹ or are by Force so scattered, as that they cannot more re-unite, which often happens in War.

V. When the whole Body of the People is subverted.

VI. The Form of a People is gone when they lose all or some of those Rights they had in common; and this is done, either when every single Person is brought into Slavery, as the ¹ *Mycenæans*, who were sold by the *Argives*; the *Olinthians*, ² by *Philip*; the *Thebans*, ³ by *Alexander*; and the ⁴ *Brutians*, made publick Slaves by the *Romans*: Or when, tho' they retain their personal Liberty, they are yet utterly deprived of the Right of Sovereignty. So *Livy* tells us, that the *Romans* were willing that *Capua* should be inhabited as a Town, but that there should be no Corporation, no Senate, no Common-Council, no Magistrates, no Jurisdiction, but a dependent Multitude, ⁵ and that a Governor should be sent from *Rome*, to

VI. When that Form is lost that makes them a People.

IV. (1) *SERVIVS* in *Fulden. Excerpt. ad I. Æneid. An Army is overthrown two Ways, either by an utter Slaughter, or by being intirely dispersed and routed.* GROTIUS.

The learned GRONOVIVS here quotes a Passage of STRABO, where it is said that a People becomes extinct in two Manners: Either when the Persons, who composed that Body, fail, and the Country remains intirely desert; and when the Name and Body of the People subsists no longer. Lib. IX. p. 664. Edit. Amst. (434. Paris.)

² *Myus* in VITRUVIVS, *Helice* and *Buris* in PAUSANIAS, STRABO, SENECA, *Nat. Quæst.* Lib. V. Cap. XXIII. XXXII. and in *Antholog.* GROTIUS.

³ *Epist.* XCI. Lib. XVII. *Rer. gest.* Diod. XVI.

⁴ That is inherit the Goods and Rights of all the private Persons who are lost. See PUFENDORF, B. VII. Chap. XII. § 8.

⁵ The Author in his Margin quotes two Laws, the former of which expressly decides that if a Body is reduced to one Person, that Person preserves the Name and Right of the whole Body. Dig. Lib. III. Tit. IV. *Quod cujusque Universitatis, &c.* Leg. VII. § 2. The other Law is not much to the Purpose, the Case is this. A Slave, who belonged to several Masters, being taken Prisoner of War, is redeemed by one, who thereby has a Right to keep him, till his former Masters reimburse the Expence of the Ransom. See B. III. Chap. IX. § 13. Num. 6. If the Reimbursement is made in the Name of all those, to whom the Slave belonged in common, they from that Moment recover him in common. But if in the Name of one, or some of them only, then he or each of them recovers not only the Share he had before the Slave was made

Prisoner, but also, in Regard to the other Shares, succeeds to the Right of him who delivers the ransomed Slave; that is, as ANTHONY FAURE explains it, *Jurisprud. Popinian.* Tit. XI. Princip. VIII. Illat. XIV. till the rest have paid their Part of the Ransom, the Slave remains as it were a Pledge in the Hands of him or them, who have paid the Money. This is the whole Purport of the Law in Question, or rather of the Paragraph, the Sense of which, sufficiently clear from the rest of the Law, was perhaps misunderstood by our Author, Lib. XLIX. Tit. XV. *De Captivis & postlimin.* &c. Leg. XII. § 13.

V. (1) PHILO, in his aforesaid Treatise, *De Mundo*, τὰ μὲν ἐν διεσπόμεναις, &c. Bodies composed of distinct and distant Members, such as Flocks, Herds, Chorus's, Armies, as well as those that are made up of compacted Parts, are dissolved by Division and Separation. See what is said above about a Ship. GROTIUS.

VI. (1) See DIODORE, of *Sicily*, Lib. XI. Cap. LXV.

² This is related by the same Author, Lib. XVI. Cap. LIV. p. 538. Edit. H. Steph.

³ See the same Writer, Lib. XVII. Cap. XIV. p. 569. and ARRIAN, Lib. I. Cap. IX. &c.

⁴ We have this Fact from AULUS GELLIUS, Lib. X. Cap. III.

⁵ See FESTUS upon the word *Præfectura*. VELLEIUS, Lib. II. Their Rights were restored them about 152 Years after *Capua*, in the *Punic War*, had been reduced by the *Romans* into the Form of a Prefecture, or Government. Add to this the Examples produced in the Text and Notes, at B. I. Chap. I. § 8. GROTIUS.

dispense Justice among them. And therefore *Cicero*, in his first Oration to the People against *Trullus*, says, that *Capua* had ⁶ not so much as the Shadow of a State left. The same may be said of those reduced into the Form of a Province, and of them who are subjected to another People, as *Byzantium* was to *Perinthus*, ⁷ by the Emperor *Severus*; and ⁸ *Antioch* to *Laodicea*, by ^a *Theodosius*.

VII. But not by only changing of Place.
Flor. 2. 15.

Plut. in Ages.

VII. But if the People shall only leave the Place, either of their own Accord, through Famine, or any other Misfortune, or by Compulsion, as the ¹ *Carthaginians*, in the third *Punick War*; if the Form, I mentioned, continue, they do not cease to be a People, much less if only the Walls of the City be thrown down. And therefore, when the *Lacedemonians* refused to admit the *Messenians* to swear to the Peace of *Greece*, because their Walls were demolished, it was carried against them in the general Assembly of the Allies.

VIII. Nor upon the Change of Government; where also of the Rank that is due to a new King, or a People lately become free.

VIII. 1. Nor does it signify much, under what Government they are, whether Monarchical, Aristocratical, or Democratical. For the ¹ *Romans* were the same People under Kings, Consuls, and Emperors: Nay, tho' the Government be never so absolute, yet the People are the same they were, as when they were free, whilst he who rules, rules as the Head of that People, and not as the Head of another. For that sovereign Power which is in the King as Head, rests still in the People as in the Whole, whereof the Head is a Part: So that if the King, being elective, should die; or if the Royal Family be extinct, the Sovereignty reverts to the People, as we have shewed already. Neither can that of *Aristotle* be objected against me, who denies that to be the same State, where the Form of Government is changed, no more than the Musick is the same, when it is altered ² from a *Doric* to a *Phrygian Air*.

Pol. 3. 3.

2. For we must know that there may be several Forms of one and the same artificial Thing, as a Legion has one Form of ³ Command, and another of ⁴ Engagement. Thus one Form of a State consists in the Community of Rights and Sovereignty, and another in the mutual Relation which the Parts between themselves have, as well those that govern, as those that are governed. This is the Politician's Business, and that the Lawyer's: And this is what *Aristotle* understood, when he added, *But whether upon the Change of Government Debts are to be paid or not, is* ⁵ *another Consideration; that is, a Consideration belonging to another Science; which Aristotle would not confound with Politicks, lest what he blamed in others he should be guilty of himself, μέταβαλὼν ἐκ γένους εἰς γένος, Skipping from one Subject to another.*

3. A Debt contracted by a free People, ceases not to be a Debt, because they are at present under a King; for the People are the same, and they still retain a Property in those Things that belonged to them as a People, and hold the Sove-

⁶ Severus gave to the Alexandrians, who had lived under the Conduct of a Judge, called Juridicus, without any publick Council, the Liberty of chusing a Senate of their own. GROTIUS.

This last Fact is disputed by the learned REINESIUS, *Not. ad Inscript. XXVI. Clafs. 2.*

⁷ See XIPHILINUS, in his Life of *Severus*. HERODIAN, *Lib. III.* And to these subjoin what is below in this, *B. II. Chap. XXI. § 8.* GROTIUS.

⁸ See ZONARAS. GROTIUS.

^a *Theod. V. Hist. Ecc. Zon. in Val. & Theo.*

VII. (1) The *Romans* consented that the *Carthaginians* should build another City at some Distance from the Sea; but the latter chose rather to perish with their City; as it appears from the Historian, quoted by our Author in the Margin, and from APPIAN, in *Libyc. Bello.*

2 As the *Gelbi* transported to *Phintias*. DIODORUS SICULUS, in *Frag. Peiresf.* GROTIUS.

This Fact is not in the *Excerpta*, which Mr. PEIRESC published; but in the Fragments before published of *B. XXII. of DIODORE of Sicily.* The Circumstances of the Foundation of that City may be seen in Dr. BENTLEY's *English Dissertation on Phalaris's Epistles*, p. 91. &c.

VIII. (1) See PUFENDORF, *B. VIII. Chap. XII. § 1. &c.*

2 A *Doric modo in Phrygium.* From a *Doric* to a *Phrygian Air.* The Words of *Aristotle* are answerable to the *Latin* of our Author: *Δόριος φρύγιος. Politic. Lib. III. Cap. III. p. 341.*

3 For in that Regard several Parts are distinguished, according to the different Generals, or subaltern Officers, who command.

4 The Camp was dispersed, and the Army drawn up in several Manners. See on this Subject JUSTUS LIPSIUS's Treatise, *De Militiâ Romanâ*; and the fourth Volume of DOM. BERNARD DE MONTFAUCON's *Antiquity explain'd and illustrated with Figures.*

5 Thus GEFANIUS translates *ἑτέρας λόγους, is another Question.* But BOECLER, in his *Dissertation De actis Civitatis.* Tom. I. *Dissert. p. 860.* pretends, but without alleging any Reason, that the Words ought to be rendred, *we shall speak of that elsewhere.* But the Philosopher treats this Question in no other Part of his Works; and it is evident he would not undertake to decide it.

reignty too, tho' it be not exercised now by the Body, but the Head. And hence we have an Answer ready to that Question which does sometimes actually arise concerning his Place in ⁶ an Assembly of Confederates, who has newly taken upon him the Supremacy over a People who were before free; and that is, the same Place or Rank that the People themselves were entitled to; as *Philip of Macedon* took the Place of the *Phocians* in the Council of the *Amphyctyones*. So on the other Hand, the Place or Rank which formerly belonged to the King, the free People shall have.

IX. But ¹ if two Nations be united, the Rights of neither of them shall be lost, but become common, as the ² *Sabins* first, and afterwards the *Albans*, were incorporated with the *Romans*, and so were they made one State, as *Livy* (Lib. 1.) expresses it. The same may be also judged of Kingdoms which are really and truly united, and not only by a Treaty of Alliance, or because they have but one Prince.

X. On the contrary, it may so fall out, that what was before but one State may be divided, either by mutual Agreement, or by Force of Arms, as the *Per-
sian* Empire was among *Alexander's* Successors. When this happens there will be several Sovereignities in the Room of one, which shall each of them possess its own peculiar Right and Authority over its respective Parts; but if any Thing were held in common, it shall either be enjoyed in common, or proportionably shared among them. Hither also may be referred that Separation which is made, when People by one Consent go to form Colonies. ¹ For this is the Original of a new and independent People, *οὐ γὰρ ἐπὶ τῷ δέλοι, ἀλλ' ἐπὶ τῷ ὅμοιοι εἶναι ἐκπέμπον*), [Lib. 1.] For they are not sent out to be Slaves, but ² to enjoy equal Privileges and Freedom, says *Thucydides*. And the same Author tells us, that a second Colony was dispatched by the *Corinthians* to *Epidamnus*, *ἐπὶ τῇ ἴσῃ καὶ ἐμοίᾳ*, All upon the very same Foot. And King *Tullius*, in *Dionysius Halicarnassensis*, [Lib. 3.] says, *τὸ δ' ἀρχεῖν ἐκ παντὸς, &c.* For our Part we look upon it to be neither Truth nor Justice, that Mother Cities ought of Necessity, and by the Law of Nature, to rule over their Colonies.

XI. 1. There is also this famous Question, among Historians and Civilians, to whom now those Things and Dominions belong, that were once Dependencies on the *Roman* Jurisdiction; ¹ several are for having them belong now to the Kingdom,

⁶ See PUFENDORF, B. VIII. Chap. XII. § 4.

⁷ There is no Mention of Rank in the Decree of the *Amphyctyons*, preserved by DIODORE of Sicily. It is only said there that *Philip* was to have two Votes in the Assembly, as the *Phocians* had. Biblioth. Hist. Lib. XVI. Cap. LXI. p. 542. Edit. H. Steph.

IX. (1) As the *Celtiberi*, according to DIODORUS, were formed of the *Celtæ* and the *Iberi*. See if you have an Opportunity, REINKING upon this Subject. Lib. I. Class. IV. Cap. XVII. Num. 95. and what is cited there. GROTIUS.

² See BOECLER's Dissertation, already quoted, p. 882, 883. and PUFENDORF, B. VIII. Chap. XII. § 6.

X. (1) See PUFENDORF, B. VIII. Chap. XI. § 6. Chap. XII. § 5. It is well known that the present Colonies always remain dependent Members of the State, from which they are sent.

² But yet with all due Respect to the Mother States, of which Respect we discoursed, B. I. Chap. III. § 21. CURTIUS, Lib. IV. The *Tyrians* founded *Carthage*, and therefore were always honoured as their Parents. GROTIUS.

See PITISCUS's Note on this Passage.

³ The same Historian, speaking of the second Colony, sent by the *Corinthians* to *Epidamnus*, says, They ordered publick Notice to be given that such as were willing to go thither should enjoy the same Rights and Privileges as those who staid at home. Ibid. Cap. XXVII. Edit. Oxon.

XI. (1) Our Author has been very much criti-

cized on this Article; and it must be confessed not without Reason; for several Objections may be formed against him. Some have even accused him without Ceremony and with some Sharpness, of having started and decided the Question in this Place only with a View of making his Court to the Pope, and the Prince in whose Dominions he composed and published his Book. I hope I may be allowed to pass a more favourable Judgment of him, and reject Suspicions so little suitable to the Character of this great Man. Waving all Interest of a Translator and Commentator, I am persuaded that my Author has sincerely and honestly followed the Consequences of certain Principles, false indeed, but specious, and which he permitted to dazzle him. Those who are most severe upon him, own that while he designs, according to them, to flatter the Pope, he says what cannot but offend him very much, viz. That he ought to be considered only as the first Citizen of *Rome*; a Notion far removed from his ambitious Pretensions, as GROTIUS certainly knew. He saw his Book in the *Index Expurgatorius*, some time after its Publication. But whatever becomes of this Question, though I disapprove of the too warm Zeal of his Commentators, and of some other Authors, who have censured him in some particular Works; I will not fail of doing Justice to the Reasons they have employed against him, and which I shall borrow from them in the following Notes; I shall however take the Liberty of augmenting them, turning them my own Way, and sometimes even of correcting them.

IX. What if two Nations be united?

X. What if the same People be divided?

XI. To whom now do those Things and Dominions belong which were once under Roman Jurisdiction, where it does not appear that they have been alienated.

as it was formerly stiled, or to the Empire of *Germany*, (it is no Matter which Name you call it by) and pretend I don't know what Substitution of this Empire in the Room of that; when yet ² it is sufficiently known, that the *High-Germany*, that is, what is on the other Side of the *Rhine*, was all of it, the greatest Part of the Time, without the Compass of the *Roman Empire*. And for my Part, I think, that we ought not to presume any such Change, or transferring of Right, unless upon very sure and good Grounds. Wherefore I say, that the *Roman People* are now the same ³ they were heretofore, tho' mixed with Foreigners; and that the Empire still remains in them, as in a Body, where it resided and subsisted. For whatever the *Roman People* had a Right to do formerly, before they had Emperors, they had a Right to do the same ⁴ upon the Demise of any Emperor, before the Successor was established. And the Election too of an Emperor belonged to the People, and was frequently made, either ⁵ by the People alone, or by the Senate;

² This Reason would prove only, that the Emperors of *Germany*, Successors to the *Roman Emperors*, had a larger Extent of Lands in old *Germany* under their Jurisdiction. But, as in Order to succeed to the *Roman Empire*, it would not have been necessary that they should possess all that had depended on it; for several Parts of it might have been taken away by several Revolutions that happen in States: So, on the other Hand, they might have extended their Jurisdiction over Countries, which had never been conquered by the *Roman Arms*, and of which they were Masters by Vertue of some other Title. Our Author therefore has good Reason for maintaining that there has been no real Substitution of the Empire of *Germany* to the antient *Roman Empire*; but for Proof of this, he ought to have said, which however he will not acknowledge, that when the *Roman People* submitted to *Charlemagne*, the first Emperor of *Germany*, they had long before lost the Rights of their antient Empire. This Argument was not confuted by the Commentators.

³ It is indeed the same, if considered simply as a Body of a City; but not in Regard to the Rights of its antient Empire, which have been long extinct. Thus when that fatal Period is found, we may grant our Author all he says of the Times before it, without any Advantage to his Cause.

⁴ Our Author has already said, *B. I. Chap. III. § 10.* That the *Roman Empire* was elective. And it is certain that, as the first Emperors insensibly seized on the Sovereign Authority, without the express Consent of the People; so neither was there any fixed and fundamental Law concerning the Order of the Succession. We find, however, that the Sons, either natural or adopted, commonly succeeded; tho' it must be confessed, this was not the Result of a free Election of the Body of the State. Since *Augustus*, they did not even pretend to consult the People or the Senate: All depended on the Will of the Armies, and consequently on the Law of the strongest. After the Death of *Nero*, as *Tacitus* observes, *The Secret of State was discovered, that the Emperor might be chosen elsewhere than at Rome. Hist. Lib. I. Cap. IV. Num. 2.* Nor that the People had really deprived themselves of their Right in Favour of the Armies; but they made no more Use of it, than if they had had none; and if they approved of Elections in which they had no Share, it was because they could not do otherwise. Such is the inevitable Fate of all Monarchies, where a strong Army is always on Foot.

⁵ You have frequent Instances of Elections, either made or approved of by the Senate, in *ADRIAN*, *PERTINAX*, *JULIAN*, *SEVERUS*, *MACRINUS*, *MAXIMUS*, *BALBINUS*, *AURELIANUS*, *TACITUS*, *FLORIANUS*, *PROBUS*, in *DION*,

SPARTIANUS, *CAPITOLINUS*, *LAMPRIIDIUS*, *VOPISCUS*. Before *Aurelian*, the Empire was six Months without a Prince, and the Soldiery did several Times intreat the Senate to chuse an Emperor. There is an eminent Letter of *Albinus* in *CAPITOLINUS*, concerning the Right and Prerogative of the Senate, and a Letter of the Senate in behalf of the *Gordians*. *MACRINUS*, in an Harangue of his to the Senate, *The Soldiers have offered me the Empire; I accept, illustrious Fathers, the Charge of it, till I know your Pleasure, and if it be as agreeable to you as it is to the Gentlemen of the Army, I will retain the Government.* The Emperor *Tacitus*, in *VOPISCUS's* Life of *Probus*, *Me indeed, by the discreet Choice of the Army, has the Senate made their Prince.* And *Probus*, in the same *VOPISCUS*, *The last Year, most illustrious Fathers, by a just Prerogative, did your Goodness give the World a Prince, one of your own Order, who are the Princes of the World, always have been, and always will be so, in your latest Posterity.* And *Majorinus* in his Address to the Senate, mentioned in the *Novellæ*, *You must acknowledge, most illustrious Fathers, that I was created Emperor, as well by your free Choice, as by the Proclamation of an invincible Army.* *GROTIUS.*

The learned *GRONOVIUS*, in a long Note on this Place, makes it appear from the Circumstances of the Creation of each particular Emperor, that not one of them was raised to the Empire by a free Election of the Senate, and that the Approbation of that Body always came after the Choice was made; so that all the fine Speeches of some Emperors here related, and others of the like Sort, are only so many empty Grimaces. In this I agree with him; but still it may thence be inferred, that the Emperors themselves acknowledged the *Roman People* had not divested themselves of the Right to chuse themselves a Master. Besides, the Commentator justly points out some Failures in Point of Exactness made by our Author in Regard to the Facts. *First*, The Interregnum, of which he speaks, did not happen till after *Aurelian's* Death, and before the Reign of *Tacitus*. See *VOPISCUS*, in *Aureliano*, Cap. XL. and in *Tacito*, Cap. II, III. And this Example is sufficient to shew how much the Soldiers were in Possession of the Election of the Emperor; for the Senate always sent them back the Ball; well knowing, says the Historian, that the Army did not willingly receive Emperors chosen by the Senate. *Secondly*, what our Author calls a Letter of *Albinus*, is a Speech made to the Army, *Concio*, in which he doth not acknowledge the present Right of the Senate. See *Chap. XIII.* of that Emperor's Life, written by *CAPITOLINUS*. The Letter of the Senate concerning the *Gordians*, quoted by *CAPITOLINUS*, in *Maximin. duob.* Cap. XV. only says that

Senate; as for those Elections which were made sometimes by one Legion, sometimes by another, they were not valid by any Right that the Legions had, for how is it to be imagined ⁶ that a vague Name, like that, could have any Right, but by the Approbation of the People?

2. Nor does it at all argue to the contrary, that by the Constitution of ⁷ *Antoninus*, all who lived within the Dominion of the *Roman Empire*, were considered as *Roman Citizens*. For by that Constitution, the Subjects of the *Roman Empire* did only obtain such Rights as were formerly indulged their ⁸ Colonies, ⁹ municipal Towns, and ¹⁰ Provinces, where the People were dressed after the *Roman Fashion*, that is, they were made capable of receiving the Honours, and ¹¹ enjoying the Privileges of real Citizens of *Rome*; not that ¹² the Spring and Original of Empire was in any other People, as it was in the People of the City of *Rome*; this was not in the Power of the Emperors to grant, who could not change the Manner and Title of Sovereignty. Nor did it at all lessen ¹³ the Right of the *Roman People*, that their Emperors afterwards chose to keep their Court at *Constantinople*, rather than at *Rome*; for even then also the Election, which was made by

that the Senate acknowledged the two *Gordians*, Father and Son, who had been proclaimed in *Africa*, as appears from the same Author, in *Gordian*. Cap. XI.

6 PUFENDORF, in a Dissertation, *De Interregnis*, which appears in the Collection of his *Dissertationes Academicæ*, § 17. explains this in the following Manner: That the Soldiers, being only Ministers of the State, could not lawfully appropriate to themselves the Right of disposing of the Government. The Maxim is true; but that is not our Author's Thought. He means, that as there were several Legions, and those Legions not being fixt and determined Bodies, nor confin'd to any Time or Place; it could not be known what Legions had a Right to elect the Emperor, preferably to the others. In Reality it happened sometimes that an Army having proclaimed one in one Place, another was proclaimed in another Place.

7 Of *Antoninus Caracalla*. Digest. Lib. I. Tit. I. *De statu hominum*, Leg. XVII. See the excellent Treatise of Baron SPANHEIM, intitled, *Orbis Romanus*.

8 The Colonies had indeed the same Privileges as the *Roman Citizens*, in what related to Marriages, Wills, Infranchisement and other private Affairs; but not a deliberative Voice in the publick Assemblies, nor a Right of standing for the Offices of the City of *Rome*. See the illustrious Author last quoted, Lib. I. Cap. IX.

9 *Municipia*. These were, properly speaking, Towns governed by their own Laws, and which had a deliberative Voice at *Rome*, as also a Right of standing for Offices, especially in the Army. Some however were deprived of the Privilege last mentioned. See the same Author, Cap. XIII.

10 *Provincia togata*. What the Romans called *Toga*, was, according to some, a round Garment closed on all Sides, and without Sleeves; which was worn so that, after having passed the Head, the right Arm was thrust out, and the other Side of the Garment lay on the left Shoulder. But the learned Father MONTFAUCON is of Opinion that it was open before. See *Antiquity explained and illustrated by Figures*, Tom. III. B. I. Chap. V. p. 16, 17. Whatever becomes of this Question, the Use of this Garment was so peculiar to the Romans, and they esteemed it so highly, that the bare Allowance of wearing it supposed a Grant of the Right of a *Roman Citizen*. For this Reason the Appellation of *Gallia Togata* was given to *Gallia Cisalpina*, and not, as GRONOVIVS says, to *Gallia Narbonensis*, which, on the contrary, was called *Gallia Braccata*, on the

Account of a very different Dress. See once more; SPANHEIM's *Orbis Romanus*, Exercit. II. Cap. VI. p. 239. and MONTFAUCON's large Collection, before quoted, at the End of the same Chapter.

11 *Uti Jure Quiritum*. This is not the same as *Jus Latii*, as Mr. SPANHEIM shews, *Orb. Rom.* Exercit. I. Cap. IX.

12 The Senate in Favour of *Gordianus*, in HERODIAN, exhorts the Provinces, Πείθεσθαι Ῥωμαίοις ὧν δημόσιον ἄνωθεν τὸ κράτος ἐστὶν αὐτάτε φίλα καὶ ἐπὶ πόκα ἐν προσόνων, *To obey the Romans, to whom the Empire had for so many Ages belonged, and to whom other Nations, by an antient Right, were in Subjection and Friendship*. And in the same Author, *Maximus*, in his Speech to the Soldiery, Οὐ γὰρ ἐνὸς ἀνδρός, &c. *For our Empire is not the Property of any one Man, but from long and distant Ages the common Possession of the Roman People; and the Fortune of the Empire resides in this City. We are only chosen to share with you the Care and Administration of the publick Concerns*. CLAUDIAN, speaking of *Rome*.

Armorum legumque parens quæ fundit in omnes Imperium.

Founder of Arms and Laws, that over all Unbounded Sway extends. GROTIUS.

13 There was more than a bare Change of Residence, it was manifestly a Communication of Rights. The Name of *New Rome*, given to the City of *Constantinople*, with all the Encouragements, and all the Privileges of the *Old*, particularly the Consulship divided between one Consul at *Rome* and one at *Constantinople*, sufficiently shew that the Source of the Empire was from that Time no longer at *Rome*. See the learned JAMES GODEFRÖY on the *Theodosian Code*, Tom. V. p. 222, 223. and SPANHEIM on JULIAN's first Speech, p. 75, 76. Our Author says that the Emperors were then elected at *Constantinople* by a Part of the *Roman People*. But was the Election made by Romans only, or by Persons commissioned by them? This was far from being the Case; for on the Division of the Empire into the *Eastern* and *Western* Empires after the Death of THEODOSIUS the Great, the Emperor who resided at *Rome*, was to be confirmed by that of *Constantinople*; without which his Authority was not considered as lawful and well established. See GRONOVIVS on this Place.

such of their own Body as dwelt at *Constantinople*, (whence *Claudian* ¹⁴ calls the *Constantinopolitans*, *Romans*) was to be ratified by all the People; who preserved a very considerable Mark of their Right, ¹⁵ in the Prerogative of their City, and the Honour of their ¹⁶ Consulate, and in several other Instances: And therefore all the Right that those, who lived at *Constantinople*, could possibly have in electing an Emperor, depended altogether on the Will of the People of *Rome*; and when ¹⁷ they, ¹⁸ contrary to the Mind and Custom of the *Roman* People, had submitted to the Dominion of a Woman, the Empress *Irene*, to whom they had taken an Oath, as *Zonaras* has it; not to mention any ¹⁹ other Reasons, they justly revoked that Concession, which they had either ²⁰ expressly or tacitly made, and by themselves chose an Emperor, and proclaimed him such, by the Mouth of their ²¹ Chief-Citizen,

¹⁴ In *Eutrop.* Lib. II. Ver. 135.

¹⁵ *ZONARAS* says, that *Rome* had the Preference, because the Empire came from thence. *AMMIANUS*, Lib. XIV. talking of *Rome*, *She is*, however, in all Parts regarded as Queen and Mistress. *CLAUDIAN*, of *Honorius* residing at *Ravenna*:

*Quem, precor, ad finem Laribus sejuncta Potestas
Exsulat, Imperiumque suis à finibus errat?*

*How long shall Power thus be banish'd Home,
Pray tell me, how long shall sovereign Rule
Abroad thus wander, and fly its native Court?*

GROTIUS.

¹⁶ For one of the Consuls was of the City of *Rome*, and he took Place of the other. *PROCOPIUS*, in his Secret History. GROTIUS.

Notwithstanding all those exterior Marks of Distinction, as to the Substance, the Source as well as the Seat of the Empire was in the East; and *Constantinople* enjoyed real Privileges. Such is the Policy of Princes, that they know how to feed with Smoke such as they deprive of their Rights; they make no Difficulty of leaving them the Names and empty Honours of what they formerly implied.

¹⁷ Our Author makes a terrible Skip here. Had he forgot that about the Close of the fifth Century, in the Year 476. *Odoacer*, King of the *Heruli*, a People of *Seythia*, gave the finishing Blow to the Empire of the West by taking *Rome*, and making himself Master of *Italy*? And that the same Prince was vanquished and dispossessed, thirteen Years after by *Theodoric* II. King of the *Goths*, whose Successors reigned in *Italy* near a hundred Years? The *Roman* People therefore had been conquer'd as lawfully, as they themselves had conquered so many other Nations; so that they were no longer the same People, according to the Principles laid down by our Author, § 6. And after the *Goths* had been driven out of *Italy* by *Justinian*, *Rome* and the other Cities, which he took from them, became dependent on his Empire. The *Roman* People was then made tributary to the Emperor of *Constantinople*. They afterwards had *Exarchs*, or Governors, as a Province of the Eastern Empire, so that their antient Right had been long extinguished, when *Charlemagne* made War on the *Lombards*, who had driven out the *Exarchs*, and made themselves Masters of the greatest Part of *Italy*.

¹⁸ *Nero*, in the fourteenth of *TACITUS*'s Annals, accuses his Mother, for hoping to have a Share in the Empire, and to see the *Prætorian Cohorts* take an Oath to a Woman, a Thing that would disgrace both Senate and People. *PRISCUS* in *Excerpt. Legat.* Οὐδ' ἔστιν ἀνδρῶν, ἀλλὰ καὶ ἀνδρῶν καὶ τῶν γυναικῶν ἀρχὴ, For the Sovereignty of the *Roman* Empire does not belong to Women but to Men. *LAMPRIDIUS*, after the Death of *Heliogabalus*, It was

particularly provided, that no Woman should ever enter the Senate, and that whoever should attempt to introduce one should be cursed to the Pit of Hell. *TREBELLIVS POLLIO*, in *Heremianus*. *Zenobia* usurping the Empire, kept the Government in her Hands much longer than a Woman ought to have done. GROTIUS.

¹⁹ It was the Popes, who engaged the Cities of *Italy* to shake off the Yoke of the Emperor of the East, and the Reasons or Pretexts by them used, and which our Author leaves us to guess, were on one Hand, the Tyranny of the *Exarchs* of *Ravenna*: On the other, the Zeal, which the Emperor *Leo* shewed against Images; a Reason very proper for the irritating the ignorant and superstitious People; whose Credulity and Bigotry gave the Bishop of *Rome* an Opportunity of making himself a Temporal Prince by Degrees. His Spiritual Kingdom was already of a large Extent; and *Pepin*, *Charlemagne*'s Father, very well understood how to make his Advantage of it; for by the Fear and with the Approbation of Pope *Zachary*, he got King *Childeric*, condemned to pass the Remainder of his Days in a Monastery, and engaged the *Franks* to acknowledge him for their King, as more worthy of the Crown, of which he before had the whole Authority under the Title of *Maire of the Palace*: In Return for these good Offices, *Pepin*, who besides was not insensible to the Desire of making Conquests in a Country so fine as *Italy*, easily came to a Resolution of marching to the Assistance of Pope *Stephen*, *Zachary*'s Successor, in Order to free him from *Aistulfus*, King of the *Lombards*; and procured him the Exarchate of *Ravenna*, with a Sort of Temporal Power. See Note (8.) on *B. I. Chap. III. § 13*. *Charlemagne* inherited his Father's Sentiments in that Respect, when he had driven the *Lombards* out of *Italy*, and conquered the Kingdom by them established.

²⁰ This Concession being a gratuitous Supposition, as appears from the preceding Notes, the Revocation is so too.

²¹ Our Author means the Coronation of *Charlemagne* by *Leo* III. who proclaimed him Emperor of the *Romans*. But he did not then begin to reign over the *Romans*. He was already in Possession of the Thing, and only acquired a dazzling Title, which represented the Dignity of the antient Emperors of *Rome*, with which however he was not invested in the same Manner, and with the same Extent. He was far from succeeding to all their Rights; those Rights were extinct, as well as the Rights of the People. The People were become dependent on the Emperors of *Constantinople*, as was before observed. *Charlemagne* himself acknowledged that Dependence, by his Transaction with the Empress *Irene*; a Transaction, which was ratified by *Nicephorus*, that Prince's Successor. See *EGINHART*, *De vitâ Caroli Magni*, Cap. XXVIII. with the Notes of the Commentators, which

Citizen, that is, their Bishop; as in the *Jewish* State, the first Person, when there was no King, was their ²² High-Priest.

3. Now this Election was personal ²³ in Regard to *Charlemagne*, and some of his Successors, ²⁴ who very carefully distinguished their Right of Sovereignty over the *Franks* and *Lombards*, ²⁵ from that which they had over the *Romans*, as acquired by a new Title. ²⁶ But the Nation of the *Franks* being afterwards divided into the *Western*, who now possess *France*, and the *Eastern*, who have *Germany*, (*Otho Frisingensis* calls them the two Kingdoms of the *Franks*) when the *Eastern Franks* began to elect themselves Kings (for tho' till that Time the Succession to the Crown of the *Franks* was, as it were ²⁷ agnatic, yet it did not depend so much upon any fixed and certain Law, as upon the Choice of the People) the *Romans*, that they might have a stronger Assistance and Security, thought fit not to chuse a King of their own, but to take him whom the *Germans* had chosen, but yet with the Reserve ²⁸ of a Right, either to approve or disapprove the Election, so far as that Affair had any Relation to them.

4. And this Approbation of theirs used to be declared by their Bishop, and was solemnly notified by the Ceremony of a particular Coronation. And therefore, tho' he who is elected by the seven Electoral Princes, who represent the whole Body of the *Germans*, has an undoubted Right to reign over the *Germans*, according to their own Customs; yet is he not but by the Approbation of the *Roman* People made King or Emperor of the *Romans*, or as Historians often call him, ²⁹ King of

which may be seen in Mr. SCHMINCKE's Edition; as also the Life of *Charlemagne*, by BOECLER, in Tom. II. of his *Dissertations*, p. 2111. &c. and in III. p. 21. &c. and PUFENDORF, *De Origine Imperii Germanici*, Cap. I. p. 50. &c. with the Notes in the late Mr. TITIVS's Edition.

²² Supposing this true (for were not the *Judges* the first Persons in the State, before the Institution of Kings?) it doth not thence follow that a Bishop ought to be the first Person of his City, or that the Ecclesiastical Order ought to hold the first Rank in a Civil Society. Under the Law, the High Priests had, beside the Rights relating to Religion, some Authority in Civil Affairs; it was a poltick Establishment. But the Case is not the same under the Gospel; and if Ecclesiasticks have found Means to abuse the Simplicity of the People, for gratifying their own Ambition, it is contrary to the Rules of their Duty, and the Spirit of the Doctrine they preach.

²³ This is not agreed on; and it is much more probable that, as *Charlemagne* succeeded to the Rights of the Emperors of the East over *Italy*, he had also an hereditary Title to them. We find, at least, that *Charlemagne* and some of his Successors declared their Sons Emperors, without consulting either the *Roman* People or the Pope. See HERMANN. CONRING. *De German. Imper. Rom.* Cap. VII. § 21. &c. If in Process of Time, the Popes would pretend to crown whom they pleased, it was the Result of a Design they had long entertained, of making themselves Temporal Sovereigns both of *Italy*, and, if they could, of the whole Earth. But all this is nothing to the principal Question in Hand.

²⁴ See the Synod of *Pont-yon* among the Capitularies of *Charles the Bald*. And ÆMILIUS, *Lib. III.* of *Charles the Great*. GROTIUS.

²⁵ They had Reason to make this Distinction; for they reigned over the *Franks*, and had conquered the Kingdom of the *Lombards*, before they acquired the Title of Emperors. But that Title gave them no Right over the ancient *Roman* Empire: it was a Name not worth even the Sovereignty of *Rome*, and of the Cities of the *Exarchate*, since *Charlemagne* had had it before he was saluted Emperor.

²⁶ See WITHIKIND, *Lib. I.* and MEIBOMIUS's Observations there; and the Treaty of *Charles and Henry*, after the Capitularies of *Charles the Bald*, and the Remarks upon it of the judicious and learned JACOBUS SIRMUNDUS. WIBBO calls that Western Division of the *Franks*, the *Latin*, because the *Roman* Language was there in Use, as it is to this Day, for the People on the other Side the *Rhine* use the *German* Tongue. GROTIUS.

²⁷ This was observed by PRISCUS, in *Excerpt. Legat.* and by REGINON, *ad Ann. DCCCXVI.* *Charlemagne* in his Will, *If the Son of any of these three Sons*. GROTIUS.

See the *Historical Preface* to Father DANIEL's *History of France*, where he shews that, under the second Race of Kings the Crown was not hereditary. To which add what I have observed, Notes 4. and 5. on *B. I. Chap. III.* § 13.

²⁸ This is certainly Fact, and expressly attested by WIBBO, in his Life of *Conradus Salicus*. GROTIUS.

The Fact is very far from being certain; and this pretended Reserve is no where to be found. The particular Approbation of the *Roman* People might have been requisite for shewing that the Dignity of the Emperor of *Rome* was distinct from the Kingdom of *Germany*; and that is the Reason why the Emperor was crowned at *Rome*; a Coronation which was only a bare Ceremony, and no more gave the Pope a Right of approving or disapproving of the Election, than the Coronation performed at *Aix la Chapelle* or *Frankfort* gave the Inhabitants of those Towns a Right of rejecting the Person named by the Electors. See HERMANN. CONRING. *De Imper. Rom. German.* Cap. VII. § 21. &c. and BOECLER, in the Life of *Otho I.* p. 221. &c. of Tom. II. of his *Dissertations*.

²⁹ Thus the Pope, in his Excommunication of the Emperor *Henry IV.* names the Kingdom of the *Teutonic*s, and that of *Italy*, distinctly. See *Otho's* Privilege granted to *Alderamus*, published by MEIBOMIUS, after WITHIKIND's *Saxonica*; and CRANTZIUS *Saxonic*, V. in *Otho's* Oath, which GRATIAN has inserted in his sixty-third Distinction, *I will in Rome make no Decree or Order about any Thing that belongs to you (the Pope) or the Romans,*

of *Italy*; and by Vertue of that Title, ³⁰ he becomes Lord of all that did formerly belong ³¹ to the *Roman* People, and has not passed from them to ³² the Jurisdiction of any others, either by Treaties, or by Seizure, upon the Presumption of its being abandoned, or by Conquest. From whence we may easily apprehend by what Right the Bishop of *Rome*, when the Throne becomes vacant, ³³ grants the Investiture of the Fiefs of the *Roman* Empire, because he holds the prime Rank among the *Roman* People, who are at that Time intirely free and independent. For it is ³⁴ usual to have what relates to a whole Body, executed by the principal Person, in the Name of that Body, as we have elsewhere said. Nor is it ill observed by *Cynus* and *Raynerius*, that if the *Roman* Emperor, by Sicknes or Captivity, be incapable of discharging the Offices of his Government, ³⁵ it is in the Power of the People of *Rome* to appoint one in his Stead.

XII. Of the
Right of Heirs.

XII. That the Person of the Heir is to be looked upon to be the ¹ same as the Person of the Deceased, in Regard to the Continuance of Property, either publick or private, is an undoubted Maxim.

XIII. Of the
Right of a Con-
queror.

XIII. But how far the Conqueror may succeed to the Conquered, shall be explained below, when we treat of the Effects of War.

mans, without your own Advice and Direction. GROTIUS.

Our Author here confounds what he had before distinguished, the Kingdom of *Italy* with the *Roman* Empire. The former belonged to *Charlemagne*, as he had taken it from the *Lombards* by Conquest, and independently on the Imperial Dignity, which he afterwards acquired. This has been substantially proved by the learned CONRINGIUS, in his Treatise *De Germanorum Imperio Romano*, which I have quoted, and which ought to be consulted on this whole Affair. Those who are desirous of seeing in a few Words, what best can be said on the Subject, may read a Dissertation by the late Mr. HERTIUS, *De uno homine plures sustinente personas*, Sect. I. § 1, 2, 3. p. 55. &c. of Tom. III. of his *Comment. and Opuscula*, &c.

³⁰ As King of *Italy*, all that had been the Kingdom of *Lombardy* belongs to him: As *Roman* Emperor, he has only the City of *Rome*, the *Exarchate* of *Ravenna*, and some few Towns more which lay out of the Lands of the Kingdom of the *Lombards*; which is but a small Matter.

³¹ Not so, as appears from what has been said in the foregoing Notes.

³² See Chap. XXII. of this Book, § 13.

³³ Just as in the *German* Empire, the Elector *Palatine* and the Elector of *Saxony* do, who are Vicars of the Empire, and have it parted betwixt

them. See SERRANUS, in the Life of *Lewis XII.* GROTIUS.

The Comparison is not just. The two Electors, here mentioned, are incontestably in Possession of that Right by the Laws of the Empire; but the Pope has no Right to give the Investiture of the Fiefs of *Italy*, which are those in Question; since the Kingdom of *Italy* doth not at all depend on the *Roman* People, nor ever did since the Invasion of the *Lombards*.

³⁴ So during the Interregnum of *Poland*, the Archbishop of *Gnesna*, as Primate, supplies the King's Place, and sits on the regal Throne. PHILIP HONORIUS, in *Dissert. de Reg. Pol.* GROTIUS.

The Primate of *Poland* has that Right by the fundamental Laws of the State; but the Pope has no such Right, for the Reasons already alledged.

³⁵ Our Author's System being overthrown, this Consequence, and all others of the same Sort, fall of themselves.

XII. (1) And consequently, the Right of the Deceased is not extinct; it is continued in the Person of the Heir to whom it devolves. It is a Maxim of the *Roman* Law, agreeable to the Principles of the Law of Nature, that *An Inheritance is nothing but a Succession to the whole Right which the Deceased enjoyed.* Digest. Lib. L. *De diversis regulis juris*, Leg. LXII.

CH A P. X.

Of the Obligation that arises from Property.

I. The Obligation to return what is another's to the Owner, from whence, and what Manner of Obligation it is. We are obliged to restore the Things we have by us, and to do what we can that the Owner may have them again.

I. I. HAVING declared what Right we have over Things or Persons, as much as serves to our Purpose, let us now see what Obligation to us does from thence arise. Now this Obligation arises either from ¹ Things now in Being (un-

I. (1) On all this consult PUFENDORF, B. IV. Chap. XIII. where he only explains, supplies, or corrects what our Author advances in this Chapter. I go still farther than he, in my Notes on the

second Edition; where I resolve all the Questions here handled, by a Principle more simple, and, in my Opinion, much better grounded.

der the Name of Things, I shall comprehend the Right we have over Persons too, so far as we can receive any Benefit from it) or from Things not in Being.

2. From Things now in Being this Obligation naturally arises, ² that he who has in his Hands what belongs to me, should endeavour all he can, to have it come into my Possession; all he can, I say, for he is not obliged to an ³ Impossibility, nor to restore it at his own Charge; but he is obliged to signify it, that I may recover my own if I please. For as there was an Equality to be observed in that State, where all Things were common, that one as well as another might have the Liberty of using what was common; so as soon as ever Property was introduced, there was a Sort of mutual Engagement, ⁴ tacitly agreed on among the Proprietors, that if one Man should get another Man's Goods, he should be obliged to restore them to the Owner; for if the Power of Property reached no farther than to have a Thing restored upon demand, Property would have been too weakly secured, and the keeping of it too expensive.

3. Neither is it here considered, whether a Man has fairly or fraudulently come by a Thing; for an Obligation ⁵ which arises from a Crime, is different from that which arises from the Thing itself. The ⁶ *Lacedemonians* had cleared themselves indeed of the Crime of breaking the Articles, by condemning *Phæbidas*, who, contrary to their Treaty with the *Thebans*, had seized the Fort of *Cadmea*; but they were ⁶ charged with, and as much guilty of Injustice in keeping the Place, notwithstanding all this, still in their Hands. And this, as it was a very singular Injustice, so was it punished by a very singular Providence of GOD, as ⁷ *Xenophon* has remarked. Thus *Cicero* ⁸ blames *M. Crassus*, and *Q. Hortensius*, for holding

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² Among the positive Commands of the Law given to the *Hebrews*, there is one that enjoins the restoring a Thing found to its Owner. It is in the seventy-fourth commanding Precept. This is founded as well upon a natural Equity, as upon a Passage in *Deuteronomy* xxii. 1. St. CHRYSOSTOM, 1 Cor. v. 8. Ταῦτα γὰρ καὶ οἱ τῶν ἑξωθεν, &c. Even human Laws allow us to seize on our own wherever we find it, without pursuing the Thief or Robber. St. JEROME upon *Leviticus*, Many People think there is no Harm in keeping what they have found, tho' it belongs to some Body else, and cry, GOD gave it me, and to whom must I restore it? But let them understand, that it is a Crime very much like Theft, not to return what one has found. St. AUSTIN, in his eighteenth Sermon upon the Apostle's Words, If you have found any Thing, and not restored it, you have stole it. And a little afterwards, Whoever restores not what he has got of another Body's, would, if he had an Opportunity, rob him too. GRATIAN has put both these Passages together, in *Caus. XIV. Quest. V.* GROTIUS.

The Passage there quoted, and attributed to St. JEROME, belongs to ORIGEN, and is translated from his *Hom. IV. on Leviticus* vi. as is observed in PITHOU's Edition.

And the same St. AUSTIN, *De Fide & Operibus*, As by the Right of holding Estates, he who is in Possession of another Man's Lands, is very justly reputed the lawful and honest Proprietor, as long as he knows nothing of that Matter: But, when he is acquainted with it, and does not quit them, then is he looked upon as a pitiful tricking Fellow, and shall be justly termed a Rogue and a Villain. To this Purpose is a Law of the *Wise-goths*, *Lib. IX. Tit. I. Cap. IX.* But for some weighty Reasons the Civil Law does sometimes stretch and augment this Obligation, as the *Burgundian Law*, *Lib. I. Tit. VI.* in the Case of a Slave who runs away. *Nerva* ordered all those Goods to be restored which *Domitian* had unjustly taken from the right Owners, as we are told by XIPHILINUS. And *Belisarius*, in PROCOPIUS, *Gothic. II. Οἱ μὲν δ' ἑλόντες τὴν, &c.*

For my Part I think, that he who sets upon him and robs him, and he who has got what is his Neighbour's, and refuses to give it him again, are all one. GROTIUS.

3 That is, if he knows not the Master, or does not find Means to let him know he has his Goods, or convey them to him; the Obligation is then suspended.

4 There is no Necessity of supposing an Agreement in this Case. See my first Note on PUFENDORF, *B. IV. Chap. XIII. § 3.*

5 He who is in Possession of another Man's Goods, is obliged to restore them, purely because they are another Man's Goods. But he who has taken them, or retains them, knowing them to be such, renders himself, moreover, subject to Punishment.

^a *Plut. in Pelop.*

6 So thinks DIODORUS, *Lib. XV. PLUTARCH*, in his *Life of Agesilaus*, τὴν πόλιν ἐπεισεν, &c. He persuaded the City to take upon them the Injustice, and so to detain *Cadmea* for themselves. You have such another Action of *Bajazet*, in Regard to *Nicopolis*, mentioned by LEUNCLAVIUS, *Lib. VI. GROTIUS.*

It appears from the Passage of DIODORUS of *Sicily*, to which we are here referred, and that quoted from PLUTARCH, that those Authors argue on a Supposition that *Phæbidas* had acted of his own Head, or at least the *Thebans* had no Proof of the contrary. So that Mr. COCCEJUS, late Professor at *Franckfort*, on the *Oder*, in an academical Dissertation, *De Testamentis Principum*, Sect. II. § 14.) charges our Author wrongfully with contradicting himself; because the *Lacedemonians* were as culpable as *Phæbidas*, who had acted only by their Order; so that, in condemning him, they only condemned themselves.

7 He says they were punished by the very Persons on whom they had practised this Perfidy. *Hist. Græc. Lib. V. Cap. IV. § 1. Edit. Oxon.*

8 Certain Persons brought a forged Will, attributed to L. Minutius, a Man of a good Estate, from Greece to Rome. To make it pass more easily,

Part of an Estate by Vertue of a forged Will, tho' the Will was made and drawn up without any Fault of theirs.

4. But because this Obligation, as by an universal Contract, binds all Men, and creates a certain Right to the Owner of the Thing; hence it is, that all particular Contracts, as being made afterwards, do from thence receive an Exception. And this gives us some Light into that Passage of ^b Tryphoninus, *A Rogue deposits what he had stole from me, in Scius's Hands, who knew nothing of the Fellow's Villany; now should Scius restore it to the Thief, or to me? If we respect the Giver and the Receiver only, it is but just to restore the Thing entrusted, to the Person who delivered it. But if we regard the Equity of the whole Affair, and the Quality of all the Persons interested in it, the Thing ought to be restored to me, from whom it was taken by a detestable Action.* And then he very judiciously adds, *And I agree that it is Justice to give every Man his own, yet in such a Manner as not to keep from any other Person what he has a juster Title to.* Now he must needs have the juster Title, who claims by a Right as antient as Property itself, as we have just now shewn; whence it also follows, (which is in the same Tryphoninus) that he who ignorantly takes that from another in Trust, which he afterwards perceives is his own, is not obliged to restore it. And the Case which the same Author puts just before, ⁹ concerning Things deposited by him, whose Goods are confiscated, is better determined by this Principle, than what he there mentions about the Usefulness of Punishments.

5. For it is nothing to the Essence of Property, whether it arises from the Law of Nations, or from the Civil Law; for it is always accompanied with its natural Effects, whereof this is one, that every Man who is possessed of another's Goods, is bound to restore them to the right Owner. And this is what ^c Martian means, when he says, that by the Right of Nations a Man may bring his Action at Law, ¹⁰ and recover his Goods from the unjust Possessors of them. Hence comes that in ^d Ulpian, that he who finds what belongs to another, is in so particular a Manner obliged to restore it, that he ought not so much as to demand *εὐέλπον*, any Thing for finding it. All the Profits of another's Goods are likewise to be returned, with a Deduction only of reasonable Charges.

II. Where we have not the Things by us, or they are not in Being, we are obliged to restore what we have gained from them; this illustrated by several Examples.

II. 1. Of Things not still remaining, or in Being, Mankind have thought fit, that if you have gained by what is mine; whilst I am forced to go without it, you are bound to refund as much as you have gained by it, ¹ because you have so much the more for what you had of mine, and I so much the less for want of my own ^a; whereas the very Design of Property was to preserve an Equality, that is,

they put down M. Crassus, and Q. Hortensius, Co-heirs with themselves, two very considerable Persons, of the same Age; who suspecting the Forgery, but being conscious of no Fault committed by themselves, did not refuse the Advantage arising from the Crimes of others. But is this sufficient for clearing them from the Imputation of Guilt? I think not. De Offic. Lib. III. Cap. XVIII. Here our Author seems to me to suppose that M. Crassus and Q. Hortensius at first believed the Will to be genuine, and that having afterwards suspected it to be forged, they however took the Advantage of it, under Pretence they had no Hand in the Forgery. Thus the Example may make to the Purpose; as it shews it is not sufficient to have at first acquired the Possession of another Man's Goods, *bonâ fide*, as these two Romans had done, by acting as Heirs to what they believed fell to them by Vertue of the Will; but that as they ought to have left it to the lawful Heirs, as soon as they perceived the Cheat; so every Possessor, *bonâ fide*, ought to restore what he has in his Hands, as soon as he knows the true Proprietor. So that our Author may thus be screened from the Criticism of PUFENDORF, in the Chapter quoted, answering to this, § 4.

^b L. Bona fides. D. Deposit.

^c L. rerum, D. de act. rer. amot.

^d L. Falsus. D. de furtis.

⁹ See what I have said on PUFENDORF, *ibid.*

¹⁰ *Conditio*. This relates to the Subtilties of the Roman Bar: See the Dispute on this Law in Question, between ANTHONY FAURE, *De Errorib. Pragmatic.* Decad. LXXVIII. Err. IV. and REINH. BACHOVIVS, *Chiliad. Errorum*, or *Exercitation.* p. 53, 54.

II. (1) In my Notes on PUFENDORF, B. IV. Chap. XIII. § 3. 6. &c. I have examined our Author's Principles concerning this whole Matter; and shewn by Reasons, which tho' new, I think sufficiently solid, that the Possessor, *bonâ fide*, has as such, and while he remains such, the same Right as the unknown Proprietor. Hence arise Decisions widely different from these of our Author, in Regard to the Obligations of such a Possessor. Mr. THOMASIVS, who in the main is of the same Opinion with GROTIUS and PUFENDORF, owns in his Notes on HUBER, *De Jure Civit.* p. 535: That, when the Question is whether a Possessor, *bonâ fide*, is enriched by the Possession of the Thing itself, or by the Enjoyment of the Profits arising from it, it is an Enquiry subject to infinite Difficulties, and which it is almost impossible to satisfy.

^a *Cajet.* ad Th. 2. 2. 62. Art. 6. L. *Hem veniant.* D. de petit. *Hered.*

that

that every Man might enjoy his own. *It is against Nature*, says ^b Cicero, *for a Man to make an Advantage of another's Loss*. And in another Place, *Nature cannot bear that we should raise our Fortunes, and our Wealth, ² upon the Spoils and Ruin of other People*.

2. There is so much Equity in this Maxim, that the Lawyers have made Use of it to decide many Cases on which the antient Laws had not prescribed any Thing; ³ and they have always appealed to this Principle, as to a Rule whose Justice is of the greatest Certainty and Evidence. A Contract made by a Slave, who is employed as a Factor, ^c shall oblige his Master, unless he has before given publick Notice, that no Body should trust him. But if such publick Notice be given, and the Slave has any separate ⁴ Interest in that Contract, or if it turns to his Master's Advantage, such Notice shall be deemed a Fraud. *For I think*, says Proculus, *that any Man who would gain by another's Prejudice, acts fraudulently*, where the Word *Fraudulently* implies, whatever is done contrary to natural Right and Equity. He, who by the Mother's Order gives in ⁵ Bail for the Son's ⁶ Defendant, can have no Action ⁷ of Commission against the Defendant, because indeed he did not properly act for him, but only engaged himself on the Account of the Mother. But however, ⁸ according to Papinian's Judgment, an Action (an ⁹ indirect one, if I am not mistaken) for Business done, shall lie against the Defendant, because it is with the Security's Money that he is discharged.

So the Wife who gives her Husband Money, which she may by Law demand again, has a personal Action of Recovery against him, or a real indirect Action upon the Thing that was purchased ¹⁰ with that Money: Because, says Ulpian, it cannot be denied, but that the Husband is the richer for it; and the Question is, what Goods he possesses which belong to his Wife.

So again, if you have spent ¹¹ any Money which my Slave has stolen from me, thinking it to be his own, I have a personal Action of Recovery against you, as having acquired the Possession of my Goods without a just Title. Minors are not, according to the Roman Laws, obliged to pay what they borrow; but yet if the Minor be the richer for it, ¹² an indirect Action shall lie against him.

Thus, if another Man's Goods are pawned, and the Creditor sells them, the Debtor is discharged from the Creditor, to the Value of the Money received for

^b De Off. 3. L. Jure Naturæ. D: reg. Juris, & ibi Inter.

² CASSIODORE, XI. 16. *We now-a-Days confess that it is something very shocking, for one to be enriched by another's Misfortune*.

³ But, not to extend it too far, it must be considered whether he who makes Profit at the Expence of another Man, had no Right to make such Profit. For if he had, it is evident it is so much the better for him, and so much the worse for the other.

^c L. Si quis mancipiis. D. de Instit. act.

⁴ See Note 2. on PUFENDORF, B. VI. Chap. II. § 8.

⁵ He who of his own Head thus undertook the Defence of absent Persons, was obliged to give Security for the Payment of all Costs if he was cast. See Instit. Lib. IV. Tit. XI. De Satisfactionibus, § 5.

⁶ See Digest. Lib. III. Tit. III. De Procuratoribus & Defensoribus.

⁷ On Account of the Velleian senatus consultum, according to which a Woman could not enter into an Obligation for another, either mediately or immediately.

⁸ See CUJAS in Papinian. Quæst. Tom. IV. Opp. p. 209. &c. and ANTHONY FAURE, Rational. Tom. IV. p. 326, 327.

⁹ Actio utilis; an indirect Action. This is when the Case, for which an Action is granted in a Court of Judicature, not being included in the Sense of the Law, is deduced from it by a favourable Interpretation, suitable to the Rules of Equity, and consequently in an indirect Manner. Thus the Law-

yers call the opposite Action direct, as arising from the Terms and strict Sense of the Law. See Institut. Lib. IV. Tit. III. De Lege Aquelia, § 16.

¹⁰ He proposes a Case, where the Husband is insolvent, after a Divorce, so that the Wife, who would take Advantage of the Law, for revoking the Donation against the Prohibitions, cannot recover what she has given, but by taking Satisfaction one Way or other on the Thing bought with her Money. See CUJAS on this Law, Recit. in Paul. Quæst. Tom. V. Opp. p. 1088, 1089. and ANTHONY FAURE, Conject. Jur. Civil. Lib. V. Cap. IX. as also De Erroribus Pragmaticorum. Decad. LXXXI. Err. X. with the Criticism of BACHOVIVUS, in his Chilias Errorum, &c. on this Place.

¹¹ According to which it is to be said, that if you should take away and spend the Money which that Slave had stolen from me, not knowing it to be stolen, but supposing it Part of the Peculium of such a Slave; I am allowed a personal Action against you, on that Score, as having taken Possession of my Goods without a just Title. The Question here turns on a Slave which the former Master had sold with his peculium, and from whom the new Master, making Use of his Right, had afterwards taken the stolen Money, which he, bona fide, believed to be Part of the peculium acquired with the Slave. See on this Law CUJAS, in African. Tom. I. p. 1518. and ANTHONY FAURE, Rational. Tom. V. p. 512.

¹² See what I have said in my Treatise of Play, B. II. Chap. IV. § 21.

them; because, says *Tryphoninus*,¹³ be the Obligation what it will, since the Money raised was upon the Occasion of the Debt, and by Means of the Debtor, it is more equitable that it should advantage the Debtor, than be to the Profit of the Creditor; but the Debtor shall at the same Time be obliged to indemnify the Buyer, that he may not gain by another's Loss. And if the¹⁴ Creditor has taken more Rents from the Possessor than the Interest of the Debt amounts to, he must allow them as received in Part of Payment of Principal.

So if you have dealt with my Debtor, not as he is indebted to me, but thinking him to be so to some other Person, and borrow¹⁵ my Money of him, you are obliged to pay me; not because I lent you any Money, (for this could not be done but by mutual Consent) but because my Money is in your Hands, it is but just and reasonable that you should restore it me.

3. Our modern Interpreters of Law and Right, do very judiciously extend these Decisions to other like Cases: As for Instance, when the Effects of a Person, who is cast by Default, but who might put in an Exception, are offered to sale, they say, he ought to be admitted to recover the Money his Goods were sold for; and when one lends a Father Money for the Maintenance of his Son, if the Father becomes insolvent, he may have an Action against the Son, provided that this Son is possessed of any Thing that was his Mother's.

These two Rules being perfectly understood, there will be no Difficulty in answering such Questions as are often proposed, both by Lawyers and Casuists, in this Affair.

III. *He who has honestly got what is another's is not obliged to restore it, if it perishes, or be lost.*

III. For in the *first* Place, it is plain from hence, that he who comes by a Thing honestly, (for he who comes by it otherwise is inditable, not only for the Thing it self, but punishable for his having it) is not obliged to make any Restitution, if¹ the Thing be gone; because he neither enjoys the Substance, nor any Benefit by it.

IV. *But he is obliged to restore the Fruits or Produce of it that remain or are in Being.*

IV. *Secondly*, That whoever has come honestly by a Thing, is obliged, however, to restore all the Produce of it that he has still remaining; the Produce, I mean, of the Thing; for as to the Produce of his own¹ Labour and Industry, tho' without that Thing there had never been that Produce, yet does it not any Ways belong to the Thing itself. The Reason of this Obligation arises from Property, for he who is the Owner of the Thing, is naturally the Owner of all its Produce.

V. *Even those that are spent and wasted, unless it appears, that had he not had 'em by him he would have had no Occasion to have spent such Things.*

V. *Thirdly*, Whoever has honestly got what is another's, is obliged to give Satisfaction, not only for the Thing itself, but also for the Produce of it, tho' that Produce¹ be spent and gone, if it appear that he must otherwise have spent and consumed

¹³ *Dig. Lib. XX. Tit. V. De distractione pignorum, &c. Leg. XII. § 1:*

¹⁴ This Reason doth not fall on what immediately goes before, but on the first Part of the Period. For the Question is not here about a Creditor, who, for the Interest of Money lent, receives the Rent of an Estate which the Debtor possessed, *bonâ fide*, as his own; as the learned *GRONOVIVS* explains it. The Lawyer is speaking of a Creditor, who having lost the Possession of the Estate engaged, which proves not to be the Property of the Debtor, demands it, and recovers it by Law, together with the Rents which the Possessor had received from it. So that our Author might have omitted this additional Reason, which is nothing to the principal Subject, for which he alleges the Decision in the preceding Note; or at least he ought not to have imitated the Inaccuracy of the Lawyer *TRYPHONINUS*, who has obscured the Sense, by placing his Thoughts in bad order. See *Digest. Lib. XX. Tit. I. De Pignorib. & Hypothecis. Leg. XXI. § ult.*

¹⁵ That is, in Case the Creditor has given that Debtor Orders to lend it to a Third. See *Digest. Lib. XII. Tit. I. De rebus creditis, &c. Leg. XXXII.*

III. (1) Indeed, when the Question turns on a Thing bought, or acquired with any other burthenful Title, the Possessor, *bonâ fide*, will be so far from gaining, that he will lose by it; because the Profits he may have received will not commonly equal the Value of the Thing itself. But if he has received the Thing as a Present, and been in Possession of it some Time; he may be reckoned richer, in Regard of the Income, which he has enjoyed during that Time. So that this Distinction ought to be made, according to our Author's Principles; but, pursuant to mine, it is as unnecessary as subject to perplexing Discussions.

IV. (1) According to the *Roman Law*, the Decisions of which are grounded on Principles the same with those of our Author, a Possessor, *bonâ fide*, lawfully appropriates to himself both the Profits arising from his own Industry, and such as are purely natural. This is agreeable to what I have laid down in my Notes on the Chapter of *PUFENDORF*, already quoted.

V. (1) He is not obliged to it; because, as Possessor, *bonâ fide*, he had, during that Time, the same Right as the real Proprietor; as the very End and Practice of Property require. See the Notes on *PUFENDORF*, who on this Occasion adds the following

consumed as much of his own ; because he is looked upon to be so much the richer for it. Thus is *Caligula*, in the Beginning of his Reign, highly commended, ² because to those to whom he restored their Crowns, he also restored the Revenues of them that were in Arrears.

VI. *Fourthly*, That he is not obliged to make good the Fruits, or Produce, which he neglected to take, because he has neither the Thing itself, nor any Thing else in its Room.

VII. *Fifthly*, If such a Possessor shall give to another what was given him, he is not obliged to satisfy the Owner for it, unless it appear, that if he had not given that, he must have given as much some other Way ; for then the sparing of his own Stock will be reckoned a Matter of Gain and Advantage to him ¹.

VIII. *Sixthly*, If he bought what he has sold, he is obliged to return no more than the Overplus of what he sold it for ; but if what he sells ¹ was given him, he is obliged to restore what he gets for it, unless, perhaps, he has squandered away the Money, which otherwise he would not have been so lavish of.

IX. I. *Seventhly*, That another Man's Goods, tho' honestly paid for, are to be restored, nor can he demand a Reimbursement of his Charges ¹ : To which Rule I think it proper to add this Exception, ² unless where the Proprietor could not, in all Probability, have recovered the Possession of his own, without some Expence ; as, suppose it was in the Hands of Thieves and Pyrates. ³ For in this Case, what

Suet. c. 16.

VI. But not those which he neglected to take the Advantage of.

VII. That such a one is not obliged to make Restitution for what he has given away ; this with a Distinction.

VIII. Nor if he only sells what he bought ; this with a Distinction too.

IX. When he who fairly bought what is another's, may claim all, or part of what it cost him.

following Restriction : Unless the Possessor, *bonâ fide*, cannot indemnify himself by a Remedy against him of whom he holds the Thing.

² *Caligula* made this Restitution either out of Caprice, or vain Ostentation, or for some other Reason of the same Kind. For after he had reinstated *Antiochus*, the Person here mentioned by the Historian, in the Possession of that Part of Syria, called *Comagena*, which *Tiberius* had reduced into the Form of a Province, he took it away again from *Antiochus*. See SPANHEIM's *Orbis Romanus*, p. 361. And the Acquisition was originally not more lawful than most of the Roman Conquests. So that the Question here is not concerning a Possessor, *bonâ fide*.

VII. (1) But that which he has disposed of, equally belonged to him, when he gave it away.

VIII. (1) He is not obliged to restore either the Overplus in the first Case, or the full Price of what the Thing was sold for in the second ; for the Reason already often alledged. Besides, our Author had in his Margin quoted a Law of the *Digest*, which decides that if the true Master of a Thing stolen, knowing the Thief has sold it, takes from him by Force the Money he received for it, he in his turn is guilty of Theft ; because the Money produced by the Sale of a Thing is not the Thing itself, and therefore the Master of such a Thing cannot look on the Money as his own. *Lib. XLVII. Tit. II. De Furtis, Leg. XLVIII. § 7.* The Design of this Quotation is probably to shew that according to the Roman Lawyers, the Money, which the Possessor, *bonâ fide*, has got for another Man's Goods, which he has sold, is not the Thing itself, and therefore he is not obliged to restore it. For Want of observing this, PUFENDORF seems to censure our Author, in the Chapter so often quoted, § 11. Note 3. as if he intended to insinuate what is entirely contrary to his own Principles ; as is evident from B. II. Chap. VII. § 2.

IX. (1) Yes, if he can have his Remedy against the Seller ; but not otherwise, if we were to judge of the Matter by the Law of Nature alone. See Note 1. on § 13. of the Chapter in PUFENDORF, so often referred to.

² In *TERENCE's Self-Tormentor*, Act. IV. Scen. IV. ver. 42, &c.

*Sed illud quod tibi
Dixi de Argento quod ista debet Bacchidi ;
Id nunc, &c.*

But for the Money I told you, your Daughter owes to *Bacchis*, that must be paid down upon the Nail. Neither will you, I presume, shift it off by saying, *What is it to me ? Did she lend me the Money ? Was it done by my Orders ? What had she to do to pawn my Daughter without my Consent ?* As for that, *Chremes*, the old Saying is true, *You may have much Law on your Side, and but little Equity.* Where also see EUGRAFIUS. This Piece of Justice is approved too by the Rabbies, and by the *Wise Men*, *Lib. I. Tit. IX. Cap. IX. and Cap. XV. Alc. III. Præf. XXIX. Menoch. V. Præf. XXIX. Num. 26. Strach. Part. II. Num. 18. GROTIUS.*

³ But if the honest Possessor has been at no Charge, if he has only paid what the Thing was worth ; how is he entitled to profit by what the Proprietor would have been obliged to give for the Recovery of his Goods ? If the Proprietor is become more rich by the Bargain, so much the better for him ; the Possessor is not thereby more poor. Thus we see how disadvantageous the Condition of an honest Possessor would be, in Comparison of that of the Proprietor. And I will venture to say, that the Maxim under Consideration, how generally soever it may be received by the Lawyers and Moralists, will appear most shocking to Reason, if well considered ; and that it will be sufficient to make one suspect the common Principles are not supported by solid Foundations. Accordingly we find that the Customs of several Nations form Exceptions to the Maxim of the Roman Law in several Cases ; as in Regard to Things bought in a Fair established by publick Authority : Things pawned in the Hands of the *Lombards* : Old Cloaths bought of a Broker, &c. For if it appears that such Things are another Man's Property, the honest Possessor is not obliged to restore them to the true Master, but on receiving what they cost him. This our Author himself shews in his *Introduction to the Law of Holland*, written in *Flemish*, *Lib. II. Part III. Num. 13.* As doth also ZYPÆUS, *Not. Jur. Belgic. Tit. De rei vindic. verbo Jure Dominus* ; as HUBER observes, *Prælect. in Pandect. Tit. De adquir. rerum Dominio, Num. 2.* See likewise V O E T. in *Tit. De rei vindic. Num. 1.*

the Owner would have gladly spent to have it again, may very fairly be deducted. Because the actual Possession, especially when not to be recovered without Difficulty, is capable of being rated at a certain Value, and the Proprietor, when reinstated in it, is judged to be on this Account proportionably the richer. And therefore, tho' according to the ordinary Course of the Law, it signifies nothing to pretend to buy what is already our own, ⁴ all such Bargains being entirely void; yet does *Paulus* affirm, ⁵ that such a Purchase is binding, if it be first agreed upon, that we shall pay for the Possession of what another has of ours in his Hands. Nor do I think it at all material here, whether the Thing was bought ⁶ with a Design to restore it to the Owner, in which Case some are of Opinion, there does an Action for Cost arise; but others deny it, since an Action for Business done results from the Civil Law, and has none of those Foundations ⁷ upon which Nature builds an Obligation. Whereas our Inquiry here is after what is natural.

2. Not unlike this is what *Ulpian* writes, ⁸ of Expences laid out upon a Funeral, that a prudent and equitable Judge does not observe there what is strictly performed, and what the Rigour of the Law would allow, but administers Justice with a greater Liberty, since the Nature of the Action ⁹ will indulge him in it; and what he says in another Place, If a Man has done my Business, not so much with a View to serve me, as for his own Profit, and has been at some Charges about it, he shall have his Action ¹⁰ against me, not for what he laid out, but for what Advantage I have made of it. Thus too, the Owners of such Goods ¹¹ as in a Storm are thrown over-board, to lighten the Ship, come in for a Share with them whose Effects were by that Means preserved: Because he who has saved what would otherwise have been lost, seems to be so much the richer for it,

X. If *my* what does not belong to him who sells it, I must not return it to him, but to the Owner.

XI. If I have got a Thing in my Hands, and do not know the Owner, I am not obliged to part with it to any Body.

XII. If I take a Fee upon a dishonest Account, or for doing a Service that I am obliged to, I am not by the Law of Nature bound to restore it.

X. Eighthly, He who buys another Man's Goods, cannot return them upon the Hands of the Seller, and demand his Money back, because as soon as ever those Goods came into his Power (as we have said already) there commenced in him, an Obligation to restore them to the Owner ¹.

XI. Ninthly, Thus he who has got a Thing, and knows not the Owner of it, is not obliged by the Law of Nature to give it to the Poor, ² tho' this would be a very commendable Action, and what is a Custom in many Places very wisely established. The Reason is, because by the Laws of Property, none but the Proprietor can claim a Right. And to the Party here concerned, the not appearing of any Owner is the same as if there really were none.

XII. Lastly, That by the Law of Nature, whatever is taken either upon a dishonest Account, ³ or for an honest Piece of Service, which, however, he was of himself obliged to do, is not to be restored, tho' such a Restitution is what some

⁴ *Digest. Lib. XVIII. Tit. I. De contrahendâ emptione, Leg. XVI.*

⁵ *Ibid. Leg. XXXIV. § 4.*

⁶ *Spec. Saxon. I. 37. Landrecht, Tit. XV. GROTIUS.*

⁷ It is grounded on a most evident Maxim of natural Equity; viz. That he that doth another Service ought not to sustain any Damage from it. Now this would be the Case, if we refused to reimburse the Expences which a Man has made for our Use, at a Time when we could not attend our own Affairs. The Good of Society, and the Interest of each Member of it, require also that if during a Person's Absence, some Business of his is to be done, for which he has left no Orders, either general or particular, some Person should take Care of his Affairs. This the *Roman* Lawyers call a *received Practice*, (*receptum*) and add that, *No one would undertake this, was he not to be allowed an Action for his Expences.* *Institut. Lib. III. Tit. XXVII. De obligatione, quasi ex contractu, § 1.* So that unless he who has taken Care of the Affairs of a Person absent, did not plainly declare he designed to charge himself with them out of pure Liberality, and place the necessary Expences to his own Account, he is and ought to be supposed not to have given his Trouble for nothing.

⁸ *Digest. Lib. XI. Tit. VI. De religiosis, & sumptibus funerum, &c. Leg. XIV. § 13.*

⁹ This is said on Occasion of a Person, who being charged by the Will of the Deceased to bury him, acquits himself of his Commission, notwithstanding the Prohibitions of the Heir; and thus cannot have an Action against him, as for doing Business. But even according to the Maxims of the *Roman* Law, *He who is at the Expences of a Funeral, is supposed to contract with the Deceased, and not with his Heirs.* *Ibid. Leg. I.* So that the Debt is attached to the Goods left by the Deceased.

¹⁰ *Digest. Lib. III. Tit. V. De negotiis gestis. Leg. VI. § 3.*

¹¹ *Digest. Lib. XIV. Tit. II. De lege Rhodiâ, &c. Leg. I.*

X. (1) True; but, as he is not obliged to lose his Money, according to my Principles, it is sufficient that he gives the right Owner Notice, and as far as in him lies, furnishes him with Means for recovering his Goods.

XI. (1) *St. CHRYSOSTOM*, in the Place just mentioned. (§ 1. *Note 2.*) *GROTIUS*:

XII. (1) See what I have said at large on *PUFENDORF, B. III. Chap. VII. § 6. Note 2.* of the second Edition.

Laws have very justly enacted. The Reason is, because no Body is bound to part with any Thing, unless it belongs to some other ; but here the Property is entirely transferred, by the voluntary Act of the former Owner. ² The Case indeed will be otherwise, if there be any Vice in the Manner of taking it ; as for Instance, if we extorted it by Threats, or by Violence : For this is another Principle of Obligation, not to our Purpose ^a now.

XIII. Let us also add, that *Medina* is mistaken when he asserts, that the Property of other People's Goods may pass to us without the Owner's Consent, provided they are such Things as are usually valued by Weight, Number, and Measure. Because, tho' Things of this Nature admit of an Equivalent ; that is, may be returned by something of the same Kind ; yet, even in this Case, Consent must be first had ; or there must, by Vertue of some Law or Custom, be Room to believe that there has been such a Consent, as in what we borrow ; or when a Thing is spent and consumed, and so cannot be actually produced. But without such a Consent, either expressed or presumed, and excepting the Case of Impossibility, just mentioned, such Equivalents are not to be allowed of ¹.

XIII. The Opinion, that the Property of Things which consist of Weight, Number, or Measure, may pass without the Consent of the Owner, refuted.

² St. AUSTIN, in his fifty-fourth Epistle, makes a very excellent Distinction in this Affair. GROTIUS.

^a See § 9. of the following Chapter, and Chap. XII. § 9, 10, 11.

XIII. (1) That is, if such Things fall into any one's Hands, and he has not consumed or expended them, he is not less obliged to restore them *in Specie* to their right Owner, than other Sorts of Things which in their own Nature do not admit of an Equivalent.

CHAP. XI.

Of Promises.

I. 1. **W**E now come in the Order of our Subject ¹ to treat of Obligations arising from Promises ; where we presently meet *Franciscus Conmanus*, an eminent Scholar, opposing us. He maintains this Opinion, that those Agreements which include no Contract ² are not binding, either ³ by the Law of Nature, or Nations ; and yet he owns, that they may, however, be laudably performed, if the Thing promised be such as might, had no Promise ever been made, honestly, and conformably to the Rules of some Virtue, be done.

I. The Opinion which maintains that no Promises are naturally obliging, refuted.

2. To confirm his Opinion, he not only brings the Testimony of some Lawyers, but also these Reasons. *First*, That he who believes a Man who promises rashly, and without any Cause, is as much to blame, as he who himself makes such a vain Promise. ⁴ *Secondly*, That it would be very dangerous to most Men's Fortunes, if they were obliged to perform all their Promises, which they generally make more out of Ostentation, than a real Intent to perform them. And *lastly*,

I. (1) See Chap. I. of this Book, § 2.

² Συλλάλλαμα, that is according to the Notion of the Roman Lawyers, whom that Author follows, an Engagement valid in Law. Now Engagements valid in Law were either *Contracts*, properly so called, which were distinguished by some particular Name, as Sale, Letting, Loan, &c. or Agreements by Vertue of which there was somewhat in Fact, or actually given. Both of them are in general called not only *Contracts*, but also *Affairs*. (*Negotia*) Civil Affairs (*Negotia Civilia*) Civil Causes, &c. See Mr. NOODT's excellent Treatise, *De Pactis & Transactionibus*, Cap. IX.

³ Compare this with what I have said on PUFENDORF, B. III. Chap. V. § 9. Note 2. I have since seen a Dissertation of the late Mr. COCCIEUS, inti-

tuled, *De Jure circa Actus imperfectos*, printed at Francfort on the Oder, in 1699. in which he maintains, *Seet*. II. That even by the Law of Nature, a simple Agreement is not Obligatory. But for Proof of this Paradox, he makes use of very weak Reasons, which seem as void of Solidity as those of the French Lawyer, refuted by our Author. I say the same of the Explication given by the same COCCIEUS, in his Dissertation, *De Jure pœnitendi in Contractibus*, of what the Roman Law understands by Συλλάλλαμα, *Seet*. II. § 6. On Occasion of which he accuses our Author, § 7. Of not knowing what he says on that Subject.

⁴ See PUFENDORF, B. III. Chap. V. § 9. &c, with the Notes.

That it is reasonable to leave some Things to every Man's Honour, and not to confine him to a Necessity of Performance. It is reputed base not to perform what we have promised, not that it is really unjust, but because it argues a Lightness in the Promiser. He also urges the Testimony of *Cicero*,⁵ who said, that those Promises are not to be performed, which are of no Advantage to them who receive them, or are more prejudicial to us, than of Service to them. But if the Thing be not intire,⁶ he would have the Party not engaged to execute what he had promised, but only to make the other Person Amends for his Disappointment. And as for Agreements that are not of themselves obligatory, that they receive their Force, either from the Contracts in which they are inserted, or to which they are joined, or from the actual Delivery of the Thing promised: Which produces on the one Side Actions, on the other Exceptions, and a prohibiting any future Claim to what has been so delivered. And that such Agreements as do oblige according to the Laws, as those that are made by Way of Stipulation in Form, and some others, receive all their Power from the Benefit of the Laws, whose Efficacy is such, as to make that which in itself is only honest or reputable, to be also necessary and binding.

3. But this Opinion (of *Connamus*) taken so generally, as he expresses it, cannot be consistent. For, *First*, it would thence follow, that the Articles of Agreement made between Kings and People of divers Nations, so long as there was nothing performed on either Side, were of no Force, especially in those Places where there are no set Forms of Treaties or Contracts. Nor indeed can any Reason be given, why the Laws, which are, as it were, the common Covenant and Promise of the People⁷ (and so they are called by⁸ *Aristotle* and⁹ *Demosthenes*) should give such an obliging Force to Agreements; and yet, that a Man's own Will, endeavouring by all Means possible to oblige itself, cannot do the same Thing, especially in a Case where the Civil Law offers no Obstruction. Besides, since the Property of a Thing may be transferred by the bare Will, sufficiently declared, (as we have said before) why may we not in the same Manner transfer to one the Right, either of requiring us to transfer to him the Property of a Thing, (which is less than the actual Acquisition of the Right of Property itself) or of requiring us to do something in his Favour, since we have as much Power over our Actions as we have over our Goods?

4.¹⁰ And to this do wise Men agree; for as the Lawyers say, Nothing is more natural,¹¹ than that the Will of the Proprietor, desiring to transfer his Title to another, should have its intended Effect: In like Manner it is said,¹² that nothing is so agreeable to human Fidelity, as to observe whatsoever has been mutually agreed upon. So the Edict for Payment of Money promised,¹³ tho' there was no other

⁵ The Passage shall be quoted in *Chap. XVI.* of this Book, *Note 2.*

⁶ That is if the Person, to whom the Promise was made, has entered on the Performance of what he engaged to do in View of our Promise.

⁷ The Laws are not, properly speaking, Covenants, though they are the Result of human Establishment, grounded on Covenants. See *PUFENDORF, B. I. Chap. VI. § 2.*

⁸ *Orat. I. Adversus Aristogiton, p. 492. Edit. Basil.* The Passage is quoted at Length in the *Digest. Lib. I. Tit. III. De Legibus, &c. Leg. II.*

⁹ *Rhet. Lib. I. Cap. XV. p. 545. Tom. II. Edit. Paris.* That Philosopher elsewhere defines Law, *An Agreement made according to the common Consent of the People.* *Rhet. ad Alex. Cap. I.*

¹⁰ Inasmuch that the *Hebrews* maintain that Silence, in an Affair that will not admit of a Delay, has the Force of a direct Engagement. *BABA KAMA, Cap. X. § 4. GROTIUS.*

See on that Question the Commentaty of *CONSTANTINE* the Emperor.

¹¹ *Institut. Lib. II. Tit. I. De divisione rerum, &c. § 40.* These Words do not signify, as it may seem on first Sight, that a bare Declaration of a

Will of alienating one's Goods, is sufficient for transferring the Property of them on the Person in whose Favour that Will has been sufficiently intimated. For, according to the *Roman* Lawyers, who on this Occasion pay but little Regard to the true Principles of the Law of Nature, the Translation of Property can be effected only by the actual Delivery of the Thing alienated. All that is here meant, is, when a Man delivers a Thing with a Design of transferring the Property of it, (not of lending or depositing it) this, according to the Law of Nature, which *JUSTINIAN* re-establishes in its whole Force, is sufficient for transferring a full Right of Property; whereas before his Time, none but what were called *Res Mancipi*, could be thus alienated. See *Chap. VIII.* of this Book, *§ 25. Note 2.*

¹² *Digest. Lib. II. Tit. XIII. De Pactis, Leg. I.*

¹³ This our Author calls *Pecunia constituta*, in the Language of the *Roman* Lawyers, who likewise expressed it by one single Word *Constitutum*, as appears from the Law itself, from whence this Maxim is taken. *Digest. Lib. XIII. Tit. V. De Pecuniâ constitutâ, Leg. I.*

Reason alledged why it should be due, but the free Consent of the Promiser, is said to be agreeable to natural Equity. And *Paulus*, the Lawyer, says, ¹⁴ that he does naturally become a Debtor, who by the Law of Nations is obliged to pay, because we relied upon his Credit. Where this Word *Obliged* implies a certain moral Necessity, or an indispensable Obligation. Neither may we allow what *Connanus* says, that we are then reckoned to rely upon a Man's Credit, when the Thing promised ceases to be intire, or has something of it already performed by one Party. For *Paulus*, in that Place, was treating of a personal Action, brought for a Thing paid where it was not due, ¹⁵ which is entirely void, if the Payment was made upon any Agreement whatever. ¹⁶ Because then, even when the Money was not yet laid down, and consequently, when the Thing was as yet entire, one was obliged by the Laws of Nature and Nations, to discharge one's Promise; tho' the Civil Law, to prevent the Occasions of litigious Suits, gives no particular Encouragement to demand it.

5. And *M. Tully* attributes so great a Power to Promises, ¹⁷ that he calls Faithfulness the Foundation of Justice; which also ¹⁸ *Horace* calls *The Sister of Justice*; and the *Platonists* often term Justice, Ἀληθείαν, *Truth*; which *Apuleius* ¹⁹ has translated *Fidelity*, or the being as good as one's Word. And *Simonides* ²⁰ makes Justice to consist not only in returning what we have received, but also in speaking Truth.

6. But to make this plainer, we must carefully distinguish the three Degrees or Manners of speaking about Things future, which either really are, or at least are thought to be in our own Power.

II. ¹ The first Degree, or Manner, is a bare Assertion, signifying what we intend hereafter, in the Mind we are now in. And that this Declaration may be innocent, it is required, that we sincerely express what at that present Time we think, but not that we continue in that Thought. For the Mind of Man has not only a natural Power, ² but also a Right to alter a Design; and if there be any Fault in the Change, as it often happens, that is not essential to the Change, but proceeds from the Subject of it, because perhaps the first Opinion was the better.

II. A bare Assertion does not lay one under an Obligation.

III. The second Manner, when the Will determines itself for the Time to come, is by giving some positive Token, that sufficiently declares the Necessity of its Perseverance. And this may be called an imperfect Promise, ¹ which setting aside the

III. That an imperfect Promise does naturally oblige, but no Right arises from thence to the Person who receives it.

¹⁴ *Digest. Lib. L. Tit. XVII. De diversis regulis Juris, Leg. LXXXIV. § 1.*

¹⁵ *Conditio indebiti. See Digest. Lib. XII. Tit. VI.*

¹⁶ Thus, for Example, a Creditor could not demand the Interest of his Money, if the Debtor had obliged himself to pay Interest by a simple Agreement only, and without a Stipulation in Form. See § 4. of this Chapter, Note 5. But if the Debtor had paid the Interest thus promised, he had no Action at Law for recovering it, as not due, provided he gave the Money on the Foot of Interest; for otherwise, the Sum received by the Creditor was reckoned into the Principal. *Digest. Lib. XLVI. Tit. III. De solutionibus & liberationibus. Leg. V. § 2.*

¹⁷ *De Offic. Lib. I. Cap. VII.*

¹⁸ *Lib. I. Od. XXIV. ver. 6, 7.*

¹⁹ *De habitud. Doctrin. Platonic, Lib. II. p. 15: Edit. Elmenhorst.*

²⁰ *PLATO, De Republic. Lib. I. p. 331. Tom. II. Edit. Steph.*

II. (1) On this Distinction see PUFENDORF, *B. III. Chap. V. § 5, &c.* The late Mr. HERTIUS observes, that our Author borrowed it of DOMINIC DE SOTO, *Lib. VII. De Justitiâ & Jure, Quæst. II. Art. I.*

² That is, when we have not laid ourselves under a Necessity of not changing our Mind, and there is nothing without us, that imposes that Necessity on us. See PUFENDORF, *B. I. Chap. VI. § 6.*

III. (1) *Pollicitatio. An imperfect Promise*, according to Mr. BARBEYRAC's Version; who adds, that he could not express it otherwise. It is, continues he, a Term borrowed from the Roman Law, by which is understood *A Promise, or free Offer, made to a City, State, Community, or in short, to any Body of Men, on a just Account; as, for Example, in View of some Employment, either to be conferred, or actually conferred on him, or for repairing the Damage done by Fire, Earthquakes, or the Fall of Houses, Digest. Lib. L. Tit. XII. De Pollicitationibus, Leg. III. Leg. I. § 1. Leg. IV. See Mr. NOODT's De Fœnere & Usuris, Lib. III. Cap. VII.* concerning the Difference between a Donation and this Kind of Promise; which is not altogether the same with the imperfect Promise mentioned by our Author. For in this the Promiser doth not intend to give any Right, properly so called, to the Person in whose Favour he lays himself under a Necessity of performing what he promises. But in the *Pollicitatio*, the Promiser has a real Intention of giving a full Right to the Body, to which the Promise is made. The whole Difference between the *Pollicitatio*, and what our Author in the next Paragraph calls a *perfect Promise*, is that by Vertue of the Decision of the Civil Laws, the former is in full Force, and irrevocable, the Moment it is made, whereas the latter may be revoked, before the Acceptance, whatever Intention the Promiser might have had of giving a full Right to demand the Performance of his Promise.

Civil Law, obliges either absolutely or conditionally; but yet gives no Right, properly so called, to him to whom it is made. For it happens in many Cases, that we may lay ourselves under an Obligation, and at the same Time give no Right to any other over us, ² as appears in the Duties of Charity and Gratitude; and of this Kind is the Duty we are talking of, of religiously keeping our Words. And therefore no Man can by the Law of Nature, from such a Promise demand or detain what belongs to the Person so promising. Nor can he be compelled by that Law to perform what he has promised.

IV. What that Promise is from whence a Right to another does arise.

IV. A *third* Degree is, when to this Determination we add a sufficient Declaration of our Will to confer on another a real Right of demanding the Performance of our Promise. And this is a compleat Promise, as having the same Effect as the Alienation of a Man's Property. For it is either an Introduction to the Alienating of a Thing, or the Alienation of some Part of our Liberty. To the former belong our Promises to give, to the latter our Promises to do something. And of this the Scriptures give us a notable Proof, where they tell us, that ¹ GOD himself, who cannot be obliged by any Law imposed by another, would act contrary to his own Nature, not to perform what he promised, *Neb. ix. 8. Heb. vi. 18. and x. 23. 1 Cor. i. 9. and x. 13. 1 Theff. v. 24. 2 Theff. iii. 3. 2 Tim. ii. 13.* whence it is plain, that to perform Promises is a Duty arising from the Nature of immutable Justice, which as it is in GOD, so it is in some Measure common to all such as have the Use of Reason. ² Add to this Solomon's Judgment in the Affair, *Prov. vi. 1, 2. My Son, if thou hast been Surety for thy Friend, thou hast tied up thy Hands to a Stranger, thou art ensnared by the Words of thy Mouth, thou art taken by the Words of thine own Mouth.* And from hence it is, that a Promise is called by the Hebrews אסרה, a Bond, or a Chain, and is ³ compared to a Vow, *Num. xxx. 4, 5, 6.* And so is the Original of the Word *ὑπόσχεσις*, observed by Eustathius, upon the second of the *Iliad*, *Ἀλέσκει γὰρ πῶς ἢ καλέσκει τὸν ὑποχέμενον ὁ τὴν ἑπαγγελίαν δεξάμενος*, He who receives the Promise, ⁴ seizes upon, and binds the Promiser: Which is very well expressed by Ovid in his second Book of *Metamorphoses*, where the Promiser says to the Promised, *Vox mea facta tua est*, My Word is become yours ⁵.

2. These Things being premised and understood, we may easily answer Connanus's Arguments. For what the Lawyers say of a bare Promise, has Respect only to ⁶ what was introduced by the Roman Laws, which made a Stipulation ⁷ in

² That is, not a perfect strict Right, by Vertue of which a Man may be forced to do what he is obliged to; as appears from what our Author says in the Close of this Paragraph. The Maxim here laid down can be admitted in no other Sense; for as for the Rest, all Obligations to another, answer to some Right, either perfect or imperfect; and this is sufficiently shewn by the Example of Gratitude. See PUFENDORF, B. III. Chap. V. § 1. and what I have said on that Place, in a Note of the second Edition.

IV. (1) So BALDUS, *Lib. I. D. De pacis. GROTIUS.*

² See PUFENDORF, B. II. Chap. III. § 5.

³ Men do, as it were, enter into a Covenant with the Gods, by making their Vows to them. *Schol. Horat. GROTIUS.*

It is the Scholiast CRUQUIUS who says this, in his Explanation of the Poet's Idea, who uses the Words *Votis pacisci*, *Lib. III. Od. XXIX. ver. 59.*

⁴ From hence they are called the Bonds of our Credit. *Donat. ad Eunuch. GROTIUS.*

⁵ These are the Words of Apollo to his Son Phaeton, when, after he had sworn by the River Styx to grant whatever he should ask, that headstrong young Man desired the driving the Chariot of the Sun for one Day,

— Temeraria, dixit,

Vox mea facta tua est.

Metamorph. Lib. II. ver. 50, 51.

Which signifies, *The rash Request you have made shews that I promised too hastily.* Here is nothing that comes near the Sense which our Author had in his Mind. But either his Memory failed him, or he was misled by some faulty Edition, and read,

— Temerarie, dixit:

Vox mea facta tua est —

⁶ It is very judiciously observed by PAULUS, *Sent. Lib. XI. Tit. XIV. If there be only a bare Promise to pay Interest, it signifies nothing, for among the Roman Citizens, a bare Promise bears no Action. GROTIUS.*

A German Lawyer, in an Abridgment of our Author, has maintained, that the Reason why the Roman Lawyers say, a bare Promise doth not bear an Action at Law, is because there was no such Thing as a bare Promise; all Promises having a Relation to some Contract, or to some Agreement authorized by the Laws. KULPIS, *Colleg. Grotian. Exercit. VI. Cap. II. § 1. in Not. OBRECHT*, in his Notes, approves of this Thought; but it has been confuted by a Lawyer of the same Nation. See the *Paræmiæ Juris Germanici*, by the late Mr. HERTIUS, *Lib. I. Cap. VIII. § 2, 3.* To which add what Mr. BYNCKERSHOEK says in his Dissertation,

⁷ in-Form, an undoubted Sign of a deliberate Mind. Nor do we deny but that such Laws are in Force among other Nations. *What Law does oblige us to perform a bare Promise?* says *Seneca*, speaking of a human Law, and ⁸ a Promise under no solemn Form.

3. But

Dissertation, *De Pactis Juris stricti contractibus in continenti adjectis*, Cap. I.

⁷ See Mr. NOODT's Treatise *De Pactis & Transactionibus*, Cap. X. In Order to enter better into our Author's Notions, it will be proper here to set down what we find delivered at large in one of his Letters, written for the Instruction of his Brother some Years before the Publication of the Work before us. "The Romans, says he, did not design to give all Promises made *vivâ voce*, such a Force of obliging, as that the Person to whom a Promise is made in that Manner, should always have a Right to demand the Performance of it; which is a natural Consequence of all Obligations merely natural. It is asked, whether Legislators really had such a Power, since JUSTINIAN himself acknowledges that the Principles of the Law of Nature are immutable? The Difficulty appears the more considerable, as the Maxims of the Law of Nature in Respect to Agreements and Promises are not reduced to a bare Permission; but imply a positive Order and a real Obligation. Now it may happen two Ways, that a human Legislator may permit a Thing seemingly contrary to the Law of Nature: Either by not acting at all; or by giving a Right to act. The Legislator doth not act at all, when he doth not punish, for Example, Lies, Fornication, and such other Crimes, contrary to the Law of Nature and the Law of GOD. He gives a Right to act, when, for Example, he authorises a Man to keep a Thing honestly acquired by Prescription. The Question is, which of the two takes Place in Promises, and Agreements made without a Stipulation in Form: Whether the Civil Law only hinders a Man from suing for what is due by Vertue of such Engagements, or whether it moreover gives a real Right to break through them? There are Difficulties on both Sides; but the latter may very well be maintained; because supposing the Civil Laws really authorize a Person to break his Word in the Case under Consideration, they yet do nothing contrary to the Law of Nature. For the Law of Nature doth not require purely and simply, that a Man should be obliged to stand to the Performance of all he has promised; but only on a Supposition that he has promised what he had a Power to promise; in the same Manner, as all Alienations are not valid by the Law of Nature, but only those whereby we alienate what we have a Power to alienate. In Reality, to be truly a Debtor, it is necessary that the Person had a Permission to contract the Debt: In Order to enter into an Obligation, the Person must be at Liberty to engage himself: To make an Alienation valid, a Man must have the full and whole Property of the Goods so disposed of. Now the Civil Laws, without clashing with the Law of Nature, and even in a Manner approved of and advised by that Law, may lay a Restraint on each Man's natural Power of entering into an Obligation, either to the Advantage of the Promiser, or for the publick Good. Thus a Vow made by a Daughter, without her Father's Consent, is by GOD himself declared null and void. *Numb. xxx. 5.* And natural Equity requires that some Sort of Restraint should be laid on the Force of a Consent given by Persons of weak

Judgment and easily surpris'd; as is declared in the Roman Law, in Relation to the Guardianship of Minors. *Digest. Lib. IV. Tit. IV. De Minoribus, &c. Leg. I.* When therefore the Civil Laws declare a Promise or Agreement null, they order nothing contrary to the Law of Nature. For they do not dispense with a Person's performing what he had a Power to promise; they only take away that Power, and consequently prevent there being any Obligation even according to the Law of Nature; for a Person lies under no Obligation, when he has promised what he could not promise: So that the Law of Nature is not changed in such Cases; all the Change is in the Matter or in the Subject.—Though Persons at Age have commonly more Judgment than Minors; some People are very forward in promising. So that the Civil Laws cannot do better than prescribe certain Forms for obligatory Promises, to hinder too hasty Engagements, and in some Measure caution Men to think well of what they do. We see they proceed in the same Manner in Relation to *Wills*, in Order to prevent Surprizes, to which some Persons are exposed from the Practice of the crafty and artful, &c." Part II. Epist. XII.

Thus our Author. I grant that the Civil Laws may take away the Right of suing for the Performance of a Promise, which is valid by the Law of Nature, and thus annul the Obligation, as much as in them lies. But, in my Opinion, this doth not hinder such a Promise from being valid in itself, when the Promiser, being well assured it would not stand good in Law, did not decline making it; for he thereby renounced the Benefit of the Law. The Case is not the same in Regard to *Wills*. The lawful Heir has made no Renunciation; and besides, the Design of the Law, in requiring certain Formalities as essential for rendering a *Will* valid, is at least as much to restrain the Liberty of disposing of one's Goods by Will, as to prevent Frauds and Surprizes. The former is necessary for the Publick Good; so that it may be said, a Testator is really deprived of a Power to make his Will in any Manner but that prescribed by the Laws; and consequently that the lawful Heir has a full Right to set aside a *Will* defective in that Point. But I see no Reason, in which the Advantage of the Publick is concerned, that, in Matter of Promises, where there is no Defect according to the Law of Nature, can require the Laws should deprive the Promiser of a Power of making, and standing to them, whether he doth or doth not design to renounce the Benefit they afford him. Compare this with what I have said in my Discourse, *On the Benefit of the Laws*, p. 21. &c. *Edit. Amst.*

⁸ That is, not ratified as the Law directs in such Cases. So in his nineteenth Epistle he makes this Distinction, *Jam non promittunt de te sed spondent. They now do not promise but engage for you.* A Stipulation and an Engagement is called by PAULUS, *A Solemnity of Words*, Lib. V. *Sent.* and by CAJUS Tit. *De Obligationibus quæ ex consensu fiunt.* GROTIUS.

I doubt whether SENECA speaks of any but the Roman Laws in the Passage here quoted. It is to be observed that for a long Time, every Promise made with Stipulation, though in Jest, was valid in Law,

3. But there may be naturally other Signs of a deliberate Mind, besides this Stipulation, or any other Thing like it, which the Civil Law requires to create an Action. And indeed, as for that which is made without Deliberation, we do not allow it to have any Power of obliging at all, as *Theophrastus*⁹ has observed in his Book about Laws. Nay, and as to what is done deliberately, but not with an Intent thereby to transfer a proper Right to another, we deny that from thence there arises naturally a Right to any Man to demand any Thing of us in Strictness, tho' we acknowledge, that we ought, not only for our Reputation, but also by a Sort of moral Necessity, to perform what we have thus promised. As to that Passage of *Cicero*, we shall treat of it below, when we come to speak how Agreements are to be understood; but now let us see what Conditions are required to make a Promise perfect.

V. First, to make a Promise complete, it is required that the Promiser have the Use of his Reason; where the Law of Nature is distinguished from the Civil Law in the Case of Minors.

V. 1. First, It is required that the Promiser should have the Use of his Reason; ¹ therefore the Promises of Madmen, Ideots, and Infants are void. But the Case of Minors is not the same; for tho' they are supposed not to have a perfect Judgment, as are also Women, yet that is not always so, nor is it of itself sufficient to render their Acts invalid ².

2. But at what Years a Child comes to the Use of Reason, cannot be certainly determined; but must be judged either from his daily Actions, or from the general Customs of every Nation. Among the *Hebrews*, ³ a Lad after thirteen Years of Age might oblige himself by any solemn Promise, and a young Woman after twelve. In other Places the Civil Law, for very good Reasons, declares many Promises of Pupils and Minors void, and that not only among the *Romans*, but the *Grecians* too, as is observed by *Dion Chrysostom*, in his seventy-fifth Oration ⁴. And some they qualified by the Benefit of a Restitution; but these are the peculiar Effects of the Civil Law, and therefore have nothing common to the Law of Nature and Nations, unless it be that where they are received, there it is natural that they should be observed. ⁵ And therefore, if a Foreigner makes a Bargain with a Native, he shall be obliged by the Laws of his State, because he who enters into a Contract in any Place, is a Subject for the Time being, and must be obedient to the Laws of that Place.

3. But it is quite a different Case, if the Bargain was made either upon the Seas, or in a desert Island, or by Letters between Persons at a Distance. For such Contracts are to be regulated only by the Law of Nature; as also such Agreements as pass between Sovereigns, considered as such. For what they do in a private Capacity may by the Laws be made void, ⁶ when it is in their Favour, but not when they will be Sufferers by it.

VI. Whether a Promise given thro' Mistake does naturally oblige us, and how far it does so.

VI. 1. As for a Promise made by an Error or Mistake, ¹ the Point is more intricate and perplexing. For it is usual to distinguish an Error, which concerns the Substance of the Thing, from that which does not concern it. Whether any Fraud gave Occasion to the Promise or not. Whether the Person with whom we

Law, and produced its full Effect in the same Manner, as if it had been made seriously. See Mr. Noodt, *Jul. Paul. Cap. XI.* Hence it appears that our Author is not entirely in the Right, when he says that the *Roman Laws* considered the Formalities of Stipulations, as a certain Mark of a real Consent, given with Deliberation. For on that Foot, the Moment there were any clear Proofs of a serious Design of engaging one's self by a bare Agreement, the Presumption ceasing, the Engagement would have been valid in Law.

⁹ That Philosopher says, *It is safer to trust a Horse with his Bridle on his Neck than loose Words.* *DIAGEN. LAERT. Lib. V. § 39.* But our Author here had his Eye on *STOBEUS*, *Serm. XXIV.* Where there is an Extract taken probably from *THEOPHRASTUS*, *Treatise of Laws*; as appears from the Title, under which *STOBEUS* has placed that Extract.

V. (1) See PUFENDORF, *B. III. Chap. VI. § 3. &c.*

² Tho' a Person is not endowed with all possible

Prudence, and Judgment; if he has Understanding enough to know what he does, and to determine with Deliberation; the Promises and Agreements made by him are valid, according to the Law of Nature, when there is no Error on the Promiser's Side, or no Fraud on the Side of the Person, to whom the Promise is made.

³ See SELDEN, *De Successionibus in Bona defunctorum*, Cap. IX.

⁴ See PUFENDORF, *B. III. Chap. VI. § 4. Note 3.*

⁵ Judges are undoubtedly obliged to make this the Rule of their Sentences. But it does not follow that all Obligations contracted by a Minor, are void, so that, according to the Law of Nature and in Conscience, he is always excused standing to his Promise. See *Note 5.* on PUFENDORF, as last quoted.

⁶ See *Chap. XIV.* of this Book, *§ 2. Num. 3, 4.*

VI. (1) See PUFENDORF, *B. III. Chap. VI. § 6, &c.*

deal was privy to, or had any Share in that Fraud. Whether it be an Act of strict Right and Justice, or only such as our Honour and Reputation would incline us to. For the Opinions of Writers differ according to the Variety of these Cases, declaring some Acts to be void, and others valid; but so, that it is wholly at the Pleasure of the Person injured, either to repeal or reform them. But most of these Distinctions come from the *Roman Laws*, as well from the old Civil Law, as from the *Prætorian*, and some of them are not perfectly true, or well digested.

2. But in Order to find out the natural Truth, it will be proper to apply here a Maxim concerning the Force and Efficacy of Laws, which has been ever allowed by the general Consent of all People, *viz.* that ² when a Law is founded upon the Presumption of a Fact, that was not really so, then that Law shall not oblige, because the Truth of the Fact failing, ³ the whole Foundation of the Law fails with it. And when a Law is founded upon such a Presumption, may be gathered from the Subject of the Law, from the Words of it, and from the Circumstances. So we may say too, ⁴ that in Case a Promise be made upon the Presumption of a Fact, that is not really so as the Promiser believed, that Promise is naturally of no Force; because the Promiser did not give his Consent to the Thing absolutely, but upon such and such Conditions, as are not verified by the Event. To which we may refer that Question in *Cicero, De Orator.* 1. of him ⁵ who falsely believing his own Son to be dead, had made another his Heir.

3. But if the Promiser were negligent, in searching out the Truth of it, ⁶ or in expressing his own Sense, and thereby caused any Damage to the other; the Promiser shall be obliged to repair it, not by Vertue of the Promise, but on the Account of the Damage occasioned through his Fault, of which we shall treat more by and by. But if there were a Mistake in the Promiser, and yet that Mistake was not the Occasion of the Promise, the Act shall be valid, because there was nothing wanting of the true Consent; but in this Case also, if the Person to whom the Promise was given, did by any Fraud ⁷ of his Occasion that Mistake, he shall be obliged to repair any Damage that shall arise to the Promiser from that Mistake, from that other Principle of Obligation. But if the Promise was but in Part caused by a Mistake, the Promise shall as to the Rest stand good.

VII. 1. There is no less perplexing a Question about a Promise made through Fear, ¹ for here too People generally distinguish between Fear, that is extremely great, either absolutely, or with Regard to the Person apprehensive, and that which is slight and inconsiderable; whether occasioned justly or unjustly; whether by the Person who receives the Promise, or by some other. They also distinguish between such Acts as are purely gratuitous, and such as both Parties are interested in; and according to these Differences it is, that some Acts are said to be void,

VII A Promise made thro' Fear obliges; but he who caus'd that Fear is bound to disengage or indemnify the Person promising.

² See an Instance in *L. Mancipia, C. de Servis fugitivis*, in *GAIUS*, *Lib. I. Obs. XI. Num. 7.* and in *MOLINÆUS, Ad Consuet. Paris. Tit. I. Sect. XIII. Gl. III.* *GROTIUS.*

³ See *Chap. XVI.* of this Book, § 8.

⁴ *SENECA, De Benefic. IV. Cap. XXXVI.* He is a Madman that stands to a Mistake. *GROTIUS.*

⁵ *De Oratore, Lib. I. Cap. XXXVI.* See *PUFENDORF, B. III. Chap. VI. § 6. Note 5.* in the second Edition.

⁶ We must distinguish here between *Promises of pure Generosity*, and *Agreements*, where a Promise is made with a View to something promised by the other Party in his Turn. In the former, as they are a pure Effect of Liberality, the Promiser is responsible only for his Sincerity. As nothing but his own good Will engages him to promise; so nothing obliges him to examine all Things with the utmost Exactness. Acts of Kindness would certainly be too burthensome, were Men obliged to pay, as it were a Fine, whenever designing to do another a Favour, and thinking himself able to do it, he is disappointed of his Hopes. If therefore the Person, to whom the Promise was made, has depended on

it, as on a Thing, which could not fail; it is his Fault and not ours; as well as when a Man has not expressed himself with sufficient Clearness. For it was his Business to call for an Explanation of what lay open to some Ambiguity; when this is not done, it is presumed that we thought ourselves sufficiently understood. But in Regard to Agreements, where both Parties have an Interest, a Man may be answerable for his Negligence in not examining the Thing in which a Mistake lies, and not expressing himself in a sufficient Manner. This is to be judged of according to the Circumstances, whereby it is the Business sometimes of one of the Parties, and sometimes of the other to speak with the utmost Exactness, or examine every Thing.

⁷ Concerning the Effect of Fraud in Promises, and Agreements, see the Text and the Notes on *PUFENDORF, B. III. Chap. VI. § 8.* To which add the notes on the Abridgment of *The Duties of a Man and a Citizen*, *B. I. Chap. IX. § 13.* Second Edition.

VII. (1) See *PUFENDORF, B. III. Chap. VI. § 9. &c.*

others revocable at the Will of the Promiser, and others to be wholly remitted; concerning every one of these Cases, there is a great Variety of Opinions.

2. For my Part I wholly agree with them who hold that, setting aside the Civil Law, ² which sometimes quite takes away, and sometimes lessens the obligatory Power, he who through Fear has promised any Thing, is obliged to perform it, because his Consent here was absolute, and not conditional, as in the Case of an Error. For, as *Aristotle* has well observed, ³ he who through Fear of Shipwreck, throws his Goods over-board, would gladly preserve them, provided there was no Storm, and he in no Danger of being lost; but upon Consideration of the Time and Place, he absolutely resolves to part with his Goods, rather than be himself destroyed. But yet I must allow, that if the Person to whom the Promise was made, did cause not a just but an unjust Fear, and this a very small one too, yet if the Promise was, upon this Motive, made, he is obliged to discharge the Promiser, ⁴ if he desire it; not that the Promise is in itself void, but on Account of the Damage unjustly caused by extorting the Consent. But what Exceptions the Law of Nations allows in this Case, ⁵ shall be explained below, in its proper Place.

3. But that some Acts are made void ⁶ on the Account of Fear, which Fear was occasioned not by him with whom we were dealing, but by another, is an Effect of the Civil Law, which often nulls Acts, tho' freely done, if the Doer be of weak Judgment, or leaves it to his Choice, either to stand to or go from his Word. And here what we have said before, concerning the Force and Efficacy of the Civil Law, ⁷ we would have again remembered. But what Force Oaths add to the Confirmation of Promises, shall be shewed hereafter.

VIII. I. To

² The Civil Laws, precisely speaking, never hinder a Man from obliging himself validly in Conscience, and according to the Law of Nature, when he had a serious Intention of so doing, and there are none of these Defects which naturally make the Obligation void. The vacating of the Contract, and the Restitution, which they grant, is but a Favour, which may be renounced; and a Man is supposed to renounce it, whenever, being unacquainted with the Law, he made a serious Bargain concerning the Things for which that Favour is granted. So that, supposing Promises and Agreements made under the influence of Force really obligatory by the Law of Nature; the Civil Law, which declares such Engagements null and void, and relieve those who have contracted them, do not remove the Obligation in Conscience of standing to them.

³ *Ethic. Nicomach.* Lib. III. Cap. I. p. 28. Tom. II. Edit. Paris.

⁴ But, if the Promiser has really given his Consent, what signifies enquiring, whether the Fear be just or unjust? No Wrong is done to the Person who consents. Besides, this useless Circuit of our Author shews how far his Ideas are from being just. See what is said on PUFENDORF, as quoted in Note 1.

⁵ In this Book, Chap. XVIII. Sect. XVIII. XIX. and B. III. Chap. XIX. Sect. II. GROTIUS.

⁶ SENECA following Nature, *Controv.* Lib. IV. Contr. XXVI. delivers himself thus, *What is transacted through Compulsion and Necessity may be repealed, if this Compulsion and Necessity was occasioned by the Party concerned in the Bargain: For it is nothing to me, says he, how you are imposed upon, if I don't impose upon you. It must be my Fault, if I am to suffer for it.* Compare with this what you have lower, B. III. Chap. XIX. Sect. IV. GROTIUS.

Had our Author copied two or three Lines more out of SENECA's Declamations, he would have found the Answer, which follows immediately, and which may be seen in PUFENDORF, as last quoted, § 11. where he likewise considers how far

Fear caused by a third Person, renders an Agreement null, by the Maxims of the Law of Nature alone. What is to be said on that Question in my Opinion amounts to this: If it is with Design of doing the Person forced a Service, that we treat with him on a Thing, which he would not agree to without Violence, the Obligation is entirely valid, without Dispute. But if we had our own Interest in View, and not the Advantage of the other contracting Party, we must distinguish. Either the Fear which engages him to treat, is known to us, or not. If not, the Agreement is entirely valid; for we are not obliged to guess. But if we very well see that Fear is the direct and only Motive, which engages the other to treat with us; we then ought not to depend on such an Engagement; the Principle of it ought, at least, to have the same Effect, as the Mistake; and we may here apply what the Roman Lawyers say, tho' in a different Sense: *Metus habet in se Ignorantiam. Fear implies Ignorance.* If we designed that the Exception of Fear should not take Place, we ought to make the Person, with whom we treat, expressly renounce it, because we are well assured he promised against his Will. In that Case it is an Act of Generosity to provide the Person forced with Means for relieving himself by an involuntary Engagement.

But it would be hard and unjust to take Advantage of such an Engagement. We ought, at least, to leave the Person forced the Liberty of ratifying or not ratifying his Promise, when the Fear ceases.

⁷ What our Author would have his Readers remember and apply in this Place, is what he has said in the foregoing Paragraph, Num. 2. So that his Opinion is, that in order lawfully to require the Person to whom we have made a Promise, should release us from the Promise, which was valid, tho' forced; or to excuse our selves from standing to such a Promise, as being really null, by Vertue of the Civil Laws, which deprive it of the Force it would otherwise have had; the Fear must be real, and not a bare Panic Fear. So that though a Person, by the Influence of Fear, is determined to enter into an Engagement, which he would not have contracted

VIII. 1. To make a Promise firm, it is requisite, that the ¹ Thing promised either now is, or may be, in the Power of the Promiser; wherefore in the first Place, it is certain, that no Promise can oblige us to that, which is in itself unlawful; for no Man has a Power to do any such Thing, or can have. But a Promise (as we said before) receives its Force from the Power of the Promiser, nor does it reach any farther. *Agefilaus* ² being once challenged upon his Promise, answered, *Ναὶ δῆτα, εἰ δ' ἐστὶ δίκαιον· εἰ δ' οὐκ, ἔλεξα μὲν, ὡμολόγησα δ' ἔ.* *Very well, if it is just; but if not, I only said it, I did not promise it.*

VIII. To make the Promise valid, it must be in the Power of the Promiser to perform it.

2. If the Thing be not now in the Power of the Promiser, but may in Time be, the Validity of the Promise remains suspended till that Time, ³ because the Promise must then be supposed to be upon this Condition, that it ever be in his Power. But if that very Condition, by which the Thing is to come into the Promiser's Power, be in his Power too, then the Promiser shall be obliged to do whatever is morally possible for procuring the Accomplishment.

3. But the Civil Law, for Reasons of publick Advantage, nulls many Promises of this Kind also, which the Law of Nature would oblige us to; as that of a Man or Woman already married, who promise some future Match, ⁴ and several other Promises made by Minors, and Children while under their Parents.

IX. Here it is usual to enquire, whether a Promise made upon a Motive that is naturally dishonest and criminal, ¹ can be valid by the Law of Nature; as if a Man should promise any Thing to him that should kill another: That this is a criminal Promise, is plain enough from this, in that it was made designedly to tempt a Man to do what he ought not to do. But yet not every Thing that is ill done, does lose the Effect of a just Right, ² as appears from a profuse and extravagant ³ Deed of Gift. Here is the Difference, as soon as ever the Gift is made, the

IX. Whether a Promise made on an ill Account be valid; this explained by a Distinction.

tracted without it; if however, he had no Reason to fear, either on the Part of him with whom he treats, or of a third Person, so much the worse for him. The Fact, supposed by the Law, has no Place here, and consequently the Favour of the Law ceases. This I take to be our Author's Meaning, though he has not sufficiently explained himself. As to the Thing itself, in my Opinion, the Whole depends on knowing whether the other contracting Party knew that the Person thus determined to treat against his Will was influenced by a Panic Fear, or not. For if he knew it, he ought not to take Advantage of it; and in that Case, the Consent requisite in Agreements, is not thereby less destitute of the Liberty requisite, so far as he is concerned.

VIII. (1) See PUFENDORF, B. III. Chap. VII.

2 This is related by PLUTARCH, *Apophthegm Laconic.* p. 208. Tom. II. Edit. Wech.

3 Consult PUFENDORF, B. III. Chap. VIII. § 4.

4 It is certain that, commonly speaking, such Promises are suspected of betraying such Sentiments as are contrary to what married Persons ought to entertain one for another, and therefore may easily imply something dishonest? But still we may conceive Cases, where they may be made without any Violation of Conjugal Fidelity. Mr. THOMASTUS produces two, in his Remarks on HUBER, *De Jure Civitatis*, Lib. II. Sect. VI. Chap. III. § 13. Let us suppose, says he, that in the Time of a Plague, two married Friends agree, with the Consent of their Wives, that if one of the Husbands and one of the Wives die, the two Survivors shall marry. Again, let us suppose a virtuous Woman married to a debauched Husband, who takes no Care of her and her Children, but squanders away his Money: A prudent Friend to whom she has communicated her Grievs, promises to serve her with his Advice, and all in his Power; and farther, engages to marry her

in case her Husband dies. There is nothing in all this but what is very innocent.

IX. (1) Concerning the whole Affair of unlawful Promises and Agreements, see what I have said in a long Note in the second Edition of PUFENDORF, B. III. Chap. VII. § 6. Note 2. To which may be added two small Pieces, in which while I was applying my Principles to a considerable Example, I have taken Occasion to clear up this Question still more; a Question, in its self difficult, and which, in my Opinion had not been well handled. These Pieces may be seen in the *Journal des Sçavans*: One in the Month of August, 1712. Edit. Paris. (October, Edit. Amst.) the other in the Month of December, 1713. (February and March, Edit. Amst.) Mr. GUNDLING, Professor at Hall in Saxony, has expressed his Dislike of my Notions, in his little Treatise of the Law of Nature, published under the Title of *Via ad Veritatem*. But as he has not undertaken to confute my Reasons, either on that Subject; or on some others, where he rejects my Opinion; I am not as yet obliged so much as to doubt of their Solidity.

2 See Chap. V. of this Book, § 14. Num. 5. and § 16.

3 That is, when a Person, who has a full Right to dispose of his Goods, is injudiciously liberal, and gives without Reason, Choice or Rule. The Author explains himself in his Treatise, *De Imperio Summarum Potestatum circa Sacra*, Cap. V. § 11. *A private Man, says he, who has the full Disposal of his own Goods, has with a rash Liberality given his Estate to others. This is a vicious Action; but the Alienation is valid.* ZIEGLER and TESMAR, two Commentators, have ventured to advance, one by Way of Doubt, and the other in the Form of an Assertion, that there is no moral Evil in such a Donation. It is diverting to see them instancing in pious Donations, and what the young Man in the Gospel ought to have done, whom our Lord commanded

the Evil ceases, for a Man does not do ill in leaving to the Donee what he gave him. But in Promises made on an ill Account, the Evil remains till the Crime is committed; for so long, the very fulfilling of the Promise, being an Inducement to what is ill, carries a Stain along with it, which begins to wear off as soon as the Crime is committed: Whence it follows, that the Validity and Efficacy of such a Promise continues in Suspence till that Time, as I said before concerning Things promised, the Execution of which is not yet in our Power; but the Crime being perpetrated, the Obligation immediately exerts its Force, which from the Beginning was not intrinsically wanting, but was hindered by the moral Evil of the Engagement. An Instance we have of this in *Judah*, *Jacob's* Son, who performed his Promise to *Thamar*, whom he reputed an Harlot, sending her the promised Reward ⁴ as her Due. But now if the Promise be occasioned by the Injustice of the Person to whom it is given, or the Bargain be unfair, and there is any Inequality in the Agreement, how this is to be amended is another Question, ⁵ of which we shall treat very quickly.

X. *What we are to judge of a Promise that entitles us to something due before.*

X. But when a Promise is made on the Account of something already due, ¹ it is not therefore the less obligatory, if we respect natural Right alone, according to what we said above, concerning our accepting what is another's. Because a Promise is a natural Debt, even when made without any Cause. But here also any Damage that arises by Extortion, or any Inequality in the Agreement shall be repaired, according to the Rules which shall be laid down a little lower.

XI. *The Manner of making a firm Promise in our own Persons.*

XI. As to what concerns the Manner of promising, it requires, as I said before, concerning the transferring of Property, ¹ an external Act, that is some sufficient Sign to testify the Consent of the Will, which may sometimes be done by a Nod, but generally by Word of Mouth or Writing.

XII. *The Manner of confirming a Promise made by others, and of Ambassadors who go beyond their Commissions.*

XII. But we may also be obliged by what ¹ another Man does, if it appears that we have deputed and impowered him to act for us, ² either as our Proxy ³ in that particular Affair, or by Vertue of some general Qualification; it may also happen, where the Commission is to act in general, that the Person so commissioned may lay us under an Obligation, ⁴ tho' he acts contrary to our Will, signified to him in his private Instructions; for here be two distinct Acts of the Will, the one whereby we oblige ourselves to ratify whatever our Proxy shall do in such a Business; the other, whereby we oblige our said Proxy, that he shall not act beyond some private Instructions that are known to him and no Body else. This is to be well observed, ⁴ in Relation to those Things which Ambassadors promise for their Principals, who by Vertue of their publick Powers and Credentials, do sometimes exceed their secret Orders.

manded to sell all he had, and give the Money to the Poor. It might easily be made appear that *pious Donations*, with how good an Intention soever made, may be and often have been faulty in several Respects.

⁴ By the Law of Nature, I mean, which was the Rule that Men then lived by. *C. Aquilius* was of another Opinion from the Civil Law, as is testified by *VALERIUS MAXIMUS*, *Lib. VIII. Cap. XI. Num. 2.* *GROTIUS*.

The Fact mentioned by *VALERIUS MAXIMUS* was this. A Roman, named *C. Visellius Varro*, being dangerously ill, gave his Mistress a Bond for a considerable Sum; that after his Death she might oblige his Heirs to pay her that Money, which he would not give her openly by Way of Legacy. He recovered, and the interested Mistress undertook to sue him for that Sum promised in the Bond. *Aquilius* being Judge in this Cause, with the Concurrence of some of the most considerable Men of the City, who were his Assistants, dismissed her Plea. Whereupon the Historian observes, that could *Aquilius* have given Sentence against both the Parties, he would certainly have done it, and punished the Lover for his criminal Conversation with the Courtesan. But he contented himself with pronouncing

on the Civil Part of the Cause, and rejecting an unreasonable Demand, and left the Punishment of the Defendant to the Criminal Judges. It is said before that as the Demand was shameful, so the Obligation was void. As to the Example of *Thamar*, see *PUFENDORF*, *ubi supra*, § 8.

⁵ *Cap. XII. Sect. IX. X. XI. GROTIUS.*
X. (1) See the Chapter in *PUFENDORF*, which I have quoted several Times, § 9.

XI. (1) Here also consult *PUFENDORF*, *B. III. Chap. VI. § 16.*

XII. (1) This Subject is treated by *PUFENDORF*, *B. III. Chap. IX.*

² See *Chap. VI.* of this Book, § 2. *Note 1.*

³ *SERVIUS*, upon that Passage of the ninth *Æneid*,

— *Hospitio cum jungeret Absens.*

And absent joined in hospital Ties. *DRYD.*

says, this was done by People sent by each Party for that Purpose. *GROTIUS.*

⁴ See an Instance of this in *MARIANA*, XXVII. 18. another in *GUICCIARDIN*, *Tom. I.* *GROTIUS.*

XIII. Hence we may understand, that an Action brought against ¹ the Owner of a Ship, on Account of the Master, and that against a Merchant, on Account of his Factors, which indeed are not so much Actions, ² as Qualities of Actions, are founded upon the very Law of Nature; and here too I cannot but observe, that it is very ill done of the *Roman* Laws, to make every Man to whom the Ship belongs ³ become wholly responsible for whatever the Master does. For this is neither agreeable to natural Equity, which is satisfied, if every one be bound ⁴ for what concerns himself, nor is it advantageous to the State, for Men would be discouraged from sending Ships to Sea, ⁵ if they were afraid of being, as it were, infinitely accountable for what the Master of the Vessel did. Infomuch that in *Holland*, where Merchandize has of a long Time mightily flourished, this *Roman* Law, neither formerly, nor now, is of any Force. Nay, on the contrary it is ordered, that the whole Company in general shall be answerable no farther, than the Value of the Ship, and of the Goods that are in it, amounts to.

XIII. *How far the Master of a Ship, and Factors, are obliged by the Law of Nature; where also is observed the Error of the Roman Law.*

XIV. But that a Promise may transfer a Right, ¹ the Acceptance of the Person to whom it is made is no less required here, ² than in the Case of transferring a Property; yet so, that here also a precedent Request shall be judged to subsist, and to have the Force of an ³ Acceptance. Neither does that which the Civil Law has introduced, concerning imperfect Promises ⁴ made to the Publick, hinder this, which Reason, however, has so far prevailed with some, that they presume that the sole Act of the Promiser is by the Law of Nature sufficient. For the *Roman* Law does not say, that the Force of the Promise is compleat before it be accepted; but only forbids to revoke it, ⁵ that it may be always accepted; which Effect is not from the Law of Nature, but merely from the Civil Law. Not much unlike to which is what the

XIV. *A Promise must be accepted before it can be binding.*

XIII. (1) The former is called in the Original *Actio exercitoria*: The latter *Actio institoria*. See *Digest*. Lib. XIV. Tit. I. and III.

² That is, that when one has lent Money, for Example, to the Master, or Factors; the Action which the Creditor has on that Account is not so much a particular Sort of Action, as an Action for Money lent to a Person borrowing in another Man's Name. And hence it is that a Man had also a personal Action directly, on the Account of a Loan, against the Master of the Vessel, or the trading Master. *Institut*. Lib. IV. Tit. VI. *Quod cum eo contractum*, &c. § 8. See HUBERT GIPHANIUS, and THEODORE MARCILLY on this Paragraph.

³ *Digest*. Lib. XIV. Tit. I. *De exercitoria Actione*, Leg. I. § 25. and Leg. II.

⁴ If we consider the Partners one with Regard to the other, natural Equity certainly requires that each should be responsible for his own Part only. But he who is supposed to have contracted with them by Means of the Master, is naturally supposed to have contracted, not with this or that Partner in particular, but with all the Partners in general, or with the Company. So that he may sue which of them he pleases, because they are all obliged *in solido* one for the other. The Master, with whom the Contract is made, represents all the Partners in general: He is not more Agent for one than for another, and it is on that Foot that the Contract is made with him.

⁵ But, as the Commentators observe, it will be said on the other Hand, that few People would contract with the Master, if they knew they could come on the Partners only for each Man's Part; for, beside the Danger of some of them proving insolvent, it would be very troublesome to have as many Law-Suits as there are Persons, who sometimes live in different Places. So that this Inconveniency counterbalances the other. And where would be the Advantage of not discouraging such as send Ships to Sea, if those, with whom the Master may have to do, in the Navigation and Trade, with which he is charged, are discouraged from contracting with

him? The Truth is, that the Civil Laws may in this Case make such Regulations as are judged proper; and that Men are supposed to engage on the Foot of such Regulations.

XIV. (1) See PUFENDORF, B. III. Chap. VI. § 15. According to the *Roman* Law, *He who writes to an absent Slave, that he may have his Liberty, doth not intend immediately to quit the Possession of his Slave; but rather to fix his Will in that regard to the Time that the Slave receives his Letter.* *Digest*. Lib. XLI. Tit. II. *De acquirenda vel amittenda Possessione*, Leg. XXXVIII.

² TERTULLIAN, speaking like a Man who was perfectly acquainted with the Laws, says, in his Book *De Jejunis*, *A Vow, when GOD has accepted it, is for the future as obliging as a Law.* GROTIUS.

Our Author, who frequently quotes DONATUS, as well as other *Latin* Grammarians, might have told his Readers what that Commentator on *TERENCE* says on Occasion of a promised Portion: *Ch. Her Portion, Pamphilus, is ten Talents. Pam. I accept of it. Had he not said, I accept of it, it would not have been a Portion; for a Donation is confirmed by the Acceptance. What is not accepted of doth not seem given.* On the *Andria*, Act V. Scen. IV. Ver. 48. CICERO observes that *neither the Delivery nor Donation can be conceived without Acceptance.* Topic. Cap. VIII.

³ See Chap. VI. of this Book, § 2.

⁴ That if a Promise is freely made, the Thing may be claimed as a Debt. *Digest*. Lib. I. Tit. XII. *De Pollicitat*. Leg. III. See what has been said, Note 1. on § 3. PUFENDORF, in the Place by me quoted, gives a different Answer to the Objection taken from this Law. But the Matter is of small Importance, because we are speaking of the Civil Law, which may give certain Acts a Force that they would not have had by the Law of Nature; as it may take from others that which they might have naturally.

⁵ See such another Law of the *Wesgoths*, Lib. V. Tit. II. Cap. VI. GROTIUS.

Law of Nations has introduced in Favour of Infants and Madmen : For in such as these the Law supplies the Intention, both of possessing Things which are required by Possession, and of accepting what is promised or given.

XV. *Whether this Acceptance should be signified to the Persons promising, explained by a Distinction.*

XV. It is also sometimes disputed, whether (to make a Promise valid) it be enough that it is only accepted, or that the Acceptance also be signified to the Promiser before it can obtain its full Effect ; and it is certain, that either Way the Promise may be obliging. As thus, *This Engagement shall stand good, if it be accepted*; or thus, *This shall stand good, if I understand that it is accepted*. In those Promises indeed, which imply a mutual Obligation, the Engagement is to be understood in the latter Sense ; ¹ but in Promises of mere Generosity it is best to suppose, that it was meant in the former Sense, unless it evidently appears to the contrary.

XVI. *Whether a Promise may be revoked, the Person to whom it was given dying before he had accepted of it.*

XVI. Hence it follows, that before Acceptance (for till then no Right is transferred) a Promise may be revoked without Injustice, nay, and without the Imputa-

XV. (1) This is likewise PUFENDORF'S Opinion, B. III. Chap. VI. § 15. In which our two Authors follow the Decision of a celebrated Scholastic, LESSIUS, *De Justitiâ & Jure*, Lib. II. Cap. XVIII. Dub. VI. whose Words Mr. VANDER MUELEN here quotes, and at the same Time approves of the Thought. I am of Opinion, however, that the Question ought to be decided in a quite contrary Manner. As Men are more easily induced to promise, when it is done for their own Interest, and in View of some other Thing they demand in their Turn ; they are and commonly may be supposed to will the Effect of such a Promise, from which some Advantage will accrue to us or ours, more invariably than that of gratuitous Promises. The late Mr. HUBER, *De Jure Civit.* Lib. II. Sect. VI. Cap. III. § 9. maintains, but without offering any Reason for it, that, unless the Promiser has expressly declared he meant the Promise should not have its full Force, till he knew it was accepted ; it is never necessary he should know it, and the Acceptance is sufficient, whether the Question turns on gratuitous Promises, or on Agreements, in which both Parties are interested. Mr. THOMASIUS, on the contrary, in his Notes on that Author, p. 514. maintains that the Knowledge of the Acceptance is always necessary ; because as the Promise remains suspended, till the Person, to whom it is made, becomes acquainted with it, the same ought to be said of the Acceptance. Suppose, says he, that the Person, to whom the Promise is made, is present, and that he accepts of the Thing either only within himself, or by whispering to a third Person ; such a Promise will not be binding. But the Consequence doth not hold good from the Necessity of Acceptance to the Necessity of knowing that Acceptance. The Acceptance is absolutely necessary, for forming an Unity of the two Wills, from which the full and entire Obligation results. But the Moment the two Wills are thus united, tho' that which is determined has as yet no Knowledge of the Determination of the other ; nothing essential to the Obligation is wanting, unless there be an express or tacit Condition, which makes the entire Accomplishment of it depend on the Knowledge of the Acceptance. If the Effect of the Promise in this Case remains suspended till the Acceptance, it is by a necessary Consequence of the Person's Absence, and not because the Promiser designed to reserve to himself a sufficient Time for retracting. He may indeed retract, because something may happen, that obliges him to change his Mind. But, in Order to prove that the Knowledge of the Acceptance is always necessary for laying him under a Necessity of persisting in his Will, we must always have Reason to believe that, if the Person to whom the Promise is made had been present, he would not

have promised so as to engage himself on the Spot, supposing the Thing had been also accepted immediately ; whereas, the Presumption will rather be on the other Side, at least in such Agreements, where both Parties have an Interest. If it was always necessary that a formal Acceptance of a Promise should be known, it would follow, contrary to what Mr. THOMASIUS himself acknowledges (*Jurisp. divin.* Lib. II. Cap. VII. § 14.) after our Author, that even when the Promise was made pursuant to the Request of him to whom it is made, it would be invalid, except the Petitioner was apprized of the good Will of the Promiser. The anticipated Acceptance of the Petitioner has, in my Opinion, no more Force than the Offers of the Person who of his own Accord promises absolutely, and on no other Condition than that of Acceptance. He, who made the Request, may as well change his Mind before he knows it is granted, as he who made the Offer, before he was acquainted with the Acceptance. As to the Instance, alledged by Mr. THOMASIUS, I own it seems to me but little to the Purpose. In the Circumstances there supposed, an Act of the Will, which either is not expressed by any exterior Sign, or manifested only by a Declaration unknown to the Promiser, can by no Means be considered as a real Acceptance. When a Man being present doth not clearly signify his Disposition of accepting the Proffer to the Person who makes it, he seems to despise it ; at least he is to be supposed unwilling to come to a Resolution of accepting it ; whatever Declaration he may make of his Intentions to any but the Promiser. Generally speaking, all those who knowing of a Promise, and having it in their Power to notify their Acceptance to the Promiser, do not do it, thereby leave him full Liberty of retracting. But the Case is different in Regard to the Absent, especially if the Distance of Place is considerable. The Absence itself makes it impossible for them to accept of the Promise as soon as it is made. From all which I conclude, that if we judge of the Matter by the Law of Nature alone, and independently of particular Proofs of a contrary Intention in the Promiser, every absolute Promise is complete on his Part, the Moment he is seriously determined to make it, and notify it in any Manner to the Person, in whose Favour it is made ; so that, unless he revokes it in Time, that is, not only before it is accepted, but even before the Person to whom it is made is apprized of the Revocation ; the Acceptance makes the Promise irrevocable ; provided the Person to whom it was made, accepted it immediately, and without Delay ; for if he has taken Time to deliberate, he has thereby given the Promiser Time to retract.

tion of Fickleness too, if it were really so intended, when first made, ¹ that it should not begin to be of Force till the Time of its being accepted. It may be also revoked, if the Person to whom the Promise was given die before Acceptance; because it seems to be referred to his own Choice, and not to that of his Heirs. For it is one Thing to be willing to give away a Right to such a Man, and by him to be transferred to his Heirs, and ² another Thing to be willing to give it indifferently to him or his Heirs; for it is very material to consider on whom we confer a Kindness. And this is what *Neratius* answered, ³ that for his Part he could not believe, that the Prince would have granted that to one who was dead, which he had granted to him, supposing him alive.

XVII. 1. A Promise also may be revoked upon the Death of the Person, who was employed to signify the Intention of the Promiser, because the Obligation lay in his Words. But it is otherwise, if the Person sent upon this Errand were a common Messenger or Carrier, who is not the Instrument of the Obligation himself, but only the Bearer of the Deed that contained the Obligation. And therefore the Letter, or Writing, which declares such a Consent, may be carried by any Body else. We must also distinguish between him who is deputed to signify the Promise we make, and one who is authorized by us to make that Promise himself. In the former Case a Revocation shall be of full Force, tho' it be not known ¹ to him who carries the Promise. But in the other the Revocation will be invalid; ² because the Right of promising depended on the Will of the Person commissioned; and consequently, if he know nothing of the Revocation, he commits no Fault in promising. So also in the former Case, ³ though the Donor die, the Donation may be accepted, as being on one part compleated, though subject to a Revocation, as does more plainly appear in the Affair of Legacies; ⁴ in the other Case it cannot, ⁵ because it is not done, but only ordered to be done.

XVII. Whether it may be revoked upon the Death of the Person employ'd to signify it, explained by some Distinctions.

2. But in a dubious Case, it is to be presumed that it was the Will and Intention of the Person, who gave such Orders, that his Orders should have been executed, unless some great Change, such as the Death of the Person so ordering, should happen to intervene. But however, there may be some Conjectures ⁶ which may

XVI. (1) In Reality, a Man may promise irrevocably, even before the Acceptance. But in Order to this he must clearly declare that from that Moment he confers a full Right on the Person in whose Favour he obliges himself, and reserves to himself no Liberty of retracting; provided always that, if he doth not accept of the Promise, when duly notified to him, the Promiser re-enters on his whole Right. Confer this Paragraph and those which follow with what PUFENDORF says, *B. III. Chap. IX. § 3. &c.*

2 And therefore, to avoid all Dispute, it was usually said, *To him and his Heirs.* *SERVIVS* upon the ninth *Æneid*, ver. 302. See too the *Wifigothic Law*, *Lib. V. Tit. II. Cap. VI.* *GROTIUS.*

3 *Digest. Lib. L. Tit. XVII. De diversis Regulis Juris*, Leg. CXCI. on which see *JAMES GODEFROY'S* Comment.

XVII. (1) It must here be supposed that the Person, to whom the Promise was made, was himself acquainted with the Revocation, by some other Means, before he accepted of it. Otherwise, if the Revocation comes too late, the Promiser will suffer.

2 Provided, however, that the Revocation of the Commission was not sufficiently known some other Way by him to whom the Agent has since promised in the Name of the Person who entrusted him with it.

3 See the Book *De Tenuris Angliæ*, Cap. VII. *GROTIUS.*

4 For, though a Testator may revoke the Legacy, yet till he has actually so done, all is done that was necessary on his Side; and if he dies, no-

thing more is requisite for giving a Right to the Legatee, who accepts of it.

5 It must here be supposed that the Person commissioned to make the Donation, was acquainted with the Donor's Death; for if he knows nothing of it, and the Donee accepts of it, though the Donor was not alive at the Time of Acceptance, it is entirely the same as if he was not yet dead. He had invested his Agent with full Power, and thus divested himself, as much as in him lay, of all Right to the Thing to be given, unless he recalled the Commission in Time, before it was executed. Had he intended the Donation should be valid only in Case it was accepted before his Death, it was his Business to insert that Clause in the Commission. Unless that be done, the Donee, who could neither accept sooner, nor guess the Donor would die, ought to be considered as if, the Donation being made to him by the Donor in Person, he had accepted of it; and that the rather, because commonly there is very good Reason to believe the Donor would not have failed giving, even though he thought he should die.

6 On this Foundation it is decided by a Law quoted by our Author in his Margin, that if a Father having permitted his Son to set one of his Slaves free, dies intestate, and the Son not knowing of his Father's Death, hath since made Use of the Power he gave him, the Act stands good in Favour of the said Slave, because it doth not appear his Master charged his Mind. *Digest. Lib. XL. Tit. II. De manumiss. vindic.* Leg. IV. This Regulation was made in Favour of Liberty; as many others, in which

may incline us to believe otherwise, and these we ought without any Difficulty to admit, to the End that what was ordered to be given upon any religious Account may stand good. And thus may the Question, which was formerly much canvassed, be answered, ⁷ whether an Action upon that Order lies against the Heir. About which particular Case the Author of *Lib. 11. to Herennius* relates, that *Drusus*, the *Prætor*, decreed one Thing, and *Sextus Julius* another.

XVIII. *Whether a Promise accepted by Proxy, may be reversed, explained by some Distinctions.*

XVIII. 1. Disputes also frequently arise concerning ¹ the accepting of a Thing for another. In which Case we must distinguish between a Promise made to me of something to be given to another, and a Promise made directly to him to whom the Thing is to be given. If the Promise be made to myself, without considering whether I have any Interest in it, a Consideration that the *Roman Law* ² has introduced, I look upon it, that by the Law of Nature I acquire a Right of accepting, that thereby the Right of demanding the Performance of the Promise may pass to another, if he also will accept of it; so that the Promiser has no Right in the mean Time to revoke it; but I, who received the Promise, may, if I please, remit it. For this Sense is not against the Law of Nature, and also very agreeable to the Words of such a Promise; nor is it a Matter of Indifference, whether another obtains a Favour by my Means or not.

2. But if the Promise be made directly to the Person to whom the Thing is to be given; we must then distinguish whether the Acceptor has a particular Commission to accept it, or one so general, as may be judged sufficient to include it; or whether he has no such Commission at all. ³ Where such a Commission has been given before, there is no Occasion to enquire, whether the Person be a Freeman or no, which the ⁴ *Roman Laws* insist upon, but the Promise is compleat and in full Force by that Acceptance. Because a Consent may be conveyed, and signified by any third Person, whose Will is reputed mine, if impowered by me, and he readily takes it upon him. But if there be no such Commission, and yet this third Person, to whom the Promise is not made, accepts it with the Consent of the Promiser; ⁵ then has the Promiser no Power to revoke the Promise, till he whom it

which for the same Reason the Rigour of the Law was relaxed. See *Cujas* on the said Law, *Recit. in Salv. Julian*, Tom. VI. *Opp.* p. 317.

⁷ It happens that the same Question is answered differently by different Persons. As when it was asked whether an Action upon the Order lies against the Heir. *M. Drusus*, the City Pretor, gave it in the Affirmative: And *S. Julius* in the Negative. *Lib. II. Cap. XIII.* Where the Enquiry turned on a Commission executed after the Decease of the Person who gave it. See what I have said on *PUFENDORF*, B. III. Chap. IX. § 4. Note 3.

XVIII. (1) Consult the Chapter of *PUFENDORF* last quoted, § 5.

² See *Institut.* Lib. III. Tit. XX. *De inutil. stipul.* § 19.

³ Our Author, without doubt, supposes the Order shewn to the Person who promises. So that this was an unnecessary Addition made by the late Mr. *HUBER* (*De Jure Civit.* Lib. II. Sect. VI. Cap. III. Num. 18.) as if our Author never thought of it.

⁴ No Man can stipulate for another, except a Slave for his Master, and a Son for his Father. *Digest.* Lib. XLV. Tit. I. *De verborum obligationibus*, Leg. XXXVIII. § 17. *Whatever Stipulation is made by a Person under another's Power, is accounted the Act of the latter, as truly as if made by himself.* Ibid. Leg. XLV. But a Father, on the other Hand, could not stipulate for his Son, nor a Master for his Slave. See Mr. *NOODT*'s excellent Treatise, *De Pactis & Transactionibus*, Cap. XXIV.

⁵ The Author here puts a Case, somewhat difficult to conceive, viz. Of an Acceptance, which however gives the Person accepting no Right. Such an Ac-

ceptance having no Effect in Relation to the Force of the Promise, and leaving the Promiser at full Liberty to revoke it without invading any Man's Right; it cannot, in my Opinion, be termed an Acceptance, unless in a very improper Sense. The pretended Acceptor is in Reality no more than a bare Witness of the good Dispositions which the other shews in Favour of the third Person. Our Author seems to consider him as a Sort of Security for the Continuance and Execution of those good Dispositions. But neither is this Notion more just. The Character and Use of a Security supposes an antecedent Obligation, which gives a third Person some true and perfect Right: But in the Case before us the Person to whom another designs to oblige himself to do what has been mentioned, has acquired no Right. From which I conclude, it is only one of those half Promises, spoken of by our Author, § 111. to which he gives the Name of *Pollicitatio*. The whole Difference is, that he there talks of a Declaration made to the very Person, in whose Favour another obliges himself to persist in the Will of doing such or such a Thing; whereas here the Declaration is made to a third Person, without the Orders or even the Privity of the Person interested in the Affair. And the former Declaration has this Advantage over the latter, that if the Promiser will afterwards confer a true Right on him in whose Favour he had declared his Will, and thus change the imperfect Promise into a perfect one; the Person last mentioned from that Moment acquires a full Right over the Thing promised: No other Acceptance is necessary than that already made by the Person concerned. Whereas, in the other Case, the third Person having had no Commission for accepting, and the Promise not regarding him; it can have

it concerns shall either approve or reject it; yet so, that in the mean Time, he who has accepted of the Promise has no Power to remit it, because he was not employed to take any Right upon himself, but only to engage the Promiser's Honour, in the Performance of the intended Favour; so that if the Promiser should pretend to revoke it, he may be said to break his Word, but not invade any Man's Right.

XIX. From what has been said we may easily understand, what we are to judge of any burthensome Condition annexed to a Promise. For that may be done as long as the Promise is not compleated by Acceptance, ^{XIX. Within what Time some Conditions may be tacked to a Promise.} nor the Promiser's Word and Honour given, that it shall be irrevocable. But a burthensome Condition annexed to a Promise, for the Advantage of a third Person, may be revoked, as long as it is not yet accepted by that third Person; tho' there are some, who in this, as well as in other Questions, are of another Opinion. But to one that thoroughly considers the Matter, the natural Equity will so clearly appear, that there will be no Occasion for many Proofs.

XX. It is also sometimes disputed, how a Promise, occasioned by an Error or Mistake in the Promiser, may become valid; if the Truth of the Matter being known, ^{XX. An invalid Promise may become obliging.} the Promiser be willing to stand to his Promise. The same Question may also be put concerning Promises, which are obstructed and disapproved of by the Civil Law, as being occasioned by Fear, ² or any other Cause or Motive, when that Cause or Motive shall afterwards cease. For to confirm these, some think, that nothing is required but the internal Act or Intention of the Mind, which being joined with the former external Act, or open Declaration, they judge sufficient to create an Obligation. Others disliking this, because they cannot allow that any antecedent outward Act should be a sufficient Sign of an internal Act coming after it, require a new Promise, notified by Word of Mouth, and a new Acceptance. But the middle Opinion is nearest the Truth, which requires some outward Act, but not a verbal one, since the retaining of the Thing promised by the Person to whom it was promised, and the relinquishing of it by the Promiser, or some other such Circumstance, are enough to testify a real Consent.

XXI. But, to avoid confounding the Civil Law with the Law of Nature, it must be observed, that neither those Promises, nor those Donations, ^{XXI. Promises made without any Motive, are not therefore naturally void.} in which the Reason for making them is not expressed, are therefore naturally invalid.

XXII. Nor is any Man by his Promise that he makes for what ^{XXII. How far he who promises for what another is to do stands himself naturally oblig'd.} another is to do, obliged to pay Damages and Interest, provided he omits nothing that on his Part he can possibly do, in Order to get that other Man to perform his; unless the Words of the Promise, or Nature of the Affair, carry with them any stricter Ob-

have no Effect till after the Acceptance of him in whose Favour another signified his Will of doing something.

XIX. (1) *A perfect Donation admits of no Conditions after it is made.* Code, Lib. VIII. Tit. LVI. *De Donationibus quæ sub modo*, Leg. IV. OBRECHT observes on this Place that our Author's Maxim takes Place only in new Conditions added by the Will of one of the Parties contracting. But our Author had no Design of denying that; which he supposed as incontestable. For who can doubt whether, if the two Parties are agreed, some new Condition may not be added, even after Acceptation, burthensome either to both, or one only? It is then a Sort of new Bargain, or at least an Amendment of the former Engagement.

XX. (1) See PUFENDORF, B. III. Chap. VI. § 14.

2 All unjust Fear annuls a Promise, by the Law of Nature, as well as by the Civil Law. See what I have said on § 7.

XXI. (1) *Quæ causam expressam non habent.* Tho' a Man doth not express his Motive for promising, it doth not follow that he had none. He may have several private Reasons, which he doth not think proper to declare. There is always Room for presuming either that the Promiser proposes some

Advantage to himself, or that he promises with a View of doing the Person, in whose Favour he engages himself, a Pleasure, and thus having the Pleasure to oblige him. Even supposing he doth not well know why he promises, it is sufficient that he resolves to promise with an entire Freedom, and that there is no Crime in the Promise. The Will doth all in this Case, as well as in Alienations. A Man is not less Master of his own Actions, than of his own Goods; so that if he is willing to lay himself under a Necessity of doing something in Favour of another, that is sufficient for giving the other a full Right to demand the Effect of such an Engagement. This I take to be our Author's Meaning. But I do not see where lies the Difference, which he here supposes, between the Rules of the Civil Law, and the Maxims of the Law of Nature. For, in the Stipulations, it was not at all necessary that the Promiser should express the Reason why he promised. He was asked, *Do you promise?* He answered, *I do promise.* That was sufficient. On the contrary, an Agreement without Stipulation, was not therefore more valid, tho' he said, for Example, *I will give you this or that, in Order that you do such or such a Thing for me.*

XXII. (1) See PUFENDORF, B. III. Chap. VII. § 10.

ligation. *He was discharged from his Engagement,* (says Livy, Lib. 2.) ² *since it was no Fault of his, that it was not performed.*

² Compare here what is below, B. III. Chap. XX. § 30: GROTIUS.

CHAP. XII.

Of Contracts.

I. Such human Acts as are advantageous to others are divided, first into simple and mixed.

II. Simple Acts are divided into such as are merely gratuitous, or that imply a mutual Obligation.

III. And into such as are permutatory, or by Way of Exchange; and these are either such as adjust what each has to give or to do.

I. **A**MONG such human Acts as turn to other Mens Advantage, some are single and uncompounded, others are mixed and compounded.

II. Those that are single, are either gratuitous, and done for nothing, or permutatory, and by Way of Exchange¹: Such as are gratuitous, are either merely so, or with some mutual Obligation. Those that are merely gratuitous, are either done out of hand, or respect the future Time. We have no Occasion to speak of a good Turn that is done out of hand; because, tho' it produces an Advantage, it does not create any Effect of Right,² no more than of a Donation, whereby a Property is transferred; for of this we discoursed above, where we treated of the several Ways of gaining a Property. Such Acts as respect the future Time, are the Promises of giving and doing certain Things, which we were just now talking of. Gratuitous Acts, with a mutual Obligation, are those which dispose of something or other without an Alienation of it; or of some Act or other, yet so as that some Effect of it does still remain; such as is, in respect of a Thing, the Leave to use it, which is called *Lending*: And as to what regards an Act, the doing of some Service that is attended with an Expence, or in Respect to which, both Parties stand obliged to do something, and this last is termed a *Commission*, one Kind of which is a Trust or Charge, where we take Pains to guard and keep what is committed to our Care. And of the same Nature with these Acts are the Promises of such Acts,³ unless it be, as we said before, that they respect the future Time, which Circumstance we would also have to be understood of the Acts we are now going to explain.

III. 1. Acts permutatory, or by Way of Exchange, either regulate and adjust the Shares, or make Things common: The Roman Lawyers rightly distinguish those Acts which regulate Shares into these, *Do ut des, facio ut facias, facio ut des*: *I give you this, that you may give me that; I do this for you, that you may do that*

I. (1) By single Acts, (*Actus simplices*) our Author means such as tend to one single Advantage, either of the Person in whose Favour it is done, or of the Person acting; whereas compound Acts (*Actus compositi*) include several Views of different Advantages.

II. (1) ARISTOTLE comprehends all those under the Title *δόςκως*, *Of Giving*, these, *πράσκως*, *Of Selling*. GROTIUS.

Our Author undoubtedly had his Eye on that Passage of the Treatise of *Rhetoric*, where the Philosopher defines Property to be the Power of alienating; and by Alienation he understands giving or selling, *Lib. I. Cap. V. p. 523. Tom. II. Ed. Paris*. So that it is plain he is not there treating of all Contracts. Those by which we dispose of our own Actions are not included; nor even several of those by which we dispose of our Goods, without alienating them.

² The Person whom we have thus served, in a Manner merely gratuitous, is obliged to no more than a grateful Acknowledgment, from which no

perfect and strict Right arises. What the Roman Lawyers call *Management*, or *Administration of Affairs*, belongs to the other Class of gratuitous Acts, that is, to such as are attended with a mutual Obligation. For he who transacts another Man's Affairs without his Privity, pretends only to give his Trouble for nothing; so that he lays an Obligation on the other to reimburse all the Expences he has been at in the faithful Management of his Affairs.

³ For the Promise is sometimes purely and simply gratuitous; as when a Man promises another to give him, or do something in his Favour, without his entering into any perfect and strict Obligation on his Side, on Account of the Present or Favour promised. Sometimes also the Promise, tho' gratuitous in the main, implies something which has or may have Consequences, in Regard to which the Liberality ceases: As when we promise a Man to execute a Commission for him; for in that Case, we usually oblige ourselves only to give our Labour for nothing, and expect a Reimbursement of the necessary Expences. See § 13.

for me; I do this for you, that you may give me that. ¹ Upon which Subject we may see *Paulus*, the Lawyer, in *L. Naturalis De Præscript. Verb.*

2. But the same Lawyers exempt from this Division some certain Contracts, which they call ² *nominate*, not so much because they have a peculiar Name, (for so has also the Contract of Exchange, which, however, they exclude from their nominate Contracts) but because, on the Account of their more frequent Use, they ³ had received a certain Effect, and a certain essential Property, which, tho' nothing at all should be particularly said, one might by their very Name sufficiently understand. Upon which Account too there were assigned to them certain set Forms of Actions. Whereas in others less frequent, there being no more comprehended than what had been expressly said and concluded, there was no common and customary Form, ⁴ but one suited to that Occasion; which was therefore called an Action in prescribed Terms. And also by Reason of this frequent Use of nominate Contracts, provided they had certain requisite Conditions, as in Case of a Sale, for Instance, ⁵ if the Price were agreed on, even tho' the Matter was yet entire, ⁶ that is, before any Thing was performed on either Side, there was an absolute Necessity of standing to the Bargain. Whereas in Contracts not so frequent, whilst the Thing was entire, they had the Liberty of repenting, ⁷ that is, they might go off from their Agreement, ⁸ without any Penalty for so doing; because the Civil Law took away from

III. (1) *Digest. Lib. XIX. Tit. V. De præscriptis verbis. Leg. V.* where we have a fourth Class, *Do, ut facias. I give you this, that you may do that*; but it is the same at the Bottom with *Facio, ut des*. See Mr. Noodt's Treatise, *De Pactis & Transactionibus*, Cap. IX. p. 677. Col. 2. PUFENDORF, however, pretends to find some Difference between them, *B. IV. Chap. II. § 9*. They are both right, according to the different Manner of considering the Question. It is more to the present Purpose to observe, that, as the Lawyer PAULUS really designed the *Do, ut facias*, as a fourth Class, different in some Respects from the other three, the Sense given by our Author to this whole Division, is much more general than that in which the Antients understood it. For, as he himself immediately after insinuates, the Contract of Sale, for Example, and that of Letting, are not comprehended in it, tho' the former belongs to *Do, ut des*; the latter to *Facio, ut des*, taking the Terms in the full Extent of their natural Signification. Our Author himself (*Num. 5.* of this Paragraph) ranks the Contract of Letting, or Hiring, under the Class of *Do, ut des*; which is not conformable to the Notions of the Roman Lawyers; as appears from the very Law already quoted, which places it under *Do, ut facias*.

2 The Distinction of *nominate* and *innominate* Contracts doth not occur in so many Words in the Roman Law; but we there find that of *Contractus certi, and incerti, certain and uncertain Contracts*, which better expresses the Reason alledged by our Author for that Distinction. *Digest. Lib. XII. Tit. I. De rebus creditis, &c. Leg. IX.* See Mr. Noodt, *De Pactis & Transactionibus*, Cap. IX. and PUFENDORF, in the Chapter lately quoted, § 7.

3 See VASQUES, *Lib. Controv. Cap. X.* at the End. GROTIUS.

4 *Digest. Lib. XIX. Tit. V. De præscriptionibus, Leg. II. III.*

5 Among the Hebrews no Sale was looked upon to be compleat, unless there was either a real or imaginary Delivery of the Thing purchased. GROTIUS.

See SELDEN, *De Jure Nat. & Gent. secundum Hebræor. Disciplinam*, Lib. VI. Cap. V.

6 Thus, for Example, when the Bargain was fixed and concluded, the Sale could not be broken

without the Consent of both Parties, even tho' the Thing sold was not delivered, nor the Money paid down. *Cod. Lib. IV. Tit. XLIV. Quando liceat ab emtione discedere. Leg. I.* See also *Tit. X. De obligat. & actionibus, Leg. V. & Dig. Lib. II. Tit. XIV. De pactis, Leg. LVIII. Lib. XVIII. Tit. I. De contrahenda emtione, Leg. VI. § ult.*

7 A Man might redemand what he had given for procuring a Slave his Freedom, if he retracted before the other Party had performed what he had engaged to do. *Digest. Lib. XII. Tit. IV. De Conditione, causa data, causa non secuta, Leg. III. § 2.* See Law V. of the same Title; and on it ANTHONY FAURE, *Rational*, p. 249, &c. 264, &c. as also Mr. Noodt's *Probabilia Juris*, Lib. IV. Cap. V.

8 The late Mr. COCCÆIUS, in an academical Discourse, *De Jure pœnitendi in Contractibus*, Sect. IV. maintains, that in this Case there is not only a bare Impunity in the Civil Courts, but that even the Law of Nature authorises the Liberty of retracting, as settled by the Roman Law, in *Contracts without a Name*. He undertakes to prove his Assertion by two Reasons. - *First*, Because the Contract, according to him, is imperfect, on the Part of him who has given something, as he did not give it absolutely, but in Order that the Person to whom he gave it, should, in Return, do such or such a Thing in his Favour; so that, while the Person receiving has performed nothing, something is wanting for completing the Contract. But this only proves, that if the Condition on which the Person gave it is not complied with, either by the Fault of the Person receiving; or some unforeseen Accident, which has rendred the Execution impossible, he may then oblige the Receiver to restore what was not given so as to be irrevocable. *Secondly*, says Mr. COCCÆIUS, The Receiver has by the very Act of Receiving, laid himself under some Obligation to him, who gave only on Condition that he should do such or such a Thing; so that the Contract is perfect on his Part, and thus the other has a Right to demand the Performance of it. Whereas the Giver obliged himself to nothing, unless the Receiver actually performs what he promised. But this is plainly begging the Question, and laying down a Principle contrary to the Equality which ought to be observed in Contracts like those under Consideration, where each of the

from such Contracts, the Power of Compulsion, and left them wholly dependent on the Word and Honour of the Parties concerned.

3. But the Law of Nature knows nothing of any such Distinctions; nor are those Contracts which they call *Innominate*, either less natural, or less antient; nay Exchange, which they reckon among the innominate, is both ⁹ more simple, and more antient, than the Contract of Sale. And *Eustathius* upon the twenty-second of the *Iliad*, speaking of a publick Trial of Skill, to which there was appointed a Prize, what *Homer* terms ἀρνυδς, to purchase, he renders ἀνταλλαγήδος, to exchange, adding, Συνάλλαγμα γάρ τι κ' τὰ πιαῦτα, for this, and such like, are a Kind of Bargain. Ver. 160. The Agreement is, I do this, that you may give me that, my Work for your Goods. And therefore we, for our Parts following Nature, shall, without any Regard to the Distinction of nominate and innominate, reduce all Contracts for the Regulation of Shares, to the three Sorts before-mentioned.

4. And accordingly we say, that in Cases where I give this that you may give that, I either immediately, and upon the Spot, give one Thing for another, as in the Way of Bartering which is an Exchange, properly so called, and the most antient Method, no Doubt of it, of Trading and Commerce; or I give ¹⁰ Money for Money; this the *Greeks* call κέλλυε, Coin for Coin; our Merchants now-a-days change, or give Goods for Money, as in Buying and Selling; or the Use of my Goods for the Property of other Goods; or the Use of my Goods for the Use of yours; or the Use of my Goods for your Money, which last is termed *Letting* and *Hiring*. By ¹¹ Use we mean here not only the bare Use of a Thing, but also all the Profits and Advantages that accompany it, whether it be made over only for a Time, ¹² or to one Person and no more, or to him and his Heirs, or limited in any other precise and particular Manner, as that among the *Hebrews*, which lasted until the Jubilee Year: But if I give, or part with a Thing, that so, at the Expiration of some certain Time, I may have as much of the same Kind, it is a

the Parties has his own Advantage in View, and consequently designs, at the same Time that he lays an Obligation on himself, to acquire a Right of demanding something in his Turn, which the other may not refuse at Pleasure. Thus, unless the Contract is made only for the Interest of the Giver, that something may be done for him; it is a visible Inequality, and such as is incompatible with the plain and equitable Rules of the Law of Nature, that he who has received a Thing, with Design to keep it, on Condition he performs what he has engaged, should not oblige him who gave it under that Condition, to leave it in his Hands, when he is ready to fulfil the Condition; and that the other, on the contrary, should be at Liberty, either to force him to stand to his Engagement, and even to demand Damages and Interest, if it be his own Fault that he cannot perform his Obligations; or to retract and recover what he gave, or the Value of it, even tho' the Receiver is both willing and able to do what he promised; as is ordered by the Roman Law, which Mr. *Cocceius* attempts to reconcile with the Law of Nature.

9 This is plain from those Verses of *HOMER*, cited *Lib. I. D. De contrahenda emptione*. *TACITUS* talking of the *Germans*, says, *The more inland People follow the good old Custom of bartering one Commodity for another*. *De Morib. German. Cap. V. Num. 6*. *SERVIVS*, at the fourth Eclogue upon the Passage,

Mutabis Merces. Ver. 39.

— For foreign Ware. DRYD.

Assigns this Reason for the Expression; *Because the Antients used to chop one Ware for another*. And upon that of the third *Georg.* ver. 307. where he

construes *Vellera mutentur*, the Fleeces are changed, *Ingenti Pretio comparentur*, are sold at a great Rate. For formerly every Commodity was purchased by Exchange: And this *CAJUS* has confirmed by an Example in *HOMER*. *PLINY, B. XXXIII. Ch. I*. *How much happier was the Age, when one Thing was exchanged for another, as HOMER thought was the Practice in the Trojan Days*. And in *B. VI. Chap. XXII*. speaking of the *Seres*, *What Goods they have to dispose of, they lay down on the other Side the River, near what they have Occasion to purchase, to be taken away by these, if they are satisfied with the Exchange*. *MELA*, of the same People, *The Seres are between, a People of the strictest Honesty in Dealing, which they manage, tho' absent, by leaving their Commodities behind them*. And *AMMIANUS* of them too, *Lib. XXIII. When Strangers are come over the River to buy Thread, or any other Goods, the Prices of the Things offered to Sale, are concluded on by the Eye only, without any Talk at all about them*. *MELA, Lib. II. Cap. I*. of the *Tartars*, *They trade by giving one Ware for another*. See *BUSBEQUIUS*, of the Inhabitants of *Mengrelia*, *Epist. Exot. III*. and *OLAUS MAGNUS*, of the *Laplanders*, *Lib. IV. Cap. V*. *GROTIUS*.

See *PUFENDORF, B. V. Chap. V. § 1*.

¹⁰ See *PROCOPIUS* upon this Subject, in his *Secret History*, *Chap. XXV*. In *Italy* they brought Species formerly from *Slavonia* instead of Goods, *PLINY, B. XXXIII. Chap. III*. *GROTIUS*.

See *BARNABY BRISSON, Select. Antiq. Juris Civil. Lib. I. Cap. VIII*. and Mr. *NOODT, Probab. Juris, Lib. IV. Cap. IV*.

¹¹ Consult *PUFENDORF, B. IV. Chap. VIII. § 7*.

¹² See *PUFENDORF, B. V. Chap. VII*.

Loan;

Loan; and this takes Place where Things are given by Weight, Number, and Measure, whether Money, or any Thing else.

5. The Bargain of my doing this, for your doing that, or Work for Work, may be as various as the Actions whereby any reciprocal Advantage may be procured. But the Agreement of my doing this, for your giving me that, is either for Money, and this in Cases of daily Labour and Service, is called *Letting* and *Hiring*; but where one takes upon one to make Amends for any Damage that you may receive, or to secure your Effects against Hazard and Casualties, it is commonly stiled *Insurance*, a Contract scarce known formerly, but now as much practised as any whatever; or else I am to do so and so, in Consideration that you give me something of yours, or the Use of something of yours.

IV. But Acts communicatory, or such as introduce a common Title, make either Actions or Things common; or on the one Side Things; and on the other Side Actions for a mutual Advantage, and all this comes under the Name of *Society*; under which also is comprehended an Association for War, as when several private Vessels unite to defend one another against Pirates, or any other Invaders, which is usually called an *Admiralty*, and by the *Greeks*, Συμπλοια, or ὁμόπλοια, a joint Fleet.

IV. Or such as put Things upon a common Foot.

V. But mixed or compounded Acts are so either as to what is principal, or by Reason of an Accessory. Thus, if I shall knowingly give more for a Thing than it is worth, or than I can buy it for of another, it is (a mixed Act) partly a Gift, partly a Purchase. If I agree with a Goldsmith, for so much Money, to make me so many Rings of his own Gold, it is partly a Buying, partly a Hiring². So also it happens in Societies, that one Side is to contribute both Actions and Money, and the other only Money. So likewise the Grant of Land to be held in Fee, is a Favour, and a Piece of Generosity; but the obliging the Person to Military Service for the Protection I give him, is *Facio, ut facias, I do this for you, that you may do that for me*. But if something be to be paid yearly for it besides, by Way of Acknowledgment, it is then so far a Quit-Rent. So Money sent to Sea by Way of Venture,³ is something compounded of the Contract of a Loan, and of an Insurance.

V. Acts mixed, are either so essentially, and of themselves;

VI. An Act becomes mixed, by Reason of some Accessory, in the Manner as we see it in the Case of a Bail or a Pawn¹. For a Bail, if you regard what passes between the Person putting in the Bail, and the principal Debtor, is generally a Sort of Commission or Order. But if you respect Matters as they stand between the Creditor and the Bail, who gets nothing at all by it, it seems an Act purely free and generous; but because it is added to a burthenfome Contract, it is therefore itself reputed so. Thus too a Pawn seems of itself to be a free Act, because it allows the Thing to be detained, without demanding any Thing for the Possession, but this also derives its Nature from the Contract, whose Security it provides for.

VI. Or by Reason of some Accessory.

VII. Now all Acts, advantageous to others, except those which are of meer Generosity, are called *Contracts*¹.

VIII. In all Contracts Nature demands an Equality,¹ insomuch that the aggrieved Person has an Action against the other, for over-reaching him. This Equality

VII. Which of the Acts are called Contracts
VIII. There is an Equality required in Contracts, and first in the Acts that are previous to them.

IV. (1) That is, such Acts as unite the Interests of the Contractors.

V. (1) On this Doctrine see PUFENDORF, B. V. Chap. II. § 10. where he corrects our Author's Notions, in Regard to some of the following Instances.

² It is rather a single Contract of Sale, as was determined by the old Lawyers, against the Opinion of CASSIUS. Institut. Lib. III. Tit. XXV. § 4. According to the same Authority, there is a Mixture of the two Contracts only, when we find the Gold, and agree with the Artist for his Labour.

³ See Note 3. on PUFENDORF, B. V. Chap. VII. § 12.

VI. (1) Nor is there any real Mixture in this Case. See PUFENDORF, B. V. Chap. II. § 10.

VII. (1) LABEO's Definition of a Contract is, A mutual or reciprocal Obligation, which the Grecians call Συλλασμα; such as Buying, Selling, Hiring, Letting, Partnership. Digest. Lib. L. Tit. XVI. De verborum significatione, Leg. XIX. Our Author quoted this Law. PUFENDORF defines a Contract in a different Manner, B. V. Chap. II. But in Reality it is arbitrary; and it is sufficient to express clearly the Idea we fix to Terms, the Signification of which is not well settled. The Commentators on the Roman Law are very much divided on the Definition of a Contract; and I do not know whether the ancient Lawyers were better agreed on the Matter or not. See BACHOVIVS, in his Commentary on the first Part of the Digest. p. 565, 566.

VIII. (1) On this see PUFENDORF, B. V. Chap. III.

lity consists partly in the Acts, and partly in the Subject itself of the Contract; and this Equality, and Dealing upon the Square, must be observed as well in those Acts that are previous to the Bargain, as those that are principal and essential in it.

IX. One is to know every Thing that relates to what he is dealing about.

IX. 1. One of these previous Acts is, that he we deal with ought to discover to us all the Faults he knows of, in the Thing we are dealing for; and this is not only what is enjoined by the Civil Law, but is also agreeable to the Nature of the Act, there being a nearer Society² and Engagement between Persons contracting, than what is common to all Mankind. And thus may we answer what *Diogenes*, the *Babylonian*, said upon this Topick, *That all Things which are not declared, are not therefore to be thought concealed.*³ Nor am I under any Necessity of telling what may be for your Advantage to hear; as in the Case of heavenly Things; for⁴ the Nature of a Contract being contrived for the mutual Advantage of the contracting Parties, requires something more of Exactness in it. It was well observed of *St. Ambrose*,⁵ *In all Contracts, whatever Faults are in the Things exposed to Sale, they ought to be discovered to the Buyer, which if the Seller does not do, tho' the Right of the Thing be transferred to the Buyer, the latter has an Action against the former, by Reason of the Fraud.* And in *Lactantius*,⁶ *If a Buyer does not inform the Seller of his Mistake, that so he may have a cheap Bargain; or if a Man sells a Slave that is a Fugitive, or a House infected with the Plague, and does not discover it to the Purchaser, regarding only his own Profit, he is not an ingenuous Man, as Carneades would have him, but a Knave and a Rogue.*

2. But it is not so with Circumstances that do not directly concern the Thing contracted for. As if a Man should know that there are several Ships coming laden with Corn, he is not obliged to tell you so; but, however, to discover such a Thing is kind and commendable, and in some Cases not to be omitted without Breach of Charity; yet I will not say it is unjust, that is, that it violates his Right with whom he is dealing; so that what the same *Diogenes* very pertinently said, as *Tully* relates it, is as applicable here, *I have brought my Commodity, I have exposed it to Sale, I sell no dearer than others do: Nay, perhaps cheaper than they, when there is a greater Quantity of it; Whom do I injure then?* Wherefore that of *Cicero* is not generally to be allowed, that to conceal or dissemble a Thing is, when you would have those whom it concerns to be acquainted with it, to be ignorant of what you know of the Matter, merely for the Sake of your own private Interest.⁸ For then only it is unjust, when it immediately concerns the Thing that is to be contracted for; as if a House be infected with the Plague, or ordered by the Magistrates to be pulled down. Which Instances you may see there⁹.

3. But it signifies nothing to speak of those Faults which are known to your Dealer, as the Servitude of the House,¹⁰ which *M. Marius Gratidianus* sold to *C. Sergius Orata*, and which he had bought of him before. For¹¹ an equal Know-

IX. (1) See the Scholiast upon that Passage of HORACE, *Lib. II. Sat. III. 285.*

Mentem nisi, &c.

*Now he that sold him, might have safely sworn,
He's sound both Wind and Limb as e'er was born;
But cheated, if he swore him sound in Soul.*

CREECH.

GROTIUS.

See the Chapter of PUFENDORF last referred to, § 2. Note 2. 2d Edit.

2 I have explained this in Note 1. on the same Chapter of PUFENDORF, § 3.

3 CICERO, *De Offic. Lib. III. Cap. XII.* But the Philosopher is in the Main of the same Opinion with our Author; he proposes no Objection, but only answers those who pretend a Man ought to discover even accidental Circumstances, which do not at all concern the Substance of the Obligation.

4 VALERIUS MAXIMUS, *Lib. VIII. Cap. XI.*
1. An honest Seller must neither augment the Buyer's Hopes of Advantage, nor disguise and conceal from him the Knowledge of the Faults and Inconveniences that accompany the Purchase. The Author is speaking there of an House which the *Augurs* had ordered to be pulled down, which Circumstance the Person who was to dispose of it had never acquainted the Purchaser with. GROTIUS.

5 *De Offic. Lib. III. Cap. X.* On this Passage see Mr. NOODT, *De forma emendandi doli mali*, Cap. XIII.

6 *Institut. Divin. Lib. V. Cap. XVII. Num. 32. Edit. Cellar.*

7 *De Offic. Lib. III. Cap. XII.*

8 *Ibid. Cap. XIII.*

9 *Cap. XVI.* See Note 4. on this Paragraph.

10 CICERO, *ibid. Cap. XVI.* See what I have said on PUFENDORF, *B. V. Chap. III. § 5. Note 1. second Edition.*

11 THEODERIC'S Edict, *Cap. CXLI. GROTIUS.*

ledge

ledge on both Sides, puts both Parties upon an equal Foot: Thus *HORACE*,¹

*Ille feret pretium pænce securus, opinor ut non benevolens
Prudens emisti vitiosum.* *Lib. 2. Ep. 2. v. 17, 18.*

*The Dealing's fair, and he may take your Gold,
And ne'er be thought a Cheat for what he sold:
You bought a faulty Rogue, he told you so.* *Creech.*

And this is a Remark of *Plato's* too, in his XI. *De Legibus* ¹².

X. Nor should there be only an Equality of Knowledge between the Persons bargaining, but also a mutual Freedom of Will; not indeed that if one of the contracting Parties has been induced to treat through a just Fear, the other is obliged to remove it, for that is a Thing extrinsick to the Contract; but that no Man should be unjustly frightened into a Bargain; and if he be, that that Fright should first be over. In Respect to this the *Lacedæmonians* made void the Purchase of some Land which the *Eleans* had by Fear extorted from the Owners, *ἐνέλεσαν μὲν δὲ δυνάστερον εἶναι βία πωλούμενος, &c.* Looking upon it to be as great an Injustice to take the Goods of weaker People, upon the Pretence of Purchase, as by meer Force. Which are the very Words of *Xenophon*¹. But what Exceptions the Law of Nations allows in these Cases, shall be shewed^a in its proper Place.

X. One is to be left entirely to Freedom, and to have no Force put upon his Will.

XI. 1. The Equality required in the principal Act of a Bargain is, that no more be exacted than what is just and fit, which can scarce ever be observed in Agreements of Bounty and Beneficence¹; for if I agree to take somewhat by Way of Reward, either for what I have lent you, or for my Diligence in executing your Orders, or for my Care in looking after what you entrusted me with, I do no Wrong,² I only mix the Contract, by making it partly permutatory, and partly gratuitous. But in all permutatory Contracts, this Equality is to be punctually observed; nor must any one pretend, that what is promised more than is due by either Party, is to be looked on as a Present: For this is seldom the Design of those that make such Contracts; nor is it to be presumed, unless it appear so. For whatsoever Men promise or give, they are supposed to do it, in Proportion to what they are to receive, and as something due only upon the Square.

XI. There is, secondly, an Equality requir'd in the Bargain itself, if it be permutatory, or by Way of Exchange.

2. Thus *St. Chrysostom*,³ *ὅταν γὰρ ἐν τοῖς, &c.* Whenever in our Contracts, our Purchases, or our Payments, we stand haggling, and use all our Might and Means to beat down the Price, what is this but a Sort of Robbery? The Writer of *Isidore's* Life in *Photius* tells us of one *Hermias*,⁴ who having bought any Thing too cheap, would of his own Accord add as much as it wanted of its true Value, holding it a Piece of Injustice to do otherwise; but such an Injustice as Few attended to. And in this Sense do the *Hebrew* Doctors interpret the Law in *Lev. xxv. 14. and 17. Ye shall not oppress one another.*

¹² The Philosopher says, If a Man sells a Slave who has been guilty of Murther, known to both the Buyer and Seller, the latter is not obliged to take his Slave again. p. 916. Tom. II. Edit. Steph. On the same Principle he had a little before said, that If a Physician, or a Master of Exercise, buys a Slave, afflicted with the Stone, &c. or any other obstinate Distemper of Body or Mind, the Sale is good and valid, as if an expresse Declaration of his Distemper had been made; because that it is presumed from the Purchaser's Profession, that he ought to know such Defects.

X. (1) *Hist. Græc.* Lib. III. Cap. II. § 22. Edit. Oxon.

^a B. III. Chap. XIX. § 2.

XI. (1) See PUFENDORF, B. V. Chap. III. § 7, 8.

² It is to be observed, in short, that the Execution of a Commission, unless it be done gratis, receives another Name. For when a Reward is agreed on,

it begins to be Letting and Hiring. And, generally speaking, in those Cases, where a Contract is made, in Regard to a Commission, or something deposited without promise of Reward; in the same Cases, if a Reward intervenes, it is understood to be a Contract of Letting and Hiring. *Institut. Lib. III. Tit. XXVI. De Mandato, § 13. See also Digest. Lib. XVI. Tit. III. Depositi vel contra. Leg. I. § 9.*

³ Our Author doth not tell us from what Part of *St. CHRYSOSTOM's* Works he took this Passage.

⁴ The Historian says, that *Hermias* practised this Maxim, among other Occasions, in Regard to an ignorant Person, who offered to sell him a Book under its Value. *Cod. CCXLII. p. 1044. Edit. Rothom. 1533.*

⁵ See MOSES DE KOTZI LXXXII. *Prac. Juden.* GROTIUS.

XII. 1. There

XII. And, thirdly, in the Thing we are bargaining for; this explained.

XII. 1. There now remains the Equality required in the Thing itself that is bargained for, consisting in this, that tho' nothing was concealed that ought to have been discovered, nor any more exacted than what was thought to be really due, yet if there be found any Inequality in the Thing itself, tho' neither Party was to blame for it, as, suppose, there was some unknown Defect, or there was a Mistake in the Value, yet in this Case must the Inequality be made up, and he who has too much, must give it to him who has too little, because in the Contract it either was, or ought to have been, proposed that both Sides should be dealt with alike, and upon the Square.

2. The Roman Law, however, does not injoin this in every Inequality; it does not concern itself with Things of small Consequence; and Legislators even think proper to prevent, as much as possible, the too great Number of Law-Suits; but only where the Damage is considerable, as where it exceeds half the just Value. For the Laws, says *Cicero*,² take one Way to root out Injustice, and Philosophers another; the former meddling no farther with it than as it breaks out into open Acts, and may, as it were, be felt with the Hand; the latter permitting nothing that may be discovered by deep Meditation and Reflection. And therefore they who are not subject to the Civil Laws, but are above them, ought to follow that which right Reason informs them to be good and equitable, and so too ought those who are subject to the Laws, when the Affair that is transacting is what relates to Justice and Honesty, provided that the Laws are silent in the Case, and neither grant nor take away our Right,³ but only, for some certain Considerations, deny their Aid and Countenance to it.

XIII. What Equality is to be observ'd in Acts of Beneficence, in such as are altogether so, and in such as are only so in Part.

XIII. 1. But we must observe, that some Equality ought to be regarded, even in Agreements of Bounty and Beneficence, not indeed entirely such a one as is expected in Contracts of Exchange; but an Equality proportionable to what is supposed here, as conform to the Nature of the Thing, and the Intention of the contracting Parties; namely, that a Man be not himself damaged by the Kindness he does. And therefore he who is employed and commissioned by another, should be indemnified from all Charges and Losses which may attend the Execution of that Commission; and so the Borrower is obliged to make good any Thing that is lost,⁴ because he stands bound to the Owner not only for the Thing itself, that is, by Vertue of his Property in it; for so any one who had had it would be obliged, but also by Way of Gratitude for his Favour in lending him it,⁵ unless it appear, that the Thing so lent would have perished, had even the Owner had it in his Possession: For in this Case he loses nothing by the Loan. On the contrary, he with whom any Thing is deposited,⁶ receives nothing but a bare Trust, and therefore, if the Thing be gone he shall not be responsible for it; neither in Respect of the Thing, because it is not in being, nor is he the richer for it; nor in Respect of his Acceptance, because in his Acceptance he received no Kindness, but did one. In Things pawned⁷ indeed, as well as in such as are let out,⁸ a middle Way is to be observed, that the Receiver is not to be answerable for every Misfortune, as he who borrows a Thing is, and yet a much greater Care is required of him to preserve it, than of him with whom a Thing is deposited; because, tho' he gives nothing for the Possession of the Pledge, yet the Engagement in itself is generally an Accessory of a chargeable Contract.

2. All which agree with the Roman Laws,⁹ but were originally derived, not from them, but from natural Equity, and therefore are found in other Nations also

XII. (1) *Cod. Lib. IV. Tit. XLIV. De rescindenda venditione*, Leg. II. See what has been observed on this famous Constitution of the Emperor *Dioclesian*, in a long Note on the second Edition of PUFENDORF, *B. V. Chap. III. § 9. Note I.*

² *De Offic. Lib. III. Cap. XVII.*

³ If there is a real Damage, the Civil Laws, what good Reason soever they may have for not allowing an Action for redressing this Inequality, leave the natural Obligation subsisting in its full Force.

XIII. (1) Concerning what relates to this Contract in general, see PUFENDORF, *B. V. Chap.*

IV. § 2, 3, 4. with the Notes in the second Edition.

² Consult the same Author in the same Chapter, § 6. with the Notes in the second Edition.

³ See *Lex Wisigoth*, *Lib. V. Tit. V. Cap. I. II. III.*

⁴ See the same Place, § 7.

⁵ PUFENDORF treats of this Contract also in general, *B. V. Chap. X. § 13, &c.*

⁶ See the same Author, *Chap. VI. of the Book* already often quoted, § 2.

⁷ The Conformity is not compleat. For, to say nothing of Losses sustained in the Execution of a Commission,

also. And among the Rest, in Rabbi *Moses Maimonides*, *Ductor Dubitant. Lib. 3. Cap. 43.* To this had *Seneca* Respect, when he said, ⁸ *Some are responsible only for their Honesty; others for the Safety of the Thing with which they are entrusted.* And by this Rule we may easily form our Judgments of other Contracts. But now having (as far as was necessary to our Purpose) discoursed of Contracts in general, we shall briefly run through some particular Questions about them.

XIV. 1. The most natural Measure of the Value of any Thing, is the Want of it, as *Aristotle* rightly observes, and this is what the least civilized People are altogether guided by; yet this is not the only Measure²; for the Will of Men, which governs every Thing, covets many Things more than are necessary. ³ *Luxury*, says *Pliny*, gave the Price to Pearls. And *Cicero*, in his Oration against *Verres*, *In Proportion to our Passion for such Sort of Things, is our Value for them*⁴. And so on the contrary, it happens, that Things which are the most necessary, are, on the Account of their Plenty, abundantly cheaper; which *Seneca* illustrates by several Instances, *De Benefic. Lib. 6. Cap. 15.* where he also subjoins this, *The Price of every Thing is according to the Markets; when you have commended them ever so much, they are worth no more than they can be sold for.* And *Paulus*, the Lawyer, *The Prices of Things do not depend on this or that Man's Humour or Interest, but*⁵ *on the common Estimation; that is, as he explains it elsewhere, on the Value that all the World puts on them*⁶. Hence is it, that a Thing is only valued at so much as is usual and customary to be offered and given for it, which can scarce be so settled as not to admit a Demand of more or less, except it be where the Law has fixed a certain Rate, *εν συμμαχία*, precisely, and to a Point, as *Aristotle* expresses it.

XIV. How Things are to be valued in selling; and for what Reasons the Price may be raised or lowered.

2. And now in that common and current Price of Things,⁷ we usually have a Regard to the Pains and Expences the Merchants and Traders have been at; and it often rises and falls all on a Sudden, according as there are more or fewer Chapmen, and according to the Plenty or Scarcity of Money or Commodities. Besides,

a Commission, on which Article our Author doth not explain himself, so as to enable us to judge certainly whether his Notions were different from those of the Roman Lawyers: He doth not entirely agree with them about Things lent for Use. For, according to the Roman Law, if the Thing lent was lost by Accident, without any Fault in the Borrower, the Owner suffered, whether the Thing might or might not have been preserved in his Hands. See my eighth Note on *PUFENDORF, B. V. Chap. IV. § 6.* second Edition. The Roman Laws, which answer to our Author's Decisions in these Cases, may be seen in the other Passages, quoted from that Book.

7 This agrees with a Passage in *Exodus*, Chap. XXII. 7, 10, 11, 12, 13. *MOSES DE KOTZI, LXXXVIII. and LXXXIX. Præcep. Juben. GROTIUS.*

8 *De Benefic. Lib. VII. Cap. XIX.* The Words of *SENECA* are, *Non tutelam, illi, sed fidem debeo.* The Philosopher is there speaking of the Obligation of restoring what we owe a Man, even tho' he is at that Time disposed to waste it; for, says he, *I am obliged to keep my Word, (Fidem debeo) but not to preserve the Thing restored, (non Tutelam).* So that, tho' these Words may bear an Allusion to the several Degrees of Care and Exactness to be observed, according to the Nature of the Contracts, the Question is very different in the Main. Perhaps *SENECA* here alludes to the Obligations of Guardianship; as if he had said, *I am not my Creditor's Guardian; I am obliged only to restore him his Goods, it is his Business to take Care of them.*

XIV. (1) *Ethic. Nicomach. Lib. V. Cap. VIII. p. 65. Tom. II. Edit. Paris.*

2 On this whole Question consult *PUFENDORF, B. V. Chap. I.* with the Notes.

3 And the same Author, in his thirty-seventh Book, treating of Jewels, *It is People's Pride and Curiosity, and especially the Extravagance of Princes, that determines the Value of these Things.* And in his thirty-second Book, *The Indians set as great a Price on our Coral, as we do on their Pearls; for these Things depend altogether on People's Fancies.* And *St. AUSTIN, De Civit. Dei, Lib. XI. Cap. XVI.* And pray where is the Strangeness of all this, when you find that so unaccountable are those Men's Notions, tho' they are in their own Natures of so much Excellence and Dignity, that they shall frequently give more for a Horse than a Man Slave, and for a Jewel than a Woman Slave? The Notions of Reason are here very different from those of Necessity and Pleasure. Reason considers a Thing according to its intrinsic Value; but Necessity, according as there is real Occasion for it. Reason seeks for what may appear true to the Mind; but Pleasure for that which may gratify the Senses of the Body. *GROTIUS.*

4 For, adds he, it is hard to fix the Value of Things, till the Extent of our Passions is regulated. In *Verrem. Lib. IV. Cap. VII.*

5 *Digest. Lib. XXXV. Tit. II. Ad Legem Falcid.* *PLINY* says, *Lib. XVIII. Cap. XXXI.* An honest prudent Man, who has a Family to maintain, makes Use of the Provisions that every Year furnishes him with. *GROTIUS.*

6 *Digest. Lib. IX. Tit. II. Ad Legem Aquil. Leg. XXXIII.*

7 Nor does *St. AUSTIN* disapprove of this, upon *Psal. lxx.* But, says the Person you are dealing with; *I bring my Goods a great Way, I only desire a living Price for my Trouble; and the Labourer is surely worthy of his Hire.* Friend, we are not talking about your Trade and Business, but about your Lying and Perjury in it. *GROTIUS.*

there may possibly some such Circumstances intervene, as may very justly raise or lessen the ordinary Market Price; as, the Loss we sustain, the Profit we lose, a particular Fancy for certain Things, the Favour we do one in buying or selling what we should not otherwise have bought or sold; all which Circumstances the Person we deal with ought to be acquainted with. And we may also have Regard to the Loss or Gain that arises from the Delay or the Promptness of Payment.

XV. When a Sale is completed by the Law of Nature, and when the Property of the Thing is transferred.

XV. 1. As to Buying and Selling, we must observe, that the Bargain and Sale is good, from the very Moment of the Contract; and tho' the Thing be not actually delivered, yet may the Property be transferred, and this is the most simple Way of Dealing: So ² Seneca says, *Selling is the alienating of a Thing that belongs to us, and the translating of it, and the Right we have in it, to some other*: For it is so in an Exchange. ³ But if it be agreed, that the Property shall not pass immediately, then the Seller shall be obliged to transfer his Property at such a Time, and in the mean While, both the Profits and Hazards shall be the Seller's. And therefore, that a Contract of Sale consists ⁴ in the Seller's engaging himself to deliver the Thing sold, and that the Buyer should not be molested in the Possession of it, or should be indemnified, in Case of such Molestation; that the Buyer must run all Risques, ⁵ and that the Profits shall belong to him before the Property be actually

XV. (1) Concerning this Contract, see PUFENDORF, *B. V. Chap. V. § 2.*

² *De Benefic. V. 10.* GROTIUS.

³ As this stands in the Original, it is urged by our Author as a Proof of what he had just advanced in Relation to a Contract of Sale, *Nam et ita fit in permutatione*. This I take to be his Meaning; on which the Commentators are silent. If, according to the Law of Nature, the Property may be transferred the Moment the Contract is made, by which one Thing is given for another, tho' neither of the contracting Parties delivers what he deprives himself of; or tho' only one of them immediately gives the other Possession of the Thing exchanged; why may not the Translation of Property be likewise made without Delivery, when we give a Thing for Money? There is no more Difficulty in the latter Case than in the former. However, as those who are prejudiced in Favour of the Roman Law, the Notions of which are not more agreeable to the Simplicity of the Law of Nature, in Regard to Exchange, may also dispute what our Author takes for granted, concerning that Contract, which is of the greatest Antiquity, the Whole amounts at last to what has been said, *Cap. VI. § 1.* in the Text and Notes.

⁴ *Præstando ut habere liceat*. According to the old Roman Law, when a Thing was sold purely and simply, the Seller only engaged so to deliver it into the Hands of the Buyer, that it might be reckoned among his Goods, according to the Law of Nations, (which was termed *Dominium Bonitarium*) and that he should not be molested in the Possession of it, or be indemnified, on legal Proof of such Molestation. But all this did not render the Buyer the real Proprietor, according to the Civil Law, till the Form of Prescription expired; he had not yet the *Dominium Quiritium*; the Property was not transferred on him *omni modo*, nor *quoquo modo*, it was only a Sort of Possession. This therefore was barely called, *to deliver*, (*tradere*) whereas the Word *to give* (*dare*) was used for expressing a Translation of the full and whole Property, which was performed with certain Formalities. (*Mancipatio, vel cessio in jure*) See *Chap. VIII.* of this Book, § 25. Note 2. But, unless it was expressly agreed to put the Buyer in Possession of the Thing bought on that Foot, he could demand the Possession only in the other Manner. See Mr. NOODT's *Præbilia Juris*, Lib. II. Cap. XII.

⁵ See PUFENDORF, *B. V. Chap. V. § 3.* where he makes a proper Reply to what is alledged for salving the Want of Connexion in the Principles of the Roman Law; or at least the Manner in which they are usually explained. The Seller, we are told, is considered as indebted for a Thing in Kind; and therefore is not answerable for Accidents, by which the Thing may be lost, without any Fault in him. Mr. THOMASIVS, however, (in his Notes on HUBER, *De Jure Civitatis*, Lib. II. Sect. VI. Cap. IV. p. 523.) not only approves of this Reason, but even maintains, that it holds good, according to the Law of Nature, when the Goods are not yet paid for, and the Seller doth not sell them on Trust. He is of Opinion, that in this Case the Property should be considered as remaining in the Seller, and that this always holds good, even according to the Law of Nature, unless it was expressly agreed, that the Property should be transferred to the Buyer, the Moment the Contract was made, and before the Delivery of the Thing sold. To support this Assertion, he observes, that by the Nature of the Contract of Sale, the Seller is not obliged to deliver the Goods till he is paid, (this probably was meant by those Words *Ad Dominium transferendum*, taking *Dominium* for Possession, not for Property; which would be begging the Question) unless he gives Credit. But I think it does not thence follow, that the Right of Property remains in the Seller. The Right, and the Enjoyment of the Right, are two different Things; as are the Contract, and its Execution. Nothing more is requisite for transferring the Right but the Will of the Proprietor; and that Will, if we judge by the Simplicity of the Law of Nature, has its full Effect, the Moment the Contract of Sale is made, unless it be otherwise agreed. But the Enjoyment of the Right, which relates to the Execution of the Contract, may be suspended till the Buyer has paid down the Money agreed on, tho' he will not thereby be less the Proprietor of the Thing sold. The Seller is not obliged to dispossess himself of his Goods till the Buyer has paid for them; because, as he gives no Credit, he tacitly reserves to himself a Right of breaking the Contract, if the Buyer does not first perform his Engagements; nor does he intend to expose himself to the Danger either of not being paid, or, at least, not without much Difficulty, or not recovering his Goods safe and sound, which he sold only on Condition, that the Sale should be null and void, on Default

tually transferred, are Maxims of the Civil Law, which are not in all Places observed. Nay, on the contrary, most Law-Makers have thought fit to enact, that till the Delivery of them the Seller shall have the Advantage, and stand to the Hazard of the Goods, as *Theophrastus* has remarked, in a Passage of ⁶ *Stobæus*, where you may also find many other Customs touching the Formalities of Selling, about giving Earnest, about retracting, very different from the *Roman* Laws; and *Dion Pruseensis* too has observed, that among the *Rhodians*, a Sale was not completed, nor other Contracts finished, till they were publicly registred.

2. And we must know too, that if one and the same Thing be twice sold, ⁷ of the two Sales, that shall stand good which had the Property immediately transferred,

fault of Payment. Now either the Time of Payment, which ought to precede the Delivery of the Thing sold, is fixed or not. In the former Case it is plain, that the Moment the Term expires, the Right of Property reverts to the Seller: In the latter, the Buyer is obliged to take away the Goods without Delay, because, otherwise, the Seller might lose an Opportunity of disposing of them to the same Advantage. This, I think, ought to hold good, according to the Law of Nature. But at the same Time it must be owned, that, commonly speaking, when the Sale is made in the Manner here specified, it is not so much a Contract of Sale, properly so called, as an Agreement which obliges the Parties to make such a Contract at a certain or uncertain Time. So that it is no Wonder if the Seller remains Proprietor of the Thing sold, and consequently, if Accidents and Casualties fall on him. The Effect of such an Agreement is, that the future Seller engages first, not to make a Contract of Sale with another, in Regard to the Thing bargained for, before the Term, either limited or not; and in the second Place, to give it at the Price agreed on, when the Contract of Sale shall be completed, by the Performance of the Obligations on both Sides. There may be an Agreement to sell, which may have some Effect, even without fixing any Price, as I have shewn in my third Note on PUFENDORF, as before quoted. Much more then may there be an Agreement to sell at a certain Price. And this seems to have been our Author's Notion; at least it ought to have been so, in my Opinion, when he was arguing on the Principles of the Law of Nature only.

6 *Tit. De Legibus, Serm. XLIV. GROTIUS.*

7 Our Author here supposes two Sales, by one of which the Right of Property was transferred, the Moment the Contract was made and concluded; which, according to him, is the most simple and natural Way of Buying and Selling: In the other it is agreed, that the Property should still remain some Time in the Seller. But he does not distinguish which is prior or posterior in Date; nor does he speak of the Case in which the two Sales were made on the same Foot; which PUFENDORF supposes, as above quoted, § 5. who on this Occasion accuses him wrongfully; imagining that the whole Difference is, that one of the Sales was accompanied by a Delivery; and following ZIEGLER in this Point, tho' he does not name him, who endeavours to make GROTIUS contradict himself. But our Author says, *By Delivery, or otherwise*. So that, according to him, it is possible there may be no Delivery; nor can it take Place here, when the other Buyer has without it acquired the Property, the Moment the Bargain was made; because the Delivery implying a present Translation of the Property, there would be a Translation of Property on both Sides, which would make Things so far equal. However, I do not approve of our Author's Way of reasoning on the Substance of the Question.

For tho' a present Translation of Property is in itself more considerable than a bare Promise of transferring the Property; yet the Promise, according to the Principles laid down in the preceding Chapter, ought, in its own Nature, to have sufficient Force to hinder the Promiser from knowingly and willingly doing any Thing that shall stand good, which may put him out of a Condition of performing it. So that the Moment a Man has promised to transfer the Property of a Thing to another, he thereby deprives himself of the Power of actually transferring that Property elsewhere, till a Term, whether fixed or not, which is either expressly or tacitly agreed on. In Reality, according to the Law of Nature alone, while there is no Delivery, the first in Date has the better Right, on what Foot soever the Sale was made. But when the Thing sold has been actually delivered, the Person to whom it was delivered is not obliged to restore it, whether he was prior or posterior in Date, provided he knew nothing of Sale made to the other. That the first in Date has the better Right, when there is no Delivery, appears from the Reason already alledged, and taken from the very Nature of Promises; even tho' there was a present Translation of Property in Favour of the last in Date, if that Translation was not accompanied with an actual Delivery, the Buyer might think it possible, that the Performance of the Contract might be hindered by several Accidents, of which Number is another Man's prior Right. The Thing is then in Nature: It has not been in the Seller's Power to dispose of it; so that the first Buyer, or the Person who has the first Right to it, may assert that Right, and the other ought to rest satisfied with demanding Damages and Interest of the Seller, who has amused him with a fallacious Contract. This takes Place particularly when it depended solely on the last Buyer to put himself in Possession of the Thing the Moment the Contract was made and settled. But when the Thing sold has been actually delivered to one of the Buyers, even to the last in Date, it is no longer in Nature, but ought to be considered as lost. The Person to whom it was delivered is not in Fault, if it was, as it were, mortgaged to another, because we suppose he knew nothing of the Matter. By what Title shall that other, with whom he had nothing to do, require the Delivery of a Thing which he has justly acquired? As, while the Thing is not yet delivered, the first in Date may come upon the Seller, who has it still in his Hands, because he neither could nor was obliged to foresee, that the Seller would promise it to another; so likewise, when the Seller has actually deprived himself of it, pursuant to a posterior Engagement, the Person to whom it was delivered is not obliged to enquire, while he has no Reason for Suspicion, whether the Seller has transferred his Right to another. The Necessity of Civil Commerce equally requires both; so that in both Cases it is a Misfortune to the Person who depended on having

ferred, either by Delivery or otherwise; for by this the moral Power of the Things goes from the Seller, which it does not by a bare Promise.

XVI. *What Monopolies are against the Rights of Nature, or the Rules of Charity.*

XVI. All Monopolies ¹ are not repugnant to the Law of Nature, ² for they may sometimes be permitted by the Sovereign upon a just Cause, and at a certain Rate; as may appear from the Example of *Joseph*, when he was Governor of *Ægypt*: So also under the *Romans*, the *Alexandrians* had the Monopoly, ³ as *Strabo* tells us, of all Commodities brought from the *Indies* and *Æthiopia*. The like may be done by private Persons, provided they are contented with a reasonable Profit. But they, who, as the Oylmen in the *Velabrum*, ⁴ do purposely combine to advance the Value of their Wares above the highest Degree of the current Price; and those also who use Force or Fraud to prevent the Importation of any greater Quantity, or else agree to buy up all, in Order to sell them again, at a Rate very exorbitant, considering the Season, commit an Injustice, and are obliged to make Amends and a Reparation for it. If indeed they do by any other Means hinder the bringing in of Goods, or ingross them to themselves, to vend them dearer, tho' at a Price not unreasonable for the Season, they act against the Rules of Charity, ⁵ as *St. Ambrose* proves by several Arguments, in his third Book of Offices, but properly speaking, they violate no Man's Right.

XVII. *How Money goes for every Thing else*

XVII. Now as for Money, we must observe, that it naturally derives its Currency, or Equivalence, ¹ not from the Matter only, ² nor from this or that particular Denomination ³ and Form, but from a more general Capacity of being compared ⁴ with, or answering the Value of all other Things, at least such as are more immediately Necessary. And its Value, if it be not otherwise agreed, must be according to the Rate it bears at the Time, and in the Place of Payment ⁵; thus *Michael Ephesius*, Nicom. v. *Ὡς ὅτι τὸ χρῆμα τῷ ὅτι τῷ, &c.* Money itself

having the Thing sold, if he is disappointed, either by the Discovery of a prior Right, or by a Discovery of the Delivery of the Thing, which puts the Seller out of a Condition to give the Possession of it.

XVI. (1) Concerning this Question, see PUFENDORF, B. V. Chap. V. § 7.

2 Every Body knows *Thales's* Story of the Olives. *Pythocles's* Invention of buying up the *Tyrian* Lead for the Advantage of the *Athenians*, is in ARISTOTLE, *Oeconomic.* II. See PLINY, VIII. 37. of the Monopoly of the Skins of Hedge-Hogs. And PROCOPIUS, of the Ingrossing all the Silks, in his *Hist. Arcan.* Chap. XXV. GROTIUS.

Thales, foreseeing there would be great Plenty of Oil, farmed all the Olive Trees in the Country. This is related by several Authors, but with some Difference in the Circumstances. See ARISTOTLE, *Politic.* Lib. I. Cap. XI. and on that Place HUBERT GIPHANIUS, in whose Version it is the seventh Charter; as also DIOGENES LAERTIUS, Lib. I. § 26. with his Commentators.

3 Lib. XVII. See too CASSIODORE II. 4. and 26. GROTIUS.

Neither this nor the foregoing Example is well applied, as PUFENDORF observes, in the Chapter above quoted, Note 2. It appears from the Passage of STRABO, that if the City of *Alexandria* was in Possession of almost all the Trade to the *Indies* and *Æthiopia*, it was owing only to the Advantage of its Situation, not to any particular Privilege granted them by the *Romans*. The Passages of CASSIODORE, referred to by our Author, are better applied.

4 It is a just and prudent Law, C. *De Monopol.* And there is a very notable Passage in LYSIAS against the Corn-Factors, who advanced the Price of their Grain, by raising false Rumors. Add to these CASSIODORE, IX. 5. and C. *quicumque*, Cauf. XIV. Quæst. IV. GROTIUS.

5 There is no Offence against the Rules of Charity in this Case, but when the Things in Question

are absolutely necessary for the Support of Life, as Corn.

XVII. (1) Not so much from the Substance as the Value, Lib. I. D. *De contrah. emtione.* We must not regard the Matter here, but the Worth of it, L. *Si is cui*, § 1. *De solutionibus.* GROTIUS.

2 Because we may give Silver Money, for Money of Gold.

3 Because we may give Crowns for Pistoles, or Half-Crowns for Crowns; or Copper-Money for Crowns, &c. in Proportion to the respective Value of each Species.

4 Because we may give Money for Corn, Wine, &c. and that by paying more or less, according as the Things bought are more or less scarce in Comparison with Money. See PUFENDORF, B. V. Chap. I. § 15, 16.

5 That is, if a Man borrows a Sum of Money, for Example, and, at the Time we are to pay it, Money, or other Things, are more plentiful, and consequently, Money is of more or less Value than it was when he borrowed it; the Creditor cannot demand more Pieces than he lent, nor the Debtor pretend to pay fewer than he borrowed. The Reason is, because the Case, which frequently happens, might as well turn to the Advantage of either of the contracting Parties, as to his Loss. So that they are and ought to be supposed to have tacitly consented, that it should be so much the better for him that should gain, and so much the worse for him who should lose by the Difference. There is a Hazard in such Agreements. The same is to be said, when a Thing or the Value of that Thing, is to be given at a certain Time, or in a certain Place. The Commentators very much enlarge here on the Change of the intrinsic or extrinsic Value of the Species. But this is a different Question, of which it doth not appear that our Author thought, and concerning which PUFENDORF may be consulted, B. V. Chap. VI. § 6, 7.

varies, as our Necessities do; for as we have not always the same Occasion for Things that belong to another, so Money is not always of the same Value, but sometimes is more, and sometimes less worth; but yet ⁶ the Value of Money is what lasts longest, and therefore we use it as the Standard and Measure of all Things in Trade. The Meaning of which is this, That which is the Measure or Standard to other Things, ought in itself to be constant, and such are Gold, Silver, and Copper, in Things susceptible of Price, for they are in themselves of the same Value, almost always, and in all Places. But as other Things which are useful or necessary, are either scarce, or in abundance, so the same Money, made of the same Metal, and of the same Weight, is sometimes worth more, sometimes less.

XVIII. ¹ Letting and Hiring, as ² Caius well observes, very much resembles Buying and Selling, and is guided by the same Rules. That which answers to the Price is the Rent or Hire; and that which answers the Property, is the possessing and enjoying the Benefit of it. Wherefore, as when a Thing perishes, ³ the Owner bears the Loss; so when a Thing rented or hired proves barren, or by any other Accident unprofitable, ⁴ the Loss is to the Tenant, nor has the Person who lets it any Thing the less Right to the Money agreed for, because when he delivered the Thing to his Use, it was then worth as much as was contracted for, tho' this may be altered either by the Laws, or particular Agreements. But if the Landlord, ⁵ upon the first Tenant's not being able to make Use of it, shall let it to another, whatsoever he shall get thereby, he shall repay to him who first took it, that he may not enrich himself by another Man's Due.

XVIII. By the Law of Nature nothing is to be abated of the Rent, or Hire, on Account of Barrenness, or the like Accidents, and what if the first Tenant being not able to use it, it be lett to another.

XIX. And what we have before said concerning Selling, that the Price may be more or less, if what would otherwise not be bought or sold at all, be bought or sold to gratify another, the same may be understood of any Thing or Work, let or hired. But if a Man, by the same Pains, can serve several Persons, as by carrying them from Place to Place, if the Undertaker shall oblige himself entirely to every one of them, he may demand the same Reward ¹ from each of them, as from any one of them; if the Law does not oppose it; because a second Person's receiving Benefit by my Labour does no Ways prejudice the Agreement made with the first.

XIX. How a just Salary may be increased or lessened.

XX. ¹ As to the Loan of a Thing consumable, it is a common Question, by what Law is the taking of Interest forbidden? And tho' it be the general Opinion, ¹ that it is prohibited by the Law of Nature; yet the Bishop of Avila ² thinks otherwise; neither are the Arguments on the other Side weighty enough to convince one of the contrary. For whereas it is said of the Loan of a consumable Commodity, that it is what is done freely, ² as much may be said too of the Loan

XX. By what Law the taking Interest is forbidden.

⁶ Its Value is publick and perpetual, D. Lib. I. D. De contr. emt. GROTIUS.

XVIII. (1) Concerning this Contract, see PUFENDORF, B. V. Chap. VI. with the Notes.

² Digest. Lib. XIX. Tit. II. Locati, conducti, Leg. II.

³ That is, a Thing sold, but not delivered. See above, § 15. and my first Note on PUFENDORF, B. V. Chap. VI. § 2.

⁴ Provided such Accidents do not entirely take away the Use of the Thing; as is the Case, when a Farm yields no Profit, or so little, that it is hardly any Thing in Comparison of the Labour and Charge employed in the Culture, and in Proportion to the Largeness of the Farm hired. The only View in hiring a Thing is to draw some Advantage from it; so that here the Case is the same as if the Thing hired had perished, or the Tenant was turned out.

⁵ It is here supposed, that the Owner, or Landlord, had no Reason to think the first Tenant would be unwilling he should let the Thing to another, so long as he is not in a Capacity of enjoying it himself. Such an Impediment might also happen, as would dissolve the Contract, by Vertue of a tacit Exception, founded on a reasonable Presumption of the Tenant's Intention.

XIX. (1) This requires some Restriction. See what is said on the Question, § 4. of PUFENDORF's Chapter, quoted in the foregoing Paragraph.

XX. (1) Concerning this see PUFENDORF, B. V. Chap. VII. § 8, &c.

² In Cap. 25. Matt. qu. 171. & 172.

² For these two Loans (the *Commodatum* and the *Mutuum*) are very much alike, as *Locatio* and *Fœneratio* are, the one Letting out of Goods, the other of Money; in L. *Unica*, C. Theod. *quod jussu est*: There is, *pecuniam commodat*. JUSTINIAN has made it in his Edition, *mutuam dat*. And HORACE calls *nummos fœnore sumtos*, Money taken up at Interest, *conductos*, Money hired, Lib. I. Sat. II. where the Scholiast has *Mercēs*, for *Usura*. GROTIUS.

See Mr. NODD's excellent Treatise, *De Fœnore, & Usuris*, Lib. I. Cap. VI. In Regard to the Terms *Mutuum* and *Commodatum*, they are sometimes confounded one with the other by antient Authors; of which we have a considerable Number of Examples in FABROT's Notes on CUJAS, *Paratit. C. De Commodato*, p. 125. To which may be added JAMES GODEFROY, on the Title of the *Code*, quoted by our Author, *Tom. I. p. 228*.

of any other Thing that is not consumable; and yet it is not unlawful to demand some Money for the Use of it, it only causes the Contract to go by another Name. Neither is the Argument drawn from the Barrenness of Money more prevalent. For ³ the Industry of Man has made Houses, and other Things naturally barren, to become fruitful. The most plausible one is, that here one Thing is given for another; ⁴ and that the Use of a Thing cannot be distinguished from the Thing itself, when that very Use consists in the Consumption of it, and therefore nothing ought to be demanded for it.

2. But here we must observe, that when it is said, that the Use and Profits of Things consumable, or of such whose Property passes to the Persons to whom they are lent, were introduced by a Decree of the Senate, ⁵ but that, however, there were no such Use and Profits in Reality, the Controversy depends on the Idea of the Word *Ususfructus*, Use and Profits, which Word certainly does no Way, according to its proper Signification, agree to any such Right ⁶; but however, it does not thence follow, that such a Right is nothing, or of no Value, when on the contrary it is evident, that if any one would yield up such a Right to the Proprietor, Money might be demanded on that Account. So also the Right of not paying Money or Wine borrowed, till after such a Time, is something susceptible of Estimation; *For he pays less, who pays late.* Therefore ⁷ ἐν ἀνέχρησται, in a Mortgage, the Profits of the Land answer the Use of the Money. But what ⁸ *Cato*,

³ Nor ought Money ever to be idle and unprofitable, *L. quid ergo, § Usuras, D. de contrar. & util. act. tutelæ, L. Debitor. D. de Usuris. GROTIUS.*

⁴ Our Author proposes and answers this Objection more at Length, in the following Manner, in a Note on LUKE vi. 35. "It is objected by some, that in the Loan of a Thing consumable, the Lender transfers his Property to the Borrower: Now, say they, the Profits arising from a Thing ought to belong to the Proprietor. But this is a Refinement of Speech, which has no Foundation in natural Equity. For, in Regard to Things that may be returned in Specie, as Money, Corn, Wine, &c. the Right a Man has to demand an Equivalent of the same Sort, stands for Property. Now it is universally agreed, that a Person to whom a Thing is restored in a short Time, receives more than he to whom it is restored after a longer Time, on Account of the Advantages attending the natural Possession. (Ἡ φύσιν καλοῦσιν.) And this holds good in a Loan of Things consumable, as well as in that of Things not consumable, if we consider the Nature of Things in themselves, and not the Subtlety of Terms. The Delay of Payment is undoubtedly susceptible of Estimation; and consequently, some Stipulation may be made in Consideration of such Delay. If, on lending a Man a hundred Crowns, I agree with him, that he in his Turn shall lend me the same Sum another Time, which is a real Exchange; how will it be proved, that there is more Injustice in such an Agreement, than when I lend a Neighbour some Oxen for Ploughing his Ground, on Condition that he shall lend me his in his Turn? Now this Obligation of Lending in his Turn, is, like all other Things, susceptible of Estimation by Money; (and, consequently, a Man may be released from it on Payment of a certain Sum in its Place). Besides, Nature dictates to us this Maxim, that we are not obliged to serve another, when we cannot do it without Damage to ourselves. Now, he who deprives himself of his Money for some Time, to pleasure another, might have laid it out on some Piece of Land, or on a House, and received Profits arising from them during that Time. It may be said, those Profits would have been uncertain. But even

"that Uncertainty has its Value, and is frequently sold, as every Thing else which is subject to Hazard. Besides, if a Person to whom the Use and Profits of a Sum of Money are bequeathed without the Property, is supposed to become richer by such a Legacy; it appears, that such Use is susceptible of Estimation; and consequently, the same may be said of the Use of a Sum lent for a Year. I perceive, that most of those, who condemn an Agreement for any Interest for Money lent, do not however disapprove of demanding some Interest for Delay of Payment; whereby they allow of agreeing that if the Borrower doth not pay at the Time appointed, he shall give so much for the Interest of the Money lent. Now is not this admitting the Substance of the Thing, and disputing merely about Words? For, according to this Opinion, we may bargain thus, *If you do not pay me in three Days, you shall give me so much more.* But, if the three Days, or some other fixed Time is not mentioned, the Agreement shall be unlawful. Is not this a mere Quibble, without any Foundation in the Nature of Things? Let us therefore conclude, that, without Prejudice to the Law of Nature, every one who deprives himself of the Use of his Money, to oblige another, may bargain beforehand, that the Borrower shall give something in Return for that Service."

⁵ *Digest. Lib. VII. Tit. V. De Ususfructu rerum, quæ, &c. Leg. I. II.*

⁶ For by *Ususfructus* we understand, a Right of enjoying a Thing belonging to another, and the Profits arising from it, without touching the Substance, or disposing of it. *Digest. Lib. VII. Tit. I. De Ususfructu, &c. Leg. I.* Whereas, when a Sum of Money is bequeathed to any one for his Use, the said Use consists in the Consumption. See Mr. Noodt's Treatise *De Ususfructu*, Lib. I. Cap. II. and XX. XXI.

⁷ *Cum debitor. D. in quibus causis pignus. L. ea pactione. C. de Usuris. GROTIUS.*

Concerning the *Antichresis*, see PUFENDORF, *B. V. Chap. X. § 14.*

⁸ Mr. Noodt has examined these Passages of the Authors here quoted, and some others, in his Treatise *De Fœnore & Usuris*, Lib. I. Cap. IV. VII. VIII. IX.

Cicero, Plutarch, ⁹ and others alledge against Usury, does not so much respect the Nature of the Thing; as the Circumstances, and accidental Consequences that commonly attend it.

3. But whatever our Opinion may be of this Matter, we ought to be satisfied with the Law given by GOD to the *Hebrews*, ¹⁰ which forbids one *Jew* to exact

⁹ As APPIAN, in *Civil*. (p. 382. Edit. H. Steph.) GROTIUS.

¹⁰ Our Author changed his Opinion since he wrote this, as appears both from his *Introduction to the Law of Holland*; his 953d Letter written to SALMASIUS; and his long Note on St. LUKE, of which I have already given a Part. He confutes himself in the following Manner, "The Law in *Deuteronomy* xxiii. 19, 20. stands thus; *Thou shalt not lend upon Usury to thy Brother; Usury of Money, Usury of Victuals, Usury of any Thing that is lent upon Usury. Unto a Stranger thou mayest lend upon Usury; but unto thy Brother thou shalt not lend upon Usury.* Those who maintain, that all Lending on Usury is contrary to the Law of Nature, pretend that the Permission here granted in Regard to Strangers is a bare Permission of Fact, not of Right, that is, a bare Impunity. But the Words do not admit of this Explication; and the People for whom the Law was made, never understood it thus; as appears from the Testimonies of JOSEPHUS and PHILO, with whom all the Rabbins agree in this Point. The former of those Authors says, *It is not lawful to lend upon Usury to any Hebrew, either Eatables or Drinkables; for it is not just to raise a Revenue at the Expence of their Countrymen. But we must assist them in their Necessities, and consider their Gratitude as Gain, as also the Reward which GOD will bestow on such as do good.* (*Antiq. Jud. Lib. IV. Cap. VIII.*) PHILO observes, that in the Law under Consideration, the Term *Brother* is not confined to one born of the same Parents, but extends to all Countrymen, or Persons of the same Nation, (*De Caritate*, p. 701. Edit. Paris.) And a little lower he adds, that *If a Man is not disposed to give, he ought at least to lend freely, and without Interest; for, says he, by this Means the Poor will not be reduced to the utmost Misery, by being obliged to pay more than they received; and the Creditors will receive no Damage, since they will receive their Due, together with the Reputation of Goodness, Generosity, Greatness of Soul, and Commendation.* (p. 702.) CLEMENT of Alexandria has imitated and explained this Passage, *Stromat. Lib. II. (Cap. XVIII. p. 473. Edit. Potter.)* Hence it appears sufficiently, that the Law in *Deuteronomy*, under Consideration, has been considered as containing only a Duty of one fellow Citizen to another; which is clearly insinuated in *Leviticus* xxv. 36. where we find this Reason given for the Prohibition of Lending on Interest, *That thy Brother may live with thee.* For which Reason, when the Royal Psalmist, and the Prophet EZEKIEL, praise such as forbear this Practice, they are to be understood as speaking only of those to whom it was forbidden by the Law. St. AMBROSE, and some others after him, are of Opinion, that by the Term *Strangers*, of whom Interest might be taken, are meant those of the seven Nations, on whom the *Israelites* might lawfully make War. We are not to be surprized, says that Father, if it was allowed to lend in this Manner to Persons, who might be killed with Impunity. (*De Tobia*, Cap. XV.) But this Explication doth not agree with the

"Terms of the Law; for when it speaks of Strangers, in Opposition to Brethren, or those of the same Nation, it is certain the Words ought to be understood of all other Nations without Exception. To this it may be added, that it was not consistent with the Gravity of the Legislator, to make a Law for allowing to lend on Interest to Persons who were to be destroyed. The Reason then of the Difference here made is this, GOD required the *Israelites* should observe among themselves, not only the Duties common to all Men, and which relate to such Things as others might in Rigour demand; but likewise several Duties of Charity and Friendship peculiar to themselves; as appears from the Laws concerning Slaves, Servant's Wages, the Permission of Gleaning in another Man's Field, and several others of the like Nature. Besides, the chief Income of the *Hebrews* arose from Cattle and Husbandry, as JOSEPHUS observes, *Lib. I. Adv. Apion.* Whereas most of the neighbouring Nations enriched themselves by Trade; as the *Sidonians*, the *Tyrians*, those who lived near the *Red Sea*, and the *Egyptians*. So that there was a very good Reason why the Law should allow the taking of some Interest for Money lent to such Strangers, tho' it forbid the *Israelites* that Practice, who were for the most Part Shepherds or Husbandmen. But this Law of MOSES being founded on the particular State of the People of *Israel*, and being imposed on them alone, obliges others only as it may insinuate some Conformity to natural Equity. As to the Gospel, our Saviour JESUS CHRIST having laid down no particular Precept concerning the Matter in Question, we are to draw Consequences from the general Precepts of his Doctrine, for knowing what he allows or prescribes in this Case, &c. — Among the old Canons of the Church we find no one that Excommunicates all in general who lend on Interest, as was practised in the following Ages. It is forbidden only to such as had some considerable Employment in the Church; to such as were called *Οἱ ἐν ναύονι*, in the forty-third of the Canons ascribed to the Apostles, in the fourth of the Council of *Laodicea*; the seventeenth of the Council of *Nice*; the fifth and sixteenth of the Council of *Africa*. And the Reason why such Sort of Men were forbid to do it, is, in my Opinion, because it was thought they ought to be free from even every Suspicion of Avarice. The Fathers of the *African Council* give us to understand as much, when they say, that *What is blamable in the Laity, ought to be much more condemned in the Clergy.* Can. V. The same Council, when it forbids Bishops, Priests, and Deacons to lend on Usury, likewise forbids them to undertake any Procuration, or plead for another; for which Prohibition this Reason is assigned, that it doth not become Ecclesiasticks to meddle with secular Affairs. [See above, *B. I. Chap. II. § 10. Num. 8.*] HAMENOPULUS alledges the same Reason, after having quoted the Canons above-mentioned. [*Promptuar. Lib. III. Tit. VII. § 28.*] The Emperor *Leo*, as the same Lawyer observes, was the first that imagining no Sort of

"Usury

exact Interest for Money lent to another. For the Subject of this Law, if not of indispensable Necessity, is, without Doubt, ¹¹ morally honest, and therefore, ¹² in the fifteenth Psalm, it is reckoned amongst some other Things that are highly moral; as also in *Ezekiel* the eighteenth. Such Precepts then as these do oblige us *Christians* too, as being called to give more noble Instances of Virtue; and certain Duties which the Law then only enjoined the *Hebrews*, or other circumcised Persons (for they were both equally obliged) the same ought now to be observed towards every Body, ¹³ all Distinction of People being entirely taken away by the Gospel, and the Word *Neighbour* of a much larger Signification. As that excellent Parable of CHRIST [*Luke* x. 29, &c.] concerning the *Samaritan*, does fully demonstrate. And therefore *Lactantius*, treating of the Duties of a Christian, says, ¹⁴ *He shall not give his Money upon Interest, for this is to gain by another's Loss*; and *St. Ambrose*, *To assist a Man in his Wants, is a Piece of great Humanity, but* ¹⁵ *to extort more than is borrowed is severe and cruel*. And *Augustus Cæsar* ¹⁶ himself set a Mark of Infamy on some *Roman* Knights, who took up Money at an easy Rate, and lent it upon extravagant Interest.

XXI. What Advantages do not come under the Name of Interest.

XXI. But yet we must observe, that there are some Contracts ¹ which look like Usury, and are generally thought to be so, which, however, are Agreements of another

" Usury was allowed to Christians, forbid it to all " in general. Before that Time, even Churches " borrowed Money at four per Cent. &c. " Thus far our Author. To which if we add the Reflections of Mr. NOODT, who has exhausted this Subject, in his Treatise *De Fœnore & Usuris*, Lib. I. Cap. X. XI. we shall receive full Satisfaction, in Regard to the Objections which the Partizans of the contrary Opinion pretend to bring from Scripture.

¹¹ The *Hebrews* are of Opinion, that by the Word *נשך*, is meant Usury for Money; but that *נשך* signifies Usury for any Thing whatever. *St. JEROME*, upon the eighteenth of *EZEKIEL*, *They think indeed that Usury consists only in the Interest of Money: Which the Divine Scriptures providing against, do in every Thing prohibit an immoderate Advantage, and oblige you to take no more on any Account than you have given.* GROTIUS.

Concerning the Signification of those *Hebrew* Words, see *SALMASIUS*, *De Usuris*, Cap. XX. p. 611, &c. and *De modo Usurarium*, Cap. VIII. p. 318, &c. as also Mr. LE CLERC's Commentary on *Leviticus* xxv. 36.

¹² And in the cxiith, *A good Man is merciful and lendeth.* GROTIUS.

¹³ ARNOBIUS, in his fourth Book, says, that *Christians* generously impart what they have, and that to all Mankind, with as much Freedom as if they were their nearest Relations. And in another Place, *They who love all Men as their Brothers.* GROTIUS.

Christian Charity certainly requires we should lend without Interest, when it can be done without incommoding ourselves, to Persons in low Circumstances, who want Money for their Subsistence. But it by no Means requires we should make no Advantage of Money lent to such as improve and gain by it, and that often much more than the common Interest.

¹⁴ *Epitom. Institut.* Cap. IV. Num. 12. Edit. Celler.

¹⁵ *St. CYPRIAN*, *De lapsis*, reckons amongst several grievous Sins, the lending Money on Interest. *St. CHRYSOSTOM*, *De jejuniis*, V. *Ἐάν νηστίας, βλέπε, &c.* If you fast, pray see that you do not put your Money out to Interest. Do you fast? Cancel the Obligations of your violent and unjust Contracts. And the same Author upon the last Chapter of the first of *Corinthians*, says, that Mo-

ney gained by Usury, and given in Charity and Alms, is no more acceptable to GOD, than if it was so much from the Stews, the Price of Lewiness and Prostitution. *St. AUSTIN*, *Epist.* LIV. *What shall I say of Usury, which even the Laws, and our Judges allow of? Is he more barbarous who cheats and robs the Rich, than he who with his Exaction murders the Poor?* MAXIMUS, *Homil.* III. *De Quadragesima*, *You will come to Church, Brother, as you ought to do, if that wretched Usury does not hamper and intangle you in her deadly Snares.* To these add *St. BASIL*, upon our LORD's Sermon on the Mount, and what *GRATIAN* has collected from the Councils and Fathers, *Caus.* XIV. *Quæst.* III. and IV. GROTIUS.

As the Practice of lending Money on Interest has been but too much abused, how innocent soever it may be in itself, and when reduced to just Bounds; we are not to be surprized, that the Zeal of the Doctors of the Church, joined to their Want of sufficient Knowledge in such Sort of Things, has betrayed them into an extravagant Opinion in this Point. If they sometimes offer Reasons that are a little plausible, it is easy to discover the Weakness of them. This Mr. NOODT has done to a Demonstration, in his Treatise *De Usuris & Fœnore*, Lib. I. Cap. IV. VII. VIII. IX. He likewise shews in *Chap.* XII. that the Interpreters of the Canon Law approve of certain Things, which imply real Usury. Father CEILLIER ought to have confuted this; and if ever I undertake to answer him in Form, it will be easy for me to shew, that, as he understands nothing of the Law of Nature, he is not more happy than the ancient Fathers, in explaining the Holy Scripture by the Rules of judicious Criticism.

¹⁶ SÆTONIUS in *Augusto*, Cap. XXXIX.

XXI. (1) And if we would speak as the *Roman* Lawyers do, we should say, that *Extortion* indeed is an odious Name, but *Usury* is not so. *Usury* is imposed, not because the Lender desires to make a Penny of you, but because you, who borrow, defer your Payment. *L. cum quidam. D. de Usuris.* And *CUJAS*, in *Paratit. de nautico fœnore*. *Extortion* is what is demanded over and above the Principal, merely for Advantage sake; *Usury* is what is given more than the Principal, that the Creditor may not be a Loser. But because several have abused the Name of *Usury*, this too is now usually taken in a bad

another Nature; as when what is demanded is to make Amends for the Damage the Lender sustains, by being a great While out of his Money; or in Consideration of that Gain, which, had he not lent it, he might otherwise have made, and so something is deducted for the Uncertainty of his Hopes, and for the Pains he must very probably be at. So likewise, if any Thing be demanded, to defray the Charges of him who lends Money to several Persons, and keeps always some Cash by him for that very Purpose; and if any Thing be advanced for the Hazard he runs of losing the Principal, where his Security is not extraordinary good, ² this is not to be reputed Usury. And *Demosthenes*, in his Oration against *Pantænetus*, positively denies, that he ought to be branded with the odious Name of an *Usurer*, who lends ³ for a moderate Profit, what he has got in his Business, and by honest Labour, partly that he may preserve what he has got; and partly that he may oblige and accommodate some Body else.

XXII. And as for those human Laws, that allow Interest for the Use of Money, or any other Thing, as in *Holland* they have long allowed ¹ eight *per Cent. per Annum*, to some, and twelve *per Cent.* to trading People; provided that they keep within the Bounds of that just Consideration, which every Man ought to have for what he does or may suffer, by the Want of his Money or Goods; they are not repugnant to any natural or divine Right. But if they exceed this fair and modest Rate, the Laws ² may indulge an Impunity, but they cannot grant a Right.

XXIII. A Contract for ¹ saving harmless, called ² an *Insurance*, is absolutely void, if either the Insurer does know at that Time for certain, that the Goods they are treating about are already safe, or the Owner that they are lost; and this not only on the Account of that Equality, which the Nature of permutatory Contracts requires, but because the subject Matter of this Contract is supposed to be a Loss considered, as uncertain and suspicious. And the Price of such an Insurance must be regulated and stated by the common Rate.

XXIV. 1. ¹ In a Company, where Trade is carried on by a joint Stock, if each Member contributes an equal Proportion of Money, their Gain or Loss shall also be equal, but if one advances more than another, then each Person shall be rated according to his Quota, which *Aristotle* thus expresses, ² ἐν χρημάτων κοινωνία πλῆν

XXII. What Power the Civil Laws have in this Affair.

XXIII. What Rules one must go by in a Contract for saving harmless, or of Insurance.

XXIV. How one is to be regulated in a Company or Partnership; where also several Kinds of it are explain'd.

bad Sense, and the Word *Interest* is substituted in the Room of it, in a good Sense. GROTIUS.

What the oldest *Latin* Authors called *Fœnus*, from an old Word which signifies to produce, meaning the Fruit or Profit arising from Money lent, is in the Main the same Thing that has been since termed *Usura*, a Word which implies, that this Profit is made on the Account of the Use of Money lent. Mr. NOODT proves this at large, and solidly, in his Treatise *De Fœnore & Usuris*, Lib. I. Cap. I, II. where he likewise shews the different Senses given by Custom to those two Words. The *Roman* Law, here quoted by our Author, doth not relate to all Kinds of Interest allowed by the Laws, but only such as has Place in Cafes like that there mentioned.

² This is admitting the Thing as to the Substance, tho' under another Name; as PUFENDORF observes, *B. V. Chap. VII. § 11.* see likewise Mr. NOODT, *De Fœnore & Usuris*, Lib. I. Cap. XII.

³ PROCOPIUS, *Goth. III. (Cap. XL.)* speaking in the Praise of *Germanus*, *Justinian's* Relation, *Χρημάσια τοῖς δεομένοις, &c.* He lent great Sums to all who had Occasion for Money, and never took of them any Interest that could be truly called so. GROTIUS.

XXII. (1) So it is in the Empire. GROTIUS.
² And therefore JUSTINIAN looked upon it to be his Duty to regulate the Interest that was permitted before his Time, and to reduce it to a juster Rate, *Novel. 32, 33, 34.* GROTIUS.

XXIII. (1) See PUFENDORF, *B. V. Chap. IX. § 8.* where he treats of other hazardous Con-

tracts; see also a Dissertation of the late Mr. HERTIUS, in his *Paræmiæ Juris Germanici*, Lib. I. Cap. XLIII. p. 460, &c. Tom. III. of his *Comment. & Opuscula*, &c. in which he handles the principal Questions relating to the Contract of Insurance.

² SÆTONIUS, in his Life of *Claudius*, said; that he took that Hazard upon himself. So CICERO took Security for the publick Money, that the People might run no Hazard in the Carriage of it. *Epist. XII. 17.* GROTIUS.

In what SÆTONIUS says of *Claudius*, there is more than a Contract of Insurance; for the Emperor took the Hazard on himself, without any Consideration, with a View of favouring the Trade of the Merchants, who freighted Ships in the Winter Time, for bringing Provisions to *Rome*. We have an Instance of the same Kind in *LIVY*, Lib. XXIII. Cap. XLIX. As to CICERO, it is probable he only gave Sums of Money to Bankers, who entered into an Engagement to return it at *Rome*, as PAULUS MANUCIUS explains that Passage. At least the Terms of the Epistle may be so understood; so that he may there speak of a very different Sort of Contract.

XXIV. (1) An Instance of Partnership you have in the Dolphins, observed by *PLINY*, Lib. IX. Cap. VIII. and in the *Nacre*, and another Shell-Fish called *Pinnother*, IX. 40. And this CICERO mentioned too. *De finibus*, (Lib. III. Cap. XIX.) GROTIUS.

On this Contract see PUFENDORF, *B. V. Chap. VIII.*

² *Ethic. Nicom. Lib. VIII. Cap. XVI. p. 115.*

λαμβάνουσιν οἱ πολλοὶ συμβαλλόμενοι In Partnership they are intitled to most who put in most. And the same is to be observed, where Persons concerned together take an equal Pains, or one does more than another; and also my Labour may answer your Money, or your Money and your Labour; for, as they usually say, *One Man's Money is but an even Recompence for another Man's Work* ³.

2. But this is not always done in one Manner, for either I may furnish my Work, and you the Use only of your Money, in which Case the Principal, whether lost or safe, is yours. Or you may put the Property of the Sum in common with my Labour, in which Case I am a Partner in the Capital. In the former Instance, the Work or Service is not set against the Stock, but the Hazard of losing it, and the Gain that might probably be expected from it. But in the other, the Value of my Work is supposed to be added to the Stock of your Money, and therefore I must have a Share in the Stock equivalent to it. What we have said of Work or Service, the same also may be understood of the Fatigue and Danger of a Voyage, and in such other Cases.

3. But that either of the Partners should share in the Profit, but yet be indemnified, in Case of Loss, is against the Nature of Partnership, but it may be so agreed on without any Injustice; and then there will be a mixed Contract of Partnership and Insurance, in which Case an Equality will still be observed, if he who undertakes to make good the Loss, shall receive a greater Proportion of the Gain, than otherwise he should have had. But that any should bear the Loss, and not partake of the Gain, is for this Reason not to be allowed of, because a common Share in the Advantages is a Thing so essential to Partnership, that it cannot subsist without it. And as to what the Lawyers say, that where the Shares are not expressly named, they are to be understood as equal, ⁴ this only holds good where the Quotas are equal. But in a Partnership of all Goods in general, not what is gained by this or that Man's particular Contributions, but what might probably be expected from them, must be regarded.

XXV. Of a Sea-Company.

XXV. When ¹ a Number of Ships are fitted out against Pirates by a joint Stock, the common Advantage consists in their common Defence; and sometimes in taking of Prizes. But the Ships, and all that are in the Ships, are usually appraised, and the Value brought into a Sum total, that so the Proprietors of the Vessels and Effects, may each of them bear his Share of the Damages and Expences, ² in Proportion to what they respectively have in that Sum, among which Damages and Expences those for curing the wounded are to be reckoned. All we have hitherto said, is agreeable to the Law of Nature.

XXVI. By the Law of Nations an Inequality in the Terms, if agreed upon, is not minded as to external Acts; and in what Sense this is said to be natural.

XXVI. 1. Nor does the voluntary Law of Nations seem to make any Alteration here, only in this one Particular, that where the Contributions are unequal,

3. *Par pari datum hostimentum est, opera pro pecuniâ.* This is in *PLAUTUS, Afinar. Act. I. Scen. III. v. 20.* The Poet is there speaking, not of a Contract of Partnership, or that of a trading Company, but of a Contract for doing something for another, on the Consideration of something to be given.

4. *Digest. Lib. XVII. Tit. II. Pro Socio, Leg. XXIX.* But it is more probable, that the Lawyers here meant a simple, not a proportionable Equality. They considered a Contract of Partnership as a Kind of Fraternity, (*ibid. Leg. LXIII.*) and, consequently, of Friendship, which threw all in common, without enquiring whether one of the Partners had contributed more than another, unless it was otherwise agreed. See Mr. SCHULTING on the *Institutions of CAJUS, Lib. II. Tit. IX. § 16. Not. 98. p. 171.* of his *Jurisprudencia Antijustiniana.*

XXV. (1) Among the marginal References in the Original, which were transposed, and improperly placed, there are two which ought to be produced here. The first is to *LIVY, Lib. XXXIX.* as it stands in all the Editions before mine. But we find nothing like it in that Book; and I believe our Author had his Eye upon what that Historian relates

in the Close of *Book XXIII.* of three Companies of Partizans, who, in a pressing Necessity of the Commonwealth, undertook to go to *Spain* with Provisions, at their own Expence, for the Army of the *Scipio's*. These Partizans, among other Terms, required that the Publick should make good their Loss, in Case any of their Ships were taken by the Enemy, or were lost in a Storm. If our Author designed to refer this to a Mixture of the Contract of Partnership, and the Contract of Insurance, of which he speaks in the foregoing Paragraph, the Example would be nothing to the Purpose. For the Agreement made by the *Roman* People with the Partizans, was a Farm, with a Mixture of a Contract of Insurance, there was no Partnership. The other marginal Reference is to *ARISTOTLE*, who speaks of an Alliance between the antient *Tus-cans* and the *Carthaginians*, by Vertue of which they were obliged to defend each other, particularly in their trading Voyages, *Politic. Lib. III. Cap. IX. p. 348. Tom. II. Edit. Paris.* The Philosopher elsewhere calls such Alliances, *συμπλοικὰς φιλίας. Ethic. Nicom. Lib. VIII. Cap. XIV.*

2 See something like this in *L. Wisigoth, Lib. V. Cap. V. GROTIUS.*

yet if they are consented to, and there be no Lie in the Case, nor any Thing concealed which should have been discovered, in all external Actions they shall be looked upon as equal; so that, as by the Civil Law, before *Dioclesian's* Constitution, ¹ no Action was allowed in Court against such an Inequality; so neither now among those who have no other common Law than the Right of Nations, ² can there be any Redress or Constraint on that Account. And this is what *Pomponius* means, when he says, ³ that in Buying and Selling one Man may naturally overreach another; where the Word *may* does not signify that it is just and lawful so to do, but only that it is so far permitted, that there is no Remedy provided for it against him who is resolved to insist upon, and justify himself, by his Agreement.

2. But ⁴ naturally, in that and some other Places, is put for what is conform to the received Custom. In which Sense Nature is said, by the Apostle *St. Paul*, to teach us, *That if a Man have long Hair it is a Shame unto him.* (1 Cor. xi. 14, 15.) when at the same Time it was no-ways repugnant to Nature, and was what several People practised. So the Author of the Book of *Wisdom* calls Idolaters, but not all Sorts of Men, φύσει μαλαίους, *Vain by Nature*, (Chap. xiii. 1.) and the Apostle *St. Paul*, τέκνα φύσει ὀργῆς, *By Nature the Children of Wrath*, (Ephes. ii. 3.) speaking not so much in his own Person as in that of the *Romans*, among whom he then lived. And *Evenus*, an antient Poet,

Φημὶ πολυχρόνιον μελέτην ἔμδραι, φίλε, καὶ δὴ
ταύτην ἀνθρώποισι τελευτῶσαν φύσιν εἶναι.

(Gnomograph. Edit. Sylburg. p. 131.)

*The Habit, Sir, that Care and Time produces,
Is what the World stiles Nature, and I think it's so.*

In which Sense too there is an old Expression of *Galen*, Πικρήλοι φύσεις τὰ ἔθνη, *Custom is an acquired or a second Nature*, (Lib. 3.) So likewise *Thucydides*, τῶν νόμων κρείσασσα ἡ ἀνθρωπεία φύσις, *Human Nature is above Laws*, (Lib. 3. Cap. 84. Edit. Oxon.) So the *Greeks* call Virtues and Vices which are become habitual, Περυσιωμένα, *Naturalized*: And we read in *Diodorus Siculus*, καὶ φύσεως ὑπὸ καὶ ἀνάγκης ἡττωμένης, *When Nature, that is, the Strength of the Mind, is overcome by Necessity*. Thus *Pomponius*, the Lawyer, when he had said, that according to the *Roman Law*, the same Person, if of the Rank of those who do not bear Arms, could not make a Will, and yet die intestate, subjoins, that there is a ⁵ natural Contradiction

XXVI. (1) That is, before Law II. of the Title of the Code, *De rescindendâ Venditione*; concerning which see Note 1. on PUFENDORF, B. V. Chap. III. § 9.

2 Concerning this Question, see PUFENDORF, as last quoted, § 10, 11. with the Notes.

3 Digest. Lib. IV. Tit. IV. De minoribus, &c. Leg. XVI. § 4. See also Lib. XIX. Tit. II. Locati, Conducti, Leg. XXII. § 3.

4 So GELLIUS, Lib. IX. Cap. X. speaking of the conjugal Act; *A Thing by the Law of Nature to be done in private*. GROTIUS.

The Word *Naturaliter*, in the Law under Consideration, has a very different Sense from what our Author gives it, as I have shewn on the Place of PUFENDORF, above quoted, so that I shall not here enquire whether the Passages produced by our Author, and others, are well applied or not, even supposing the Sense which they would fix to them. I shall only observe, that as our Author has not specified any one Greek Writer, who uses the Word περυσιωμένα to express the Strength of habitual Virtues and Vices, I at first doubted whether the Word was in Use. Besides, that it is not to be met with in our best Lexicons, as that of ROBERT

CONSTANTINE, and STEPHANUS's *Thesaurus*, I found that SYLBURGE, an able Grecian, censures ANTESIGNANUS for explaining φυσιώμενον, in naturam versus. Not in Grammatic. CLENARDUS and ANTESIGNANUS, p. 564. Edit. Hanov. 1602. According to him it should be φυσιόμενον, which comes, not from φύσις natura, but from φύσα, flatus, or follis; for which Interpretation he quotes HESYCHIUS. But I have since seen a Passage of CLEMENT of Alexandria, which probably gave our Author Occasion to make this grammatical Remark, which he repeats in his Notes on the Book of *Wisdom* xiii. 1. It is where that Father is speaking of a Gnostick, who he says by Practice acquired a Virtue which became natural to him. τῷ ἀρεῇ ἀναποδελήτον τὴν ἀρετὴν ἀσκήσει γνωστικῇ πεποιεμένῳ, φυσιστὴς ἢ ἕξις. Strom. Lib. VII. Cap. VII. p. 859. Edit. Potter.

5 Digest. Lib. L. Tit. XVII. De diversis regulis juris, Leg. VII. He is there speaking of a Case, in which a Testator had disposed only of Part of his Estate, as when, naming an Heir he had assigned him only half, or a fourth Part of the Inheritance; or, when appointing several Heirs, he had

Contradiction in these Things, tho' that Rule depended on the Custom of the *Romans* only, nor was it practised by other Nations, nor even by the *Romans* themselves, ⁶ in the Case of a Soldier's Will.

3. And the Advantage of having such a Rule as I was speaking of, introduced, was evident; for it cuts off infinite Disputes, which could not possibly be decided, by Reason of the uncertain Prices of Things, among those who had no common Judge to appeal to, nor avoided, if any Man might go back from his Bargain, upon Pretence of being unequally dealt with. *It is the Essence, or Substance, of Buying and Selling, (say the Emperors, ⁷ meaning by the Word Essence, or Substance, the constant Custom, or Way) for the Buyer to beat down the Price, and the Seller to raise it, till, ⁸ after many Words on both Sides, the one falling a little from his Demand, and the other rising in his Bidding, they agree at last in a certain and fixed Price. Seneca, with an Eye to this Regulation, says, ⁹ What signifies what they are worth, if the Buyer and the Seller are agreed about the Price? No Thanks to the Seller, if he has got a good Bargain. And Andronicus Rhodius to the same Purpose, ¹⁰ τὸ γὰρ ἐν πῶς ἐκείναις, &c. Where the Agreement is voluntary, there is no Injustice in an Advantage, nor is there any Amends to be made for it. For the Law has granted an Impunity in such Cases.*

4. The Author of *Isidore's Life*, ¹¹ whom I lately mentioned, calls the Buying too cheap, and the Selling too dear, Ἀδικίαν ὡς μὲν τῷ νόμῳ ἀφαιμένην τὸ δὲ δίκαιον

had assigned each of them his Share distinctly, in such a Manner that all the Shares together fall short of the Total of his Estate. According to the *Roman Law*, the Remainder, not mentioned by the Testator, accrued to the Heir, or Heirs, in the same Manner as if he had formerly given it them. It was laid down as a Principle, that one and the same Person could not design to make a Will, and yet let a Part of his Estate to be enjoyed by the lawful Heirs, as if he had made no Will. Mr. BYNKERSHOEK is of Opinion that the Reason of this Decision is, because, by the Laws of the XII. Tables, all the Goods of a Person either sell to his Relations, if he died intestate, or belonged to him whom the Testator had, in his Life-Time, declared his Heir with certain Formalities. (*Mancipatio familiae per aes & libram.*) See that great Lawyer's *Observat. Juris Romani*, Lib. II. Cap. III. However, when I consider well the Words of the Law in Question, I think it is plain enough that POMPONIUS designed to say there is a real Contradiction in supposing one and the same Person to die intestate, and yet have made a Will, *Jus nostrum non patitur eundem in paganis & testato & intestato discedere; earumque rerum naturaliter inter se pugna est.* It is not at all probable, as JAMES GODEFROY observes in his Comment on this Rule, that *naturaliter* here signifies, *According to the Custom received by the Roman Law.* That is sufficiently expressed in the first Words of the Rule, and it is impossible to make Choice of Terms more strong, for expressing a Contradiction founded on the Nature of Things. I easily conceive that the Notions of a false Philosophy might hinder that Lawyer from comprehending, that it is indeed a Contradiction that a Man should make a Will, and not make a Will in regard to the same Goods; but he may dispose of certain Goods by Will, and let others fall to his lawful Heirs as if he died intestate. The Question is, whether there be naturally Room for presuming that is the Reason why the Testator disposed only of Part of his Estate, or whether it was through mere Forgetfulness, that the Remainder was not mentioned. We can hardly form a Judgment of this but by Circumstances. However this may be, the Maxim of the *Roman Law* did not take Place, in Relation to Wills made by

military Men. On which Occasion the learned GODEFROY shews, that such Wills were excepted only in what concerned the Disposal of Goods acquired in the War, or on Account of the War, for thus, with great Appearance of Reason, he understands those Words, *eundem in paganis*, that is, *bonis*. There was also some Exception in regard to the Estates of Persons who did not bear Arms. See the following Note of the Author.

⁶ Nay, and often too in the Wills of those who are not military Men, where any Dispute arises about an inofficious Will, a Will which entirely leaves out, or very slightly provides for, those who ought chiefly to be considered, *L. Mater. L. Nam et si. L. circa. D. De inoff. Testament.* As also *L. cum duobus, C. de inoff. test.* as before. GROTIUS.

On this Exception consult CUJAS, in *Papinian.* p. 378, 379. Tom. IV. Opp. and ANTHONY FAURE, *Ration.* Tom. II. p. 180, 188, 197, &c.

⁷ DIOCLESIAN and MAXIMIAN, *Cod. Lib. IV. Tit. XLIV. De rescindendâ Venditione*, Leg. VIII.

⁸ FESTUS; Haglers (*Cociones*) seem to be called so (*à Cunctatione*) from their Tedioufness and Hagling, because they are a long Time bargaining before they come to a Conclusion in the Price; and therefore the first Syllable was formerly writ with the Letter V. QUINTILIAN, *Declam. pro Civibus*; *Diu cocionatus est*, He was a great While haggling about it: GROTIUS.

See the Note of GRONOVIVS on that Verse of PLAUTUS,

Vetus est, nihili cocio est; scis cujus? Non dico amplius.

Asinar. Act. I. Scen. III. ver. 51. and Mr. BURMAN's Note on the Passage of QUINTILIAN, quoted by our Author.

⁹ *De Benefic. Lib. VI. Cap. XV.*

¹⁰ Paraphrasing on *Ethic. Nicom. Lib. V. Cap. V.*

¹¹ This is an Extract from the *Bibliotheca* of PHOTIUS, already quoted at the End of § II. of this Chapter, and from the same Page 1044.

ἀναβέπρασεν, *An Injustice* ¹² *tolerated indeed by Law, but which in the Main is not the less an Injustice.*

¹² SO ANDRONICUS RHODIUS on *Nicomach.* For the Law has granted an Impunity in such Cases. V. Cap. V. in the End, τέτων γὰρ ἀδείαν νόμου, GROTIUS.

C H A P. XIII.

Of an Oath.

I. 1. **I**N every Nation, and in every Age, an Oath has always been of the greatest Weight and Consideration in Promises, Agreements, and Contracts. For, as *Sophocles* says in his *Hippodamia*, I. How great the Authority of an Oath is, even in the Opinion of the Heathens.

² *An Oath with sacred Awe doth rouse the Soul,
And thus restrains her from the double Mischief,
Of ang'ring Friends and of offending Heav'n.*

Our Ancestors, says *Cicero*, ³ could never find out any Thing stronger than an Oath to bind us to the faithful Discharge of what we had engaged.

2. And therefore it was ever a received Opinion, that some very grievous Punishment would attend Persons forsworn; as *Hesiod* has observed, speaking of Swearing,

*From whence dire Plagues and dreadful Slaughters come
On perjur'd Wretches.* ⁴

Infomuch that ⁵ Posterity was thought to be punished for the Faults of their Ancestors this Way; an Opinion that was never entertained but in Cases of the most enormous Crimes: Nay, that the bare Will and Design, without the Effect, would certainly draw down a Vengeance on it. *Herodotus* confirms both these, in his Story of *Glaucus Epicydides*, who had only deliberated with himself, whether he should falsify the Oath he had taken, of being true to a certain Trust reposed in him; where that Author produces these Verses of the Priests of *Apollo*,

I. (1) The Subject of this Chapter is handled by PUFENDORF, B. IV. Chap. II.

2 This is a Fragment of the Tragedy here specified. It is preserved by STOBÆUS. The Original, of which our Author has only given us the Translation, stands thus,

Ὅρκος δὲ προσεβένιτο Ἑπιμελεσέεσσι
Ψυχὴ καλῆς· Διοσὰ γὰρ φυλάσσει,
Φιλῶν τε μέμψιν, ἣ εἰς Θεὸς ἀμαρτάνειν.
Florileg. Tit. XXVII.

3 *De Offic. Lib. III. Cap. XXXI.*

4 Ὅρκον δ' ὅς δὲ πλεῖστον ἑπιχρονίης ἀνθρώπων
Πημάνει, ὅτε κέν τις ἐκὼν ἑπὶ ὅρκον ὁμώσῃ.
Theogon. v. 231, 232.

5 See SERVIVS, in *Excerpt. Fuldens.* upon I *Æneid.* GROTIUS.

I do not find any Remark to this Purpose in SERVIVS's Commentary on the two first Books of the *Æneid*, to which only PETER DANIEL made Additions from the Manuscript in Question. VIRGIL himself says, in his *Georgics*, that the Romans were sufficiently punished for the Perjuries of the Trojan Nation, from which they claimed their Descent, and alludes to the fabulous Account of *Laomedon's* Treachery in his Dealings with *Apollo* and *Neptune*.

—Satis jam pridem sanguine nostro
Laomedontæ luimus perjurâ Trojæ.

Lib. I. v. 501, 502.

On which the antient Commentator says not one Word. So that our Author may have confounded the Comment with the Text.

⁶ But Perjury's the Parent of a nameless Issue,
Which, without Hands or Feet, shall quick Advances make,
⁷ And seize and ruin all before him.

And Juvenal reciting the same Affair, concludes thus,

⁸ Such Punishments attend the bare Design
Of doing ill. —

3. Cicero says very judiciously and well, that *An Oath is a religious Affirmation, and whatever is promised after such a Manner, calling GOD, as it were, for a Witness to your Words, ought punctually to be performed.* But as for what he adds, and this we are to do in Regard to Honour and Justice, and not out of any Fear of the Anger of the Gods; for there is no such Thing incident to their Natures. If by Anger he means a Passion or Disturbance, he is in the Right of it; but if he excludes all Desire or Will to make the Guilty suffer, it is no Ways to be allowed, as Lactantius judiciously proves. Let us see now whence this sacred Power of an Oath arises, and how far it extends.

II. That a deliberate Mind or Intention is required in such an Affair, I mean, that he who swears is willing to do so.

II. First, What we have already said of Promises and Contracts, is also true in the Case of Oaths, that he who swears should be in his right Senses, and consider before-hand what he is going to do. And therefore, if a Man, not designing to swear, should inconsiderately utter Words importing an Oath, ¹ as is related of Cydippe, one might say of him what Ovid attributes to her,

Quæ jurat mens est; nil conjuravimus illâ. Epist. 21. ver. 135.

² It is the Mind that swears; with that we never swore.

Taken out of Eurypides, who said in his *Hippolytus*,

³ *Jurata linguâ est, mente juravi nihil.*

My Tongue 'twas swore, ⁴ my Heart did nothing swear.

But if any one willingly swears, tho' he is not willing to be bound by that Oath, he is however obliged to stand to it, because an Obligation is inseparable from an Oath, and the immediate and inevitable Consequence of it.

III. The Words of an Oath oblige in that Sense in which he to whom we swear, is believed to understand them.

III. I. Some are of Opinion, that tho' a Man solemnly pronounce the Words of an Oath, yet if it be not with an Intent to swear, he shall not be obliged by that Oath, but he sins by swearing rashly. But it is more reasonable to say, that he is bound to perform what he has called GOD to witness. For that Act, which is of

6 Ἄλλ' ὅρκος παῖς ἐστὶν ἀνάνυμτος, ἔδ' ὅππῃ χεῖρες,
"Οὐδὲ πόδες· Κρητιπὸς δὲ μελέρχει εἴσοκε πᾶσαν
Συμμάρψας ὀλέσθῃ γενεήν, ἢ οἶκον ἅπαντα.
Lib. VI. Cap. LXXXVI.

And immediately after,

*Sed si nil dedimus præter sine pectore Vocem,
Verba suis frustra viribus orba tenes.
Non ego juravi: legi jurantia Verba, &c.*

⁷ See ZECHARIAH V. 1, 2, 3. and St. CHRYSOSTOM, *De Statuis* XV. interpreting that Passage. GROTIUS.

⁸ Sat. XIII. v. 208.

⁹ *De Offic.* Lib. III. Cap. XXIX.

II. (1) There is such another Story in the *Metamorphoses* of ANTONIUS LIBERALIS, about Ctesylla and Hermochare. GROTIUS.

² In the very same Place,

*Consilium prudensque Animi Sententia jurat,
Et nisi Judicii vincula nulla valent.*

*Oaths must from Wisdom and from Thought result,
And if the Judgment's wanting, no Ways bind:*

*If all we said was only empty Sound,
Nor was our Heart concerned, in vain you think
That by our Words we're tied: I did not swear,
But read the Form the sacred Oath contains.*
GROTIUS.

3 Ἡ γλῶσς ὁμωμέχῃ, ἡ δὲ φρήν ἀνώνυμος.
Ver. 612.

⁴ Because *Hippolytus* thought the Nurse intended that some honest Action was to be concealed, he did not imagine that she meant Adultery and Incest. GROTIUS.

itself

itself binding, proceeded from a deliberate Mind: And therefore, tho' what *Tully* says holds generally good, that *Not to do what you have in Conscience, sworn, is Perjury*¹. As also what *Calypso*, in *Homer*, swearing to *Ulysses*, says,

² Ἀλλὰ τὰ μὲν νόεω ἢ φεάζομαι.

But what I think I speak.

2. Yet has it this Exception, if he who swears knows not, or has no Room to believe probably, that the Person he deals with takes the Words in another Sense; for he who calls GOD to witness what he is saying, is obliged to perform his Word³ in that Sense wherein he thinks it is taken by those with whom he deals; and this is what the same *Cicero* alledges, ⁴ *You are obliged to stand to what you swear, if you swear in such a Manner that he who requires or administers the Oath, is persuaded that you ought to perform it.* And in *Tacitus* we read, ⁵ *Those who were conscious to themselves of Guilt, were much embarrassed, and endeavoured by divers Artifices to elude the Force of the Words of the Oath.* And *St. Austin*, ⁶ *They are perjured, who, tho' they kept to the Words of the Oath, have yet deceived the Expectation of those they swore to.* And ⁷ *Isidore*, *Tho' the Words of an Oath be never so craftily contrived, yet GOD, who is the Witness of the Conscience, takes it so, as he, to whom we swear, understands it.* And this is what they call ⁸ *Liquido jurare, To swear with a safe Conscience.* And therefore *Metellus* did well in refusing to give

III. (1) *De Offic. Lib. III. Cap. XXIX.*

² *Odyss. Lib. V. v. 188.*

³ *St. Austin, Epist. CCXXIV.* speaking of a Prisoner of War, who going upon his Parole out of the *Carthaginian Camp*, returned thither again immediately, and then went to *Rome*: *Those who removed him from the Senate, did not so much regard what he intended when he swore, as what they, to whom he took the Oath, expected from him.* See also what follows there. Look for what is very excellently said upon this Subject in the Council of *Troisi*, *Concil. Tom. III. Edit. Sirmond.* And in *Hincmarus's* little *Treatise De divorcio Lotharii & Tethbergæ*, upon *Interrog. VI.* where, agreeably to his Opinion, it is very justly said of GOD,

*Qui non ut juras, sed ut is jurasse putavit
Cui juras, audit: Sic es utrique reus.*

*Who does not mind what you do really swear,
But what the Person whom your Oath concerns
Did think you swore; so are you bound to both.*

In the Profession which the *Jews* in *Spain* make with an Oath, *If you don't do it with the same Intention as I declare to you, your Words were heard and understood by us to mean.* *GROTIUS.*

⁴ *Quod enim ita juratum est, ut mens (deferentis) conciperet fieri oportere, id servandum est. De Offic. Lib. III. Cap. XXIX.* But *CICERO* there speaks of the Intention of the Person swearing, not of the Manner how the Terms of the Oath are understood by the Person who requires or administers the Oath. The Word *deferentis*, which was in the common Editions in our Author's Time, is not in the Manuscripts, nor in the best printed Copies. See my second Note on *PUFENDORF, B. IV. Chap. II. § 15.*

⁵ *Hist. Lib. IV. Cap. XLI. Num. 2.*

⁶ *Epist. CCXXIV.*

⁷ *Lib. XI. De summo bono, Cap. XXXI. 1.* It is quoted, *Caus. XXII. Quæst. V. C. quacumque.* *GROTIUS.*

⁸ *DONATUS* upon that Passage in the *Fair Adrian*,

*Quia si forte opus ad herum jure jurandum mihi,
Non apposuisse ut liquido possim.* (IV. 3, 12.)

Because if my Master puts me to swear whether I laid it there or no, I may do it with a safe Conscience. Liquido, that is, pure & manifestly, openly and plainly. *NICETAS*, in his *Life of Alexius*, blaming *Andronicus Comnenus's* Deceit, says, *Χρῶν μὴ ὑπονοθεύειν, &c.* *We ought not to adulterate our Words, by giving them another Turn, but to speak them freely in the Acceptation such Expressions bear.* And the same Author, in another Place, speaking of *Alexius*, who caught at Words contrary to their Design and Meaning, *τοῖς ῥήμασι τέτοις ἐκάλισας, ὥς αἱ μύραι τῷ μύλῳ πι,* *Sticking on what was said, as Flies upon a Sore.* The Court of *Arcadius* did very heinously offend against this Rule, which made a Person who had come to *Constantinople*, to be murdered at *Chalcedon*, tho' they had upon their Oaths promised him Safety. *ZOZIMUS, Cap. V.* Add to this what is below, *Chap. XVI. § 2. GROTIUS.*

Concerning this Manner of Speaking, *liquido jurare*, see *DUAREN's Disput. annivers. Lib. I. Cap. II.* Our Author, deceived by his Memory, ascribes to the Emperor *Alexius*, what *NICETAS* says of *Andronicus Comnenus*, who afterwards succeeded that Prince; and thinking at that Time to make himself Master of the Empire, endeavoured to elude the Force of the Oath of Allegiance which he had taken to the Emperor *Manuel* and his Son. *In Alex. Lib. I. Cap. III.* The other Passage here quoted, and this, are one and the same, tho' our Author has made two different Stories of them. The Transcribers, or Printers, have added a Fault of their own in the last Instance. The Edition of 1642 read *Zozomenus*, which has been since changed for *Sozomenus*; the Corrector thinking, no Doubt, he had thus mended a manifest Fault in the Impression. But the Fact is related by *ZOZIMUS, Lib. V. Cap. XVIII. Edit. Cellar.* The Historian is there speaking of the Favourite *Eutropius*, as remarkable for his tragical End as for his surprizing Promotion.

his

his Vote with an Oath, for passing the *Apuleian* Law; ⁹ tho' there were other Senators, who, under Pretence that the Law was null, because unduly proposed, alledged, that the Oath was to be understood with this tacit Restriction, that they approved the Law, on Supposition it had been duly proposed and enacted.

3. For tho' in other Promises some tacit Condition may be supposed, which may absolve the Promiser, ¹⁰ yet in Oaths no such Thing is admitted; to which that remarkable Expression of the Apostle to the *Hebrews* is admirably pertinent, *GOD willing more abundantly to shew unto the Heirs of the Promise, the Immutability of his Counsel, confirmed it by an Oath; that by two immutable Things, in which it was impossible for GOD to deceive, or lie, (for so I think the Word ψευδεσ is properly rendered, as plain speaking is called Truth, ¹¹ Dan. vii. 16. viii. 26. x. 1.) we might have a strong Consolation.* To understand which Words, we must know, that the Penmen of the Holy Scriptures do often speak of GOD, ἀνθρωποπαῶς, after the Manner of Men, and rather as he appears to us, than as he is in himself.

4. For GOD does not really alter his Decrees; yet he is said to change, and ¹² repent, as often as he does otherwise than his Words seem to imply, ¹³ by Reason of some Condition tacitly understood, which Condition then ceases, *Jer. xviii. 8.* You may find Instances of this Kind in *Gen. xx. 3. Exod. xxxii. 14. 1 Kings xxi. 29. 2 Kings xx. 1. Isa. xxxviii. 1. Jonab iii. 5, 11.* In which Sense too GOD may improperly be said to deceive us. And it is usual for the Word ψευδεσ, which is in the aforesaid Passage to the *Hebrews*, to signify an Event that does not answer our Expectation, as we may see in *Levit. vi. 2. Jos. xxiv. 27. Isa. lviii. 11. Hof. i. 2. ¹⁴ Habak. iii. 17.* and elsewhere. And this is a Thing frequent in Threats, because they confer no Right on any Body. And sometimes it is so in Promises, where there is a tacit Condition, as I have just now said.

5. And therefore the Apostle mentions two Things, which imply the Immutability of what GOD had declared he would do, a Promise, because it gives a Right to the Person to whom it is made; and an Oath, because it admits of no Conditions that are tacit, or any Ways obscure and concealed; as we find *Psal. lxxxix. 30, 31, 32, 33, 34, 35, 36.* But it is another Case, if the Nature of the Affair plainly discovers and points out any Conditions; to which some refer that of *Numb. xiv. 30. Ye shall not come into the Land, concerning which I swear to make you dwell therein, save Caleb and Joshua.* But the promised Land may be better understood as given by an Oath, not to such or such Persons, but to the People (or Nation) of the *Jews* in general, that is, to the Posterity of those to whom GOD had sworn, *ver. 33.* And such a Promise might be performed at any Time, not being limited to any particular Persons.

IV. An Oath
procured by
Fraud, when
binding.

IV. 1. From what has been said, we may learn what to judge of an Oath procured by Fraud or Surprise. For if it be certain, that he who swore ¹ supposed a certain

⁹ APPIAN, *De Bell. Civil.* Lib. I. p. 626. *Edit. Toll.* (368. *H. Steph.*)

¹⁰ The Respect due to GOD certainly requires we should, as much as possible, avoid leaving any Thing to be understood in our Oaths; that other Men may have no Pretext for suspecting we are not very scrupulous in an Act of Religion like this. But, as our Author himself allows of certain Conditions, manifestly implied in the Nature of the Thing, *Num. 5.* there may be others, which, tho' not so clearly connected with the Thing to which one swears, as considered in itself, shall be such, that there may be very good Reason to believe, that the Case in Question did not come into the Person's Mind who swore, and that if he had thought of it he would not have sworn, why then should not such an Oath be void of itself, as well as a Promise made without an Oath? Our Author in this Place, and all along, reasons on a false Supposition, *viz.* that an Oath contains two distinct Obligations; and in some Measure changes the Nature of the Acts to which it is added; a Supposition destroyed in the Chapter of PUFENDORF al-

ready quoted, which answers to this.

¹¹ Our Author thus explains himself on this Passage, in his Annotations, "We say improperly "a Person *deceives* (ψευδεσ) when another mistakes, for Want of understanding of what is said. "Thus the Prophet *Ezekiel* deceived *Zedekiah*, "when he told him he should not see *Babylon*. "The King imagined he should never be carried "Prisoner to that City; but he was carried thither "blind; and thus did not see *Babylon*, which was the "Prophet's Meaning."

¹² See *Jonab* iv. 2. The Council of *Toledo* VIII. Cap. II. *For to swear, in GOD, is upon no Account whatever to alter what he himself has decreed; but to repent, is to change what he has ordained, whenever he pleases.* GRATIAN has put this in *Caus. XXII. Quæst. IV.* But pray explain it as in our Text. GROTIUS.

¹³ See *SENECA, Natur. Quæst. XI. 37.* GROTIUS.

¹⁴ Add *JOB xli. 1. HOSEA ix. 2.* GROTIUS.

IV. (1) As *Hippolytus*, whom we spoke of just now;

certain Fact which really is not as he supposed, and that unless he had believed so, he would not have sworn, that Oath shall not bind him. ² But if it be doubtful, whether he would not have sworn, tho' he had not been thus mistaken, he shall then stand to his Words, because the most simple Interpretation is what is most agreeable to an Oath.

2. And hither I refer the Oath which *Joshua*, ³ and the Princes of the Congregation of *Israel*, made to the *Gibeonites*; they were indeed deceived by the *Gibeonites*, who pretended to come from a far Country. Yet it does not thence necessarily follow, that if *Joshua* and the Princes had known that they had been their Neighbours, they would not have spared them. For as to what they said to the *Gibeonites*, *Peradventure you dwell among us, and how shall we make a League with you?* It may be taken in this Sense, that the *Gibeonites* were asked what Manner of League they desired, whether to be admitted as Allies, or as Subjects; or it might be to shew, that it was not lawful for the *Jews* to enter into an equal Alliance with certain Nations, but not that it was prohibited them to save the Lives of those who surrendered themselves to them. For the divine Law which commanded them to destroy those Nations, ⁴ being compared with another Order, may be understood with this Limitation, *Unless they immediately, and upon the very first Summons, submitted and did as was enjoined them!* Which among other Things is proved by the Story of *Rahab*, ⁵ who for her good Services was saved; and by the Example of *Solomon*, who received those who were left of the *Canaanites* into the Number of his Subjects, and made them tributary.

3. And to this Purpose is what is observed in the Book of *Joshua*, that there was not a City of those seven People that ever offered to make Peace; for they were hardened on Purpose that they might be incapable of any Favour. Since then, it is very likely, that had the *Gibeonites* declared the Matter as it really was, which for Fear they did not, they would, however, have been allowed Quarter, upon Condition of their Obedience, the Oath was valid, insomuch that very grievous Punishments were, by GOD's own Order, inflicted on them, who afterwards presumed to violate it. ⁶ St. *Ambrose*, treating of this Story, speaks of it thus, *Joshua did not think fit to break the Peace he had granted, because it was confirmed with the awful Solemnity of an Oath, ⁷ lest whilst he was blaming the Perfidiousness*

now; upon that of SOPHOCLES in *OEdipus Coloneus*,

Ἀπάτα δ' ἀπάταις
Ἐτέρους ἐτέρῃ παρ' ἀλλήλους
Πόνον εἰ χάριν ἀντίδοσιν ἔχει.

(Ver. 216, &c.)

One Imposition upon another
Is not with Thanks but with Ruin paid.

The Scholiast delivers himself thus, ἡ αὐτοῖς εἰ νομίζουσι, *And they think themselves no Ways to blame for receiving him, and promising him Safety, since they did not know before that he laboured under any domestick Guilt.* And to this Purpose is that Passage,

Ἡ γλῶσσ' ὁμώμοχ', ἡ δὲ φρενὶ ἀνώμοτος.

My Tongue 'twas swore, my Heart did nothing swear.

For he himself was deceived when he swore. GROTIUS.

In the third Verse here quoted from SOPHOCLES, the best Editions, as that of *Stephens*, read ἀντίδοσιν ἔχειν. The Sense of the whole Passage I take to be this, *He who exposes himself to the Danger of being fraudulently treated, by the Person whom he has treated in the same Manner, ought to expect to be repaid, not with Favours, but with Trouble and Mortification.* But I leave this to the Judgment of the Learned.

² See PUFENDORF, § 7. of the Chapter already quoted, where he treats of an Oath.

³ But see what I have said at large in Note 1 on the same Chapter.

⁴ Yes, and if compared with the Reason subjoined to the Command of destroying them, *Exod.* xxiii. 33. *Deut.* vii. 4. For that Reason ceased in those who undertook to observe the Precepts of *Nab's* Sons, and pay Tribute. So MAIMONIDES and SAMSON MIRCOSI, and MOSES DE KOTZI, in *Præcep. judæ.* XV. and XVIII. are of Opinion. GROTIUS.

⁵ And by an Instance in the Inhabitants of *Gezer*, in the History of *JOSHUA* xvi. 10. And that the *Gergesenes*, or *Gezerites*, remained till our Saviour's Days, appears from the Gospel, *MATT.* viii. 28. For these submitted at the very first, and therefore are not reckoned in the Catalogue of Enemies, *Deut.* xx. 17. *Jos.* ix. 1. GROTIUS.

No Reason is assigned why the *Israelites* did not drive out the Inhabitants of *Gezer*. Nor do we find any Account that the *Gergesenes*, or *Gezerites*, submitted at the very first. No Inference can be drawn from their being omitted in the Catalogue of Enemies; for we find such Omissions elsewhere; the sacred Historians sometimes speaking only of the most considerable of those Nations, under which the Rest were comprehended. See the late Mr. *RELAND's Palestina*, Lib. I. Cap. XXVII.

⁶ *De Offic.* III. Cap. X. GROTIUS.

⁷ This Reason doth not hold good, for the Moment a Man is deceived in an Agreement, he is not guilty of Perfidiousness, if he doth not stand to what he had promised only on Supposition that he was not deceived.

of others, he himself should be worse than his Word, and forfeit his own Honour. But however, the Gibeonites did in some Measure suffer for their Fraud, being immediately, upon their Submission to the Hebrews, adjudged ⁸ to a Sort of personal Slavery; whereas, had they dealt frankly, they might have been received as tributary States.

V. The Words of an Oath not to be extended beyond their usual Sense and Acceptation.

V. Nor should the Meaning of an Oath be extended beyond the usual Sense and Acceptation of the Words. ¹ And the Tribes therefore were not perjured, who, when they had sworn not to give their Daughters in Marriage to the Benjamites, did yet suffer them to keep and enjoy the Women they had stolen. For ² it is one Thing to give, and another not to demand again what is lost and gone. Of this Fact St. Ambrose speaks thus, ³ Which Indulgence of theirs was not without a Punishment in some Measure suitable to their ungovernable Passion, whilst they were only permitted to steal themselves Wives, and not to enter upon that State with the sacred Solemnity of lawful Matrimony. Not unlike this was that Request which the Achæans made to the Romans, ⁴ who did not approve of some Things which they had done, and confirmed by Oath, that the Romans would be pleased to alter what they had a Mind to; but not to oblige the Achæans by any religious Vow to make void what they had established by Oath.

VI. The Oath that engages any Thing unlawful does not oblige.

VI. That an Oath may be binding, ¹ the Obligation must be lawful: For, if a Thing promised upon Oath be forbidden, either by the Law of Nature, by the Divine Law, or even by an human Law, of which we shall quickly treat, it shall have no Power at all to oblige us, ² Philo the Jew said well in this Case, ἵνα ὁ πᾶς ἐνωμότως ἄδικα δρῶν ὅτι, &c. Let him who is going to do an unjust Action, because he swore he would, know, that he is so far from discharging his Oath by this Means, that he really breaks it; an Oath is a sacred Thing, and deserves the greatest Circumspection and Care in the Management of it, as being the Seal and Sanction of just and honest Resolutions. For he does but add one Sin to another, who to a wicked Oath joins a wicked Action, since it would have been much better to have entirely desisted. And therefore let him refrain from such Actions, and implore the Mercy of GOD, which is essential to him, by asking Pardon for his rash Oath. And it would be down-right Folly, and unaccountable Madness, to chuse a double Evil when one might be excused for half. We have an Instance of this in David, who spared Nabal tho' he had sworn to kill him. And ³ Cicero gives such another Precedent in Agamemnon's Vow, and Dionysius Halicarnassensis, ⁴ in the Conspiracy of the Decemviri to seize upon the Government. Accordingly Seneca says ⁵,

⁸ As were the Brutians formerly by the Romans. GELLIUS, X. 3. FESTUS, in the Word Brutiani. GROTIUS.

V. (1) See what I have said on PUFENDORF, B. IV. Chap. II. § 13. Notes 1, 2, &c.

² JOSEPHUS says, (Antiq. Jud. Lib. V. Cap. II.) ἔτε προτεροπομένων, ἔτε κωλύόντων. Neither encouraging them to it, nor forbidding them. SENECA, Excerpt. VI. 2. He is obnoxious to the Law, who himself relieves an Exile; but not he who suffers him to be relieved. SYMMACHUS says, Why does he endeavour to scare a religious Mind with unjust and causeless Fears, because he asserts that you ought to make a Conscience of granting what you cannot take away again without rendering yourselves odious. (Lib. X. Epist. LIV.) GROTIUS.

The Words of SYMMACHUS are Part of a Petition to the Emperors Valentinian, Theodosius, and Arcadius, for obtaining Leave for the publick Exercise of Paganism, so that it is plain there is a Difference between the two Examples.

³ Offic. Lib. III. Cap. XIV.

⁴ LIVY, Lib. XXXIX. Cap. XXXVII. Num. 21.

VI. (1) This Matter is handled very well by St. AMBROSE, De Offic. I. and some other Authors, from whom Passages are inserted in Caus. XXII. Quæst. IV. And to the same Purpose is the se-

venth Canon of the Council of Ilerda, in Concil. Gall. Tom. III. and many Things in HINCMAR'S Works. GROTIUS.

² De specialibus Legibus. (p. 771. Edit. Paris.) GROTIUS.

³ He maintains, that Agamemnon ought not to have sacrificed Iphigenia, tho' he had made a Vow to sacrifice to Diana, the most beautiful Thing his Kingdom should produce that Year, and nothing exceeded his Daughter in Beauty. De Offic. Lib. IV. Cap. XXV.

⁴ It is in the Speech which that Historian makes Caius Claudius, Uncle to Appius, one of the Decemvirs, deliver in a full Senate. That Senator observes to the Decemvirs, that, supposing they were under a secret Obligation one to another, even by Oath, as perhaps they were, says he, not to resign their Office; they ought to consider, that such an Oath would be impious, as being contrary to the Liberty of the Citizens, and the Good of their Country; so that they would be so far from being guilty of Perjury, that they would do well in not standing to such an Engagement. For, he adds, the Gods are pleased with being called to witness just and honest Agreements, not such as are unjust and dishonest. Antiq. Rom. Lib. XI. Cap. XI. p. 662. Edit. Oxon.

⁵ Hercul. Oet. v. 480, 481.

*Præstare fateor posse me tacitam Fidem
Si scelere careat: Interim scelus est Fides.*

(Where *Interim* signifies *Interdum*)

*What I have promised, I own I can perform,
If there's no Crime in't; sometimes 'tis a Crime
To keep one's Promise.*

And St. Ambrose, ⁶ Some Promises cannot be complied with, nor some Oaths observed, without acting against a Principle of Duty. And ⁷ St. Austin, If Faith and Honour be engaged to make Way for Ill, I wonder we should dare to call it Faith and Honour. The same does St. Basil teach us, in his second Letter to *Amphilochius*.

VII. 1. Nay, ¹ tho' what is promised be not illegal and unjust, ² but only hinders some greater moral Good; in this Case also the Oath shall not be binding, because we stand so much indebted to GOD, for our Endeavours to grow and improve in Virtue, that it is not in our Power to deprive ourselves of the Liberty of doing all the Good we can. There is a remarkable Passage in that *Philo Judæus* I just mentioned, not impertinent to the Affair in Hand, and is very well worth our inserting here, εἰς δ' οἱ τὴν φύσιν ἀμύνησι, &c. ³ There are some People of so morose and unsociable a Nature, either in Hatred to all Mankind, or as being so much in Slavery to their own Fury and Passion, that they confirm this unhappy Temper even by an Oath, swearing, for Instance, that they will never eat at the same Table, or lie under the same Roof, with such or such a Person; that they will never do this or that Man the least Piece of Service, nor indeed will they ever be beholden to him themselves for any as long as they live. What he says, that some People swore, ⁴ that they would never do this or that Man any the least Piece of Service, the Hebrews called נדר הנאח, that is, ὄρκιον ὠφελείας, The Vow of Assistance, or Beneficence: שבע לחטיב, An Oath to do Good, Lev. v. 4. The Form of this, as the Rabbins tell us, ⁵ was מדרתחנה בני קרבן נר, or שאתה נהנהלי קרבן, All the Advantage that you might receive from me, be dedicated to GOD; agreeable to which is the Syriack, in the old Version of Matthew xv. 5. קרבני טרם רתחנהני, in Greek Δῶρον ὃ ἐὰν ἐξ ἐμῆς ὠφελήσῃς, that is, It is a Gift consecrated to GOD (for this is what is meant by קרבן, κορβάν) by whatsoever thou mightest be profited by me.

VII. Or if it
binds any
greater moral
Good.

2. The Hebrew Doctors, who were very ill Expositors in this Respect of the divine Law, thought that a Vow, to which this Sort of Consecration was added, was valid and binding, tho' made in Prejudice to their own Parents: Which Opinion CHRIST refutes in the Place just cited, where the Word τιμᾶν, to honour, signifies to assist and be kind to, as appears by the parallel Place in St. Mark, and from St. Paul, 1 Tim. v. 3, 17. and Numb. xxiii. 11. But if the Oath, or the Vow, were designed to the Disadvantage of any other Person, in this Case too we might very justly say, that it is no Ways obliging, because, as we observed before, it is against that Proficiency and Advancement in doing Good, to which all our Endeavours ought to be directed.

VIII. It is to no Purpose to say any Thing at all of what can never be performed. For it is evident enough, that no Body can be obliged to a Thing absolutely impossible.

VIII. Or if the
Thing engaged
for be impossible

⁶ Offic. Lib. I. Cap. I.

⁷ De bono Conjugali, Cap. IV. This is cited in the aforesaid Question. See too GAILIUS, De pace publica, Lib. I. Cap. IV. § 16. and the Story of Albinus, in PAUL WARNAFRED, Lib. XI. Cap. XXVI. GROTIUS.

VII. (1) See Note I. on PUFENDORF, B. IV. Chap. II. § 10.

2 Such an Oath was that of Honorius, who swore that he would never make Peace with Alaric, as ZOZIMUS relates the Affair. See C. amongst several other Things in the above-mentioned Question, and the Council of Ilerda in Conc. Gall. Tom. III. Canon. VII. and HINCMAR too in the aforesaid Treatise, at Interrog. XIV. L. De

divortio, at Interrog. VI. and XIV. GROTIUS.

³ De specialib. Legib. p. 771.

⁴ See BABA KAMA, Cap. IX. § 10. and the learned CONSTANTINE's Observations there. GROTIUS.

The Passage of Leviticus speaks of Oaths by which a Man rashly engages to do something in Favour of another, which it is not in his Power to promise, not of Oaths by which a Man swore not to do good to a Person. See Mr. LE CLERC's Comment on the Text.

⁵ See this more at large in our Author's Notes on St. MATTHEW xv. 5. as also SELDEN, De Jure Nat. & Gent. secundum Hebræos, Lib. VII. Cap. II.

IX. *What if that Impossibility be only for a Time.*

IX. As for what is impossible indeed for the present only, or because one supposes it to be so, the Obligation continues in Suspence; but so, that he who swore upon such a Supposition ¹ is obliged to take all the Care he can to render that, which he has promised upon Oath, to become possible.

X. *Men swear by the Name of GOD, and in what Sense they do it.*

X. The Form of Oaths may be different in Words, but the Substance is the same. For all are understood to appeal to GOD in this Manner; for Instance, *Let GOD be my Witness*, or *Let GOD be my Avenger*, which both amount to one and the same Thing. For ¹ when we call him to witness, who has a Power and Right to punish, we do at the same Time desire him to revenge our Perfidiousness; and he who knows all Things is an Avenger of the Crime, by the same Reason that he is a Witness of it. *Plutarch* says, *Πᾶς ὅρκος εἰς κατάραν τελευτᾷ καὶ Πιπρωρίας*, Every Oath ends in a Curse upon Perjury. And to this the old Forms of making Treaties and Alliances, by Killing of Sacrifices, allude; as appears, *Gen. xv. 9.* and in what follows there. And that of the Romans, in *Livy*, ² *Tu Jupiter, ita illum ferito, ut ego hunc Porcum.* Do thou, O Jupiter, smite him (if the Violater) as I do this Hog. And in another Place, ³ *Deos precatus, ita se mactarent, quemadmodum ipse agnum mactasset.* He prayed the Gods so to kill him as he did that Lamb. And in ⁴ *Polybius* and *Festus*, *Si sciens fallo, ita me Diespiter ejiciat, ut ego hunc lapidem.* If I knowingly deceive you, let GOD cast me away as I do this Stone.

XI. *And by the Name of other Things too, with a Regard to GOD.*

XI. 1. It was an old Custom to swear also by the Name of other Things and Persons, whether thereby wishing that those Things might prove hurtful to them, (if they swore falsely) as the Sun, the Earth, the Heavens, the Prince; or that they might be punished in them, as when they swore by their Head, their Children, their Country, their Prince: Nor did the Pagans only use to swear thus, but the Jews too, as the same ¹ *Philo* informs us; for he says it is not fit when we swear upon every Occasion, immediately *Ἐπὶ τὸν ποιητὴν καὶ πατέρα τῶν ὅλων ἀνατρέχειν*, To have Recourse to the Creator and Father of all Things; but to swear by Parents, by Heaven, by the Earth, by the Universe. Something like this is observed by the ² Interpreters of *Homer*, who say, that the antient Grecians did not use *προπελῶς κατὰ τῶν θεῶν ὀμνύειν ἀλλὰ κατὰ τῶν προσυχαινόντων*, To swear precipitately by the Gods, but ³ by such Things as were at Hand, as by the Scepter. And this Custom ⁴ *Porphyrus*, and the ⁵ Scholiast upon *Aristophanes*, say was brought up by *Rhadamanthus*, a Prince eminent for his great Justice. Thus we read (*Gen. xlii. 15.*) that *Joseph* swore by the Life of *Pharaoh*, according to a received Custom of the Egyptians, as *Abenesdras* observes, and ⁶ *Elisha* by the Life of *Elijah*, (*2 Kings ii. 2.*) Nor does *CHRIST*, *Matt. v.* as some think, allow such Oaths to be less binding than those which are

IX. (1) He is obliged so to do as he would have been by a Promise made without an Oath. See *Chap. XI.* of this Book, § 8. *Num. 4.* Thus when the Patriarch *Abraham* sent his first Servant to *Charran*, making him swear he would fetch a Wife for his Son *Isaac* from that Country, who should be one of his own Kindred, he says, that if he found no one, who would come with him, he should be free from his Oath, *Gen. xxiv. 8.*

X. (1) *St. Ambrose*, to the Emperor *Valentinian*, *What is Swearing but an Acknowledgment of his divine Power, whom you appeal to as a Witness of your Faith and Sincerity.* See an excellent Form of *Chaganus Avaror.* in *MENANDER'S Excerpt. Legat.* *GROTIUS.*

Some Doctors distinguish between taking GOD to witness and Swearing. See *Mr. BOHMER'S Jus Ecclesiasticum Protestantium*, *Lib. II. Tit. XXIV. § 3, &c.* But they have not observed what our Author says here; which overthrows their whole System.

² In their Treaty with the *Albians*, *Lib. I. Cap. XXIV. Num. 8.*

³ In the Promise made by *Hannibal* to his Soldiers, for encouraging them, *Lib. XXI. Cap. XLV. Num. 8.*

⁴ *Festus*, under the Word *Lapis*. *POLYBIUS*, *Lib. III. Cap. XXV. p. 251. Edit. Amst.*

XI. (1) *De specialibus Legibus.* *GROTIUS.*

² *EUSTATHIUS* on *Iliad. Lib. I. ver. 234.*

³ *APOLLONIUS*, speaking of *Socrates*, in *PHILOSTRATUS*, *VI. ὅμνυ τὰντα ἔχ' ὡς θεῶς, ἀλλ' ἵνα μὴ θεῶς ὦμνυ.* He swore by these Things, not as Gods, but that he might not swear by the Gods. *GROTIUS.*

⁴ In his Treatise *De abstinentiâ Animal.* where he says *Rhadamanthus* made a Law, ordering the *Cretans* to swear by Animals, *Lib. III. p. 285, 286. Edit. Lugd. 1620.* But the superstitious Philosopher attributes all this to the Respect which was paid, and which, according to him, ought to be paid to Animals; not to any Motive of reverencing the Divinity by swearing by other Things, to avoid using the Name of GOD too freely.

⁵ In the Comedy of the *Birds*; where, on the Authority of *SOSICRATES*, (not *SOCRATES*) an antient Writer of the History of *Crete*, he says, that *Rhadamanthus*, was the first who forbid swearing by the Gods; and ordered that his Subjects should swear by a *Goose*, a *Dog*, or a *Ram*, and such like Animals. On ver. 521.

⁶ Add *2 Kings iv. 30. Cant. ii. 7.* *GROTIUS.*

expressly made in the Name of GOD ; but because the *Jews* did not so much regard these, being prepossessed with such an Opinion as he was, who said *Sceptrum non putat esse Deos*, ⁷ he does not believe the Scepter to be the Gods ; he shews that even these are true Oaths. For, as *Ulpian* has very well observed, *He who swears by his own Life, seems to swear by GOD*, ⁸ for he swears with an Eye and Respect to some divine Power : So *CHRIST* tells us, that he who swears by the Temple, swears by GOD who presides there, and that he who swears by Heaven, swears by GOD, whose Throne it is.

2. But the *Jewish* Rabbins of those Times were of Opinion, that an Oath made by created Things was not obligatory, unless some Penalty were added to it, as if the Thing by which they swore were consecrated to GOD. And this Oath they called *Κορβάν*, or *ἐν τῷ δώρῳ*, *By Way of Gift*, whereof Mention is made not only in *St. Matthew*, but also in the *Tyrian Laws*, as we learn from *Josephus*, in his Dispute against *Appion*. ⁹ And for the same Reason, I suppose, it was that the *Greeks* called the Eastern People, *Κορβανῆς*, ¹⁰ which Word we find in *Æschylus* ¹¹ and *Euripides* ¹²; and *Κορβάνᾳ δ' ἀνδρᾶς*, in the same *Æschylus*. *CHRIST*, in the above-mentioned Passage, opposes this Error. And *Tertullian* ¹³ informs us, that the antient Christians used to swear by the Life of their Prince, a Thing more august and venerable than any Genius whatever. And in *Vegetius* we find a certain Form, which we took Notice of before, wherein the Christian Soldiers swore, not only by GOD, but by the Majesty of the Emperor, which, next to GOD, is what ought to be valued and revered by all Mankind.

XII. Nay more, ¹ if any one swears by false Gods, his Oath shall bind him, because, whatever chimerical Notion he may have in his Mind, yet he thinks of the Deity in general, and therefore the true GOD, if he be forsworn, looks upon it as done in Contempt to him. ² And tho' we see indeed, that the holy Men of Antiquity have never proposed an Oath in that Form, much less have taken it themselves, which I admire that ³ *Duarenus* should have allowed; yet, if they could

XII. It is an Oath, tho' sworn by false Gods.

⁷ *OVID* says this of *Agamemnon*, who swore he had taken no Liberties with *Briseis*, a young Captive whom he had taken from *Achilles*, *Remed. Amoris*, ver. 783, 784. This Oath is in *HOMER*, *Iliad*. XIX. ver. 258, &c. But *Agamemnon* there swears by *Jupiter*, the *Earth*, the *Sun*, and the *Furies*; not by his Scepter.

⁸ So does *GRATIAN* think, *Caus. XXII. Quæst. I. GROTIUS*.

⁹ For this he quotes *THEOPHRASTUS*, who, in his Treatise *Of Laws*, not now extant, said it was forbidden by the *Tyrian Laws*, to use the Forms of Oaths established in other Nations, and among others that called *Corban*. From which *JOSEPHUS* concludes that his Nation, and its Customs, were not unknown to other People, since that Sort of Oath was used only by the *Jews*, *Lib. I. p. 1046, 1047*.

¹⁰ But the Grammarians derive this from the *Carians*, a People of the *Lesser Asia*, whom *HOMER* calls *Βαρεαροφώνους*, *Iliad*. II. v. 867. See *ERASMUS*'s *Adagia*, under the Proverb *Carica Musa*. This Etymology is, at least, more plausible than that of our Author. The *Grecians* were not sufficiently acquainted with the *Jews*, to take from any Sort of Oath used by them, a Name to signify all the Eastern Nations. Besides, the Word *Κορβαναι*, is found in *ÆSCHYLUS*, a *Greek* Author, who wrote long before the Vow called *Corban* was introduced; for we find no Mention of this Sort of Vow made in the sacred Writers. It is an Invention of later Ages, when the Doctors had several Ways corrupted the Doctrine of *MOSES*.

¹¹ In two different Places which *GRONOVIVS* quotes. One is in the Tragedy of *Agamemnon*,

Σὺ δ' ἀντὶ Φωνῆς φερίζε κορβάνῳ χειρί.

Ver. 1070. p. 208. Edit. H. Steph. The other in the *Suppliants*,

—Κορβάνᾳ δ' ἀνδρᾶν
'Εὐακοῖς —

Ver. 124. p. 312. which the Scholiast explains thus, Νοεῖς ἢ τὴν βαρβαρον φωνήν. You understand that barbarous Word.

¹² I know not in what Part of *EURIPIDES* our Author found this Word. I doubt whether that Poet has used it at all. It does not appear in Mr. *BARNES*'s Index, who, I think, would not have omitted a Word which occurs so seldom. Nor do I believe it is in *SOPHOCLES*. It is very possible that our Author, trusting to his Memory, has confounded what he had read in *LYCOPHRON*, from whom a Passage is quoted, where he uses that Word.

¹³ *Apolog. Cap. XXXII.*

XII. (1) *Wisdom*, Chap. XIV. οὐ γὰρ ἡ τῶν ὀμνυμένων δύναμις, ἀλλ' ἡ τῶν ἀμαρτανόντων δίκη ἐπεξέρχεται, αἰὲν ἢ τῶν ἀδίκων πρᾶγμασιν. Which the *Latin* Translator turns thus, Non enim Juratorum virtus, sed Peccantium pœna perambulat semper Injustorum prævaricationem. It is not the Power of them they swear by, but the Vengeance which constantly pursues Sinners, that always haunts and attends the Frauds and Collusion of the unjust and perjured. *GROTIUS*.

² Our Author, in a Note on the apocryphal Book last quoted, applies this to a Passage of *SENECA*, quoted *Chap. XX.* of this Book, § 51. Note 6.

³ In his Commentary on the Title of the *Digest. De Jurejurando*. But *ZIEGLER* here justly observes that our Author has mistaken the Sense of that learned Lawyer, who only allows of tendering an Oath to a *Turk*, for Example, tho' it is well

could not prevail with those they had Business with to swear otherwise, they, however, dealt with them, they, for their Parts, swearing as they ought, and receiving from them such an Oath as they could get. We have an Instance of this in *Jacob and Laban*, Gen. xxxi. 53. ⁴ This is what *St. Austin* says, *Even he who swears but by a Stone, if he swears falsely, is perjured: And then, The Stone does not bear you speak, but GOD punishes you for your Deceit.*

XIII. The Effects of an Oath; whence arises a twofold Obligation, one at the Time of Swearing, the other after; this distinctly explained.

XIII. 1. The principal Effect of an Oath is to end all Disputes, πάσης ἀντιλογίας πέρας εἰς βεβαιώσων ὁ ὅρκος, says the divine Author to the *Hebrews*, *An Oath for Confirmation is the End of all Strife.* Not unlike to this is that of *Philo*, ¹ Ὁρκοῦ μαρτυρία θεῶν περὶ πράγματι ἀμφισβητούμενα, *An Oath is the Testimony of GOD in doubtful Cases.* And that of *Dionysius Halicarnassensis*, τελευταία ὅτι πῶς εἰς ἀπασὶν ἔστιν, &c. ² The utmost Assurance that either Greeks or Barbarians can give, and which no Time can efface, is when by their Oaths and Vows they make the Gods the Sureties of their Contracts and Agreements. ³ So was an Oath among the *Ægyptians*, Μεγίστη παρ' ἀνθρώποις πίστις, *The greatest Pledge of human Fidelity* ⁴.

2. He then who swears is obliged to two Things. *First*, That his Heart agree with his Words, which *Chrysippus* ⁵ terms ἀληθορκεῖν, *To swear truly.* *Secondly*, That his Actions answer his Words, which he calls ὀρκεῖν, *To swear well*; he who offends in the former Case is said, ⁶ ψευδορκεῖν, *To swear falsely*; he who in the latter, ὀπιορκεῖν, *To be perjured*, as the same *Chrysippus* nicely distinguishes them, tho' sometimes they are confounded.

XIV. When an Oath lays us under an Obligation both to GOD and Man, and when to GOD only.

XIV. And indeed, if the Matter be such, and the Words so conceived, that they regard not only GOD, but also some certain Person, that Person, no Doubt of it, shall from that Oath be entitled to a Right, as including a Promise or Contract, which ought to be taken in the most simple and plainest Sense. But if the Words of the Oath do not directly regard that Person, by conferring any Right on him; or if they do respect him, yet so as that somewhat may be opposed to his Claim, then the Force of the Oath will be such, that that Person shall acquire no Right, but that the Swearer shall nevertheless be obliged before GOD to make good his Oath. ¹ We have an Instance of this in him, who by an unjust Fear has extorted a Promise upon Oath. For he obtains no Right, or at least such a one only, as he is obliged to give up, because in acquiring it he was the Cause of Damage to him whom he forced to promise. Thus we read, that the *Hebrew Kings* were both ² reproved by the Prophets, and punished by GOD, ³ for breaking

known he will swear by *Mahomet*. See *DUAREN's* first Treatise, *De Jurejurando*, Cap. XI. Tom. I. Opp. Edit. Lugd. 1579. p. 235, and the other Treatise on the same Subject, Cap. IV. Tom. II. p. 11. As to the Question itself, consult what I have said on *PUFENDORF*, B. IV. Chap. II. § 4. Note 2. second Edition.

⁴ Sermon XXVIII. *De verbis Apostoli*; it is quoted, C. *Ecce dico*, Cauf. XXII. Quæst. V. GROTIVS.

XIII. (1) *De Legis. Allegor.* Lib. II. p. 99. Edit. Parif.

² PROCOPIUS PERSIC. Ὁρκος ὁ τῶν ἐν ἀνθρώποις, &c. An Oath, which is looked upon by all Mankind to be the last and strongest Pledge of mutual Faith and Veracity. GROTIVS.

³ *Antiq. Rom.* Lib. VI. Cap. LXXXIV. p. 319. Edit. Oxon. (406. Sylburg.)

⁴ DIODORE of Sicily, Bibliothec. Lib. I. Cap. LXXXVII. p. 49. Edit. H. Steph.

⁵ The Passage of CHRYSIPPUS is preserved by STOBÆUS, Sermon XXVIII. p. 196. Edit. Genev. 1609. Our Author has quoted and explained it, in his Notes on St. MATTHEW v. 33. But this is at the Bottom no more than a Dispute about Words, of which Sort we have a great Deal in Stoick Philosophy.

⁶ This false Swearing is forbidden. *Exod.* xx. 11. And the Perjury, *Levit.* xix. 12. as the *Hebrews* assert, præcep. jubent. CCXL. GROTIVS.

XIV. (1) ST. AUSTIN, in his 224th and 225th Epistles, tells us, that an Oath, tho' we were drawn into it by Force, ought in Reverence to GOD to be kept. GROTIVS.

See PUFENDORF, B. IV. Chap. II. § 8. I might here add, that, if our Author's Hypothesis, in Regard to the double Obligation he conceives in Promises made with an Oath was well grounded, I do not see how he could say, as he does below, § 20. that a Superior has a Power to annul such Sort of Oaths. For, since the present Question is not concerning Things in themselves unlawful, I should think a Superior could not make void an Obligation contracted towards GOD, nor even hinder it being contracted, unless GOD had declared his Will to renounce his Right, if I may use the Expression.

² See JEREMIAH xxxix. 5. EZEKIEL xvii. 12, 13, 15. GROTIVS.

³ This Example is of no Service toward establishing our Author's Hypothesis. For, first, according to his own Principles, every Treaty made with a Conqueror, even without an Oath, is valid by the Law of Nations, how unjust soever the Fear was by which the Person was obliged to make it. See B. III. Chap. XIX. § 11. So that the Oath which bound the Treaty between King *Zedekiah* and *Nebuchadnezzar*, would only have rendered the Violation of that Treaty more criminal. *Secondly*, *Zedekiah* probably designed to swear truly, and considered the Treaty as good and valid; as he would

ing their Faith, which they had sworn to the Kings of *Babylon* to maintain inviolable. *Cicero* commends *Pomponius*, ⁴ the Tribune, for keeping his Word and Promise, tho' what he swore was forced from him by the Fright they put him into; *So great*, says he, *was the Reverence of an Oath in those Days*. And therefore, not only *Regulus*, ⁵ how unjust soever his Confinement was, was obliged to render himself a Prisoner; but also those ⁶ ten that *Cicero* mentions, were obliged too to return to *Hannibal*, for this was what their Oath had laid upon them.

XV. 1. Nor does this take Place only in Relation to publick Enemies, but in Regard to every other Enemy; for it is not so much the Persons to whom we swear, ¹ as GOD, whom we invoke as a Witness to what we swear, that creates this Obligation. And therefore *Cicero* ² is not to be minded, when he says, that it is no Perjury, if a Man does not pay the Money which he promised with an Oath to Pirates, or Robbers, for saving his Life; because a Pirate, or Robber, has no Claim to the Right of Arms, but is a common Foe to all Mankind, and with whom we ought not to keep either our Word or our Oath. And the same, in some other Place he says of a Tyrant, ³ as *Brutus* does in *Appian*, ⁴ ἡ δὲ ἐν π. 50ν ἐστὶ Παλαιὰ πρὸς τυράννους ἔδ' ἔροπον, *The Romans think it no Point of Honour or Duty to observe either Faith or Oath to Tyrants*.

2. But tho', by the Law of Nations, there is a great Difference between an Enemy in Form, and a Pirate, as we shall shew hereafter, yet will not that Difference be of any Weight in this Case, where we have to do with GOD; for tho' ⁵ the Condition of the Person be such as he cannot claim a Right, yet that signifies nothing, since it was GOD we are engaged to, and therefore an Oath is sometimes called a Vow ⁶; nor is what *Cicero* says allowable, that there is no common Right that ought to be observed with Respect to a Pirate. For by the Law of Nations whatsoever is deposited with us by a Thief, ⁷ is to be restored to him, ⁸ if the right Owner does not appear, as *Tryphoninus* well observes.

3. Wherefore I cannot approve of their Opinion, ⁹ who think it Discharge enough, if a Person does but barely lay down the Sum, which he has promised to pay a Robber, tho' he immediately takes it back again; because, when we swear to GOD, our Words ought to be understood in the plainest Sense, and so as they may have a real Effect. And therefore he who came back to his Enemy privately,

would have done that which he might have extorted, by the Superiority of his Arms, from a People on whom he had no more Right to make War, than the King of *Babylon* had to fall on his Dominions. So that no Consequence can be drawn from thence, against such as have no Design of Swearing truly, and do not think themselves obliged to stand to an Agreement where Force is employed. Thirdly, GOD had declared to *Zedekiah*, by his Prophets, that he required that Prince should religiously stand to what he had promised the King of *Babylon*; against whom he could not rebel without the highest Imprudence.

4 That Tribune having accused *Lucius Manlius* of holding the Dictatorship beyond the Time prescribed by the Laws, the Dictator's Son, afterwards surnamed *Torquatus*, went to *Pomponius*, and finding him alone, swore he would kill him if he would not promise on Oath, not to molest his Father. Whereupon *Pomponius* desisted; to which the People consented, as soon as they knew his Reason. *De Offic. Lib. III. Cap. XXXI.* See *Livy, Lib. VII. Cap. V.* and *Polybius, Lib. VI. Cap. LVI.*

5 But our Author himself elsewhere maintains, that such Promises are valid in their own Nature, and independently of an Oath, *B. III. Chap. XXIII. § 6.*

6 Those ten Prisoners who returned to *Hannibal's* Camp for one Moment, under Pretence of having forgot something, thereby committed a Fraud, which would have rendered them guilty of a Violation of Fidelity, even though they had not

sworn. See *B. III. Chap. XXIII. § 13.*

XV. (1) GREGORAS, εἰς θεὸν ἡ ὑποχρῆσις τὸ πειρασθῆναι ἀνατίθῃσιν ἐγκλημα. Perjury charges GOD with Negligence. GROTIUS.

2 *De Offic. Lib. III. Cap. XXIX.*

3 *De Offic. Lib. III. Cap. VI.*

4 *De Bell. Civil. Lib. II. p. 838. Edit. Amst. (515. H. Steph.)*

5 PLUTARCH, in his *Lysander*, ὁ ὅρκῳ παρα- κρούσθῃ, &c. He who deceives his Enemy by an Oath, confesses that he fears him, but despises GOD. GROTIUS.

6 It is called so only improperly. For there is in Reality a wide Difference between a Vow and an Oath. See PUFENDORF, *B. IV. Chap. II. §*

8. *Votum fit Deo; Juramentum per Deum*, says our Author himself, in his Notes on *Numbers xxx. 3.*

7 *Digest. Lib. XVI. Tit. III. Depositi, &c. Leg. XXXI. § 1.* And to an Usurper too, as the *Prienses* did to *Orofernes*. POLYBIUS and DIODORUS SICULUS, in *Excerpt. Peires.* GROTIUS.

8 In that Case, and others of the same Kind, we do not deal with a Thief considered as such, and as using Extortion; but as with any other Person. We renounce our Right to taking an Advantage of the infamous Character of such a Contractor.

9 LESSIUS is quoted for this Opinion, *Lib. II. De Justitiâ & Jure, Cap. XLII. Num. 27.*

and then went off again, did not, in the Judgment of the Roman Senate, satisfy his Oath of Returning ¹⁰.

XVI. Whether an Oath given to one who does not regard his Word be to be kept; explained by a Distinction.

XVI. 1. As to that of Accius, ¹ T. *Fregisti fidem.* A. *Quamneque dedi, neque do infideli cuipiam.* T. You have broke your Faith. A. Which I neither gave, or ever do give, to a Person who has none himself; may in this Sense be allowed, if our Promise made, and confirmed by Oath, ² was grounded upon another's Promise, as upon a Condition to which ours related; for that Condition not being performed, makes void our Promise. But if the Promises were of different Kinds, and did not respect each other, then each Promise is to be faithfully discharged by the Persons who swore; and hence it is, that Silius commending Regulus, addresses himself to him in the following Terms,

*Who to long Ages in the Records of Fame,
Shall stand a bright Instance of nicest Honour,
To false Carthaginians kept ³.*

2. A plain Inequality in Contracts, naturally gives sufficient Cause either to repeal or reform them, as I have said before. And tho' the Law of Nations has made some Alteration in it, yet by the Civil Law, which is of Force where both Parties are of the same Nation, they often have Recourse to what is allowed by the Law of Nature, as we have also proved elsewhere. But here too, if an Oath intervene, tho' little or nothing be due to the other, yet our Faith given to GOD must be punctually observed ⁴. And therefore the Psalmist reckoning up the Qualities of a good Man, adds this as one of them, *He that sweareth to his Neighbour, and disappointeth him not, tho' it were to his own Detriment ⁵.*

XVII. He who is bound to GOD alone does not oblige his Heir after him.

XVIII. It is no Perjury not to keep one's Word, or Oath, to him who does not desire that it should be kept; or if that Quality or Circumstance of Condition, under which, and in Consideration of which the Oath was made, ceases.

XVII. But it is to be observed, that where there is no Right transferred to the Person with whom we deal, on the Account of some Defect, as aforesaid, but we are engaged only in Respect of the Oath that we made to GOD, there the Heir of him who made the Oath is not bound ¹. For as the Goods of the Deceased pass to the Heir, so do also the Charges and Incumbrances, but not any other Obligations, which were only the Result of meer Piety, Gratitude, or Sincerity. For these have nothing to do with what is strictly termed Right, as it is now established, as we did not forget to observe elsewhere.

XVIII. But also where there arises no Right to the Person who receives it, yet if the Oath seems to respect the Advantage of a third Person, and ¹ that Person will not accept thereof, the Oath shall not oblige him who gave it; ² nor if the Quality

¹⁰ This is the Fact mentioned at the Close of the preceding Paragraph. LIVY gives us the following Account of it. *One of them, (the Captives) returned home, imagining he had satisfied his Oath by returning privately. As soon as the Thing was known, it was laid before the Senate; who unanimously voted he should be seized, put under a Guard, and carried back to Hannibal. Lib. XXII. Cap. LXI. Num. 4.* See AULUS GELLIUS, *Noct. Attic. Lib. VII. Cap. XVIII.*

XVI. (1) In CICERO, *De Offic. Lib. III. Cap. XXVIII.*

2 C. *pervenit. III. de jure jurando.* Add L. *lege fundo*, in fine D. *de lege commissoria.* GROTIUS.

3 *De Bell. Punic. Lib. VI. v. 63, 64.*

4 This is grounded only on the false Supposition of two distinct Obligations in Promises made by an Oath. The Truth is, the Moment it appears there is a real Inequality, to which Consent was not given, the Oath falls of itself. See PUFENDORF, in the Chapter often quoted, § 11.

5 *Psal. xv. 4.* Our Author, in his Note on this Text, gives a different Explication of the Word, which he here renders, *Tho' it were to his own Detriment.* Having observed, that the Vulgate Latin has followed the LXXII. Interpreters, who read as if the original Word had been לרעה, *To his*

Neighbour, instead of לרעה, he only says, others translate, *He who hath sworn to afflict himself, (that is, has made a Vow to fast) and doth not fail to keep his Vow.* But if we follow the common Translation, *Tho' it were to his own Detriment*, there is no Necessity of understanding this as spoken of Promises bound by an Oath, in which there is an Inequality sufficient of itself to render them null. It is well known that several Persons are tempted to break their Word, even tho' given under Oath, when they cannot keep it, without suffering some Inconvenience or Loss, which they did not foresee, tho' it be not such as forms a reasonable Exception to the Obligation contracted. He, who resists such a Temptation, may be justly called a good Man, such as the Psalmist describes.

XVII. (1) See PUFENDORF, in the Chapter answering to this, § 17. with the Notes in the second Edition.

XVIII. (1) PLAUTUS, in his *Ruden*, *I beg that you would discharge him from his Oath.* (Act. V. Scen. III. v. 58, 59.) GROTIUS.

2 See to the same Purpose in L. *Si duas*, § *Gentium*, D. *de excusat. tut.* and in GAILLIUS, II. *Obs. CXLIV. Num. 8.* and *de Arrestis*, X. 9. and in AZORIUS's *Moral Institutions*, V. 22. Qu. 6. Part 1. GROTIUS.

of the Person ceases, in Regard to which a Man swore; as if a Magistrate shall cease to be a Magistrate, the Obligation ceases. In *Cæsar*, ³ *Curio* thus speaks to *Domitius's* Soldiers, *How is it possible that you should be bound by an Oath to him, who having thrown away the Ensigns of Power, and renounced his Command, is become a private Man, and a Prisoner under another's Power?* And presently adds, ⁴ the Oath has lost its obliging Force, by the Loss of the Imposer's Liberty.

XIX. It is an Inquiry too, whether an Act done contrary to an Oath, be only unlawful or void? Where we must distinguish, that if our Faith only be engaged, ¹ the Act done contrary to our Oath shall stand good, as in a Testament or Sale; But the Oath shall not be of Force, if it be so framed, that it comprehends an absolute renouncing of any Power to do that Act ². And these Things do naturally attend any Oath; whence we may easily judge of the Oaths of Kings and of Foreigners to one another, when the Act is not subject to the Law of the Place.

XX. 1. Let ¹ us now see what Power and Authority Superiors, that is, Kings, Fathers, Masters, and Husbands (as to what regards a conjugal State) are intitled to. And here the Act of our Superiors cannot make void an Oath which is truly obligatory, so that it should not be fulfilled; for that belongs both to natural and divine Right. But because all our Actions are not fully in our own Power, but they have some Dependence on our Superiors, therefore our Superiors have a double Power over us, concerning that which is sworn; the one directly over the Person swearing, the other over the Person to whom he swears.

2. The Act of the Superior may restrain the Person swearing, either before he swears, by making such an Oath void, as far as the Right of an Inferior is subject to the Power of a Superior; or, after he has sworn, by forbidding the Performance of it. For an Inferior, as such, could not bind himself without the Consent of his Superior, beyond which he had no Power. After this Manner, by the *Hebrew* Law, the Husband had Power to make void the Vow of his Wife, the Father that of his Children, so long as they were under the Power of his Government. *Seneca* proposes this Question, ² *What if there should be a Law made, that no Man should do what I have promised my Friend to do for him?* Which he thus answers, *The same Law dispenses with the Performance that forbids me to promise.* But some Acts may be mixt, and made up of both, as when the Superior orders, that what the Inferior shall swear in such and such Circumstances, as, suppose, through Fear or Want of Judgment, shall be binding only so far as he, the Superior, approves of it. And upon this Foundation are built the Dispensations and Absolutions, ³ which Princes in former Times did exercise by themselves, which

XIX. *When that which is done contrary to one's Oath becomes void.*

XX. *How far the Prince's Power extends concerning what his Subjects have sworn to Strangers, or Strangers to them, explained by a Distinction.*

³ *De Bello Civil. Lib. II. Cap. XXXII.*

⁴ *Ibid.*

XIX. (1) That is, if a Person has only sworn not to do a certain Thing, as not to marry; or to give somewhat, without actually transferring his Right to it. See *PUFENDORF, B. IV. Chap. II. § 11.*

2 As when we give or mortgage a Thing to a Person, which was before given, or mortgaged, to another, by an Act, accompanied with an Oath, *Mr. VITRIARIUS*, in his *Institut. Juris Nat. & Gent. Lib. II. Cap. XIII. § 28.* brings the Example of a Prince, who, making a Treaty of Alliance with another, has sworn to conclude no such Treaty with any Person whatever, and afterwards should enter into an Alliance with a third.

XX. (1) *St. AUGUSTIN, Epist. CCXL. and CCXLI. GROTIUS.*

2 *De Benefic. Lib. IV. Cap. XXXV.* On this Question see *PUFENDORF's Law of Nature and Nations, B. IV. Chap. II. § 24.* and what I have said on the Abridgment of *The Duties of a Man and a Citizen, B. I. Chap. XI. § 6. Note 3.* in the third and fourth Editions.

3 *SUETONIUS*, in his *Tiberius, XXV.* And so it was in *Spain* for a great While, as is observed by

FERDINAND VASQUES, de Success. creat. Lib. II. Sect. 18. GROTIUS.

SUETONIUS there speaks of a certain *Roman* Knight, who had sworn never to repudiate his Wife; but on his surprizing her in the Fact with her Son-in-Law, the Emperor discharged him from his Oath. In the same Manner the Emperors *Antoninus* and *Verus* dispensed with the Oath of a Man who had sworn never to accept of any publick Post, and was afterwards created *Duumvir*. *Digest. Lib. L. Tit. I. Ad Municipalem, &c. Leg. ult.* The Fact which relates to *Spain*, is not in the Section of *VASQUEZ*, quoted by our Author, tho' it treats of scarce any Thing but Cases where an Oath intervenes. I have in vain sought for it in several other Parts of that large Work, where he might have had Occasion to speak of absolving from Oaths. What farther inclines me to doubt whether there is any Thing like it, is, that the late *Mr. HERTIUS*, in a Note on *PUFENDORF, B. IV. Chap. II. § ult.* tells us, that the *Kings of Spain*, as well as those of *France*, do at this Day absolve their Subjects from Oaths, for just Reasons. He does not, indeed, produce any Vouchers for what he advances; and I have not Time at present to examine the Matter more particularly.

Power, by their Consent, is now executed by the Heads of the Church, the more effectually to prevent any Thing contrary to Piety ⁴.

3. So the Act of a Superior may be directed against the Person to whom it is sworn, either by taking from him that Right which he has gained, or if he has no Right, by forbidding him to claim any Right by that Oath ⁵. And this may be done two Ways, either by Way of Punishment, ⁶ or for the publick Good ⁷ by Vertue of that eminent Power which a Sovereign has over the Goods of his Subjects. And hence we may learn, what Power Princes have over the Oaths of their Subjects, where he who swears, and he to whom it is sworn, are of different Nations. ⁸ But he who upon his Oath has promised any Thing to an injurious Person, as to a Pirate, acting as such, ⁹ cannot, by Way of Punishment, take away from him, that Right which he has given him by his Promise. For then Words would have no Effect, ¹⁰ which is a Circumstance that ought wholly to be avoided. And for the same Reason, the Right of that which is promised, cannot be recompensed with the Right of that which was before disputed. If the Agreement were made, after that Dispute began.

4. Yet may a human Law take away that Clog and Impediment, which itself had laid upon some particular Kind of Acts, if an Oath intervene, either in general Terms, or under some certain and precise Form; which the Roman Laws have done in such Impediments ¹¹ as do not directly respect the publick Advantage, but the private Benefit of him who swears. And if this be so, the Act sworn shall be

4 See Note 3. on PUFENDORF, B. IV. Chap. II. § 24. It is on *papist* Principles that some Protestant Doctors, even at this Day, pretend, that if Princes have a Power to dispense with the Oaths of their Subjects, they have it not as Princes, but as invested with the Right of Bishops; as Mr. BOHMER observes, in his *Jus Ecclesiasticum Protestantium*, Lib. II. Tit. II. § 30. See also what he says, Tit. XXIV. § 23, &c. concerning other Things, in which the Protestants in this Case imprudently follow the Principles of the Canon Law.

5 If he had acquired no Right, the Oath is void of itself; so that there is no Need of a Dispensation.

6 A Criminal, for Example, is assured of something on Oath; a young Woman has promised to marry him. The Sovereign may deprive that Criminal of a Right of claiming such a Promise, tho' bound with an Oath.

7 A Man, for Instance, has sworn to pay another in such a Time, a Sum that he owes him. It happens that the State has Occasion to employ the Debtor in the Wars, or some other Way; and that he could not be useful to the State, were he obliged to pay his Debt at the Time fixed. In such Case the State deprives the Creditor of his Right to demand the Payment.

8 The Sovereign of him who has sworn, not being able directly to deprive the Person in whose Favour the Oath was taken, and who does not depend on him, of the Right he has thereby acquired, may, for good Reasons, discharge his own Subject from his Oath. And the other has no Reason to complain, when the Discharge is granted for just Reasons; because he knew, or ought to have known, that the Person who has sworn, could oblige himself only as far as his Sovereign should think proper, in such Things as are subject to his Direction. On the contrary, the Sovereign of him to whom the Oath was taken, cannot discharge him who took it, and whom we suppose not to depend on him. But he may deprive his own Subject of the Right which he had acquired by such an Oath; which, in the Main, comes to the same as if he who swore was discharged from his Oath.

9 He has no Need of it; since the Oath is null of itself.

10 This Reason is good, when there is nothing that can hinder a Man from contracting a real Obligation by Swearing. But when the Engagement is null, the Words of the Oath ought to have no Effect.

11 See PUFENDORF, B. V. Chap. XI. § 6.

12 Our Author here seems to follow the common Opinion, grounded on a Law of the Code, Lib. II. Tit. XXVIII. *Si adversus venditionem*, Leg. I. where the Emperor Alexander Severus refuses the Benefit of Restitution *in Integro*, to a Minor, engaged in the Army, on Account of the Oath by which he had confirmed a Sale, made to his own Prejudice. But that Law contains only a Rescript in Regard to a particular Case; nor doth it speak of all Sorts of Oaths, but of an Oath taken in Person (*Juramentum corporaliter præstitum*. See PUFENDORF, B. IV. Chap. II. § 16.) which was considered as having more Force than one taken by Writing or by Proxy, &c. There might likewise be some particular Circumstances in that Case, either in Regard to the Person pretending to be injured, or in Regard to the Injury itself which determined the Emperor to make the Oath stand good, without designing to establish a general Rule, contrary to the Civil Law, according to which an Oath has no more Force than a single Contract. But MARTIN, a scholastick Lawyer, mistaking the Sense of this Rescript, persuaded the Emperor Frederick II. to join to it a Constitution, which extended this Exception of an Oath to all Contracts in general, made by Minors, at the Age of Puberty, as Mr. SCHULTING very well observes, *Enar. partis primæ Digest.* in Tit. *De Minoribus*, &c. § 3. See also CUJAS, on the Title of the Code, under which this Rescript appears, and PUFENDORF, as above quoted, § 11. All this is derived from the Authority of the Canon Law, which, without having any Regard to the Civil Laws, by which an Act is declared null, reaches that the Oath joined to it, renders it valid, of what Nature soever it be. See Note 3. on PUFENDORF, B. IV. Chap. II. § 19. second Edition, and Mr. BOHMER's *Jus Ecclesiasticum*, Lib. II. Tit. XXIV. § 23, &c.

of Force in the same Manner, as it naturally would be if there was no such human Law, either by obliging his Faith only, or by giving also a true Right to another, according to the different Nature of the Acts, which we have explained in another Place.

Ch. 11. of this Book, § 3, 4.

XXI. 1. We must observe here by the Way, that what is said in the Precepts of CHRIST, and by St. James, of *not Swearing at all*, does not belong properly to affirmative Oaths, ¹ of which we have some Instances in St. Paul, but to obligatory Oaths, which promise something future and uncertain. This is plain from the Opposition, in the very Words of CHRIST, *Ye have heard it hath been said by them of old Time, thou shalt not forswear thyself, but shalt perform unto the LORD thine Oath; but I say unto you, swear not at all.* And by the Reason given by St. James, *Μη εἰς ὑπόκρισιν πείσῃτε*, that ye fall not into Hypocrisy, that is, *that ye be not found Deceivers*, for so the Word *ὑπόκρισις*, signifies in the Greek, as appears Job xxxiv. 30. Matt. xxiv. 51. and in several other Places.

XXI. What Manner of Oaths CHRIST forbids when he prohibits Swearing at all.

2. The same may be proved by our Saviour's Words, *ἔσω ὃ λόγον ὑμῶν ναὶ, ναὶ; ἔ, ἔ;* Let your Communication be *Yea, yea; Nay, nay;* which St. James thus expounds, *ἔσω ὃ ὑμῶν τὸ ναὶ, ναὶ; καὶ τὸ ἔ, ἔ;* Let your *Yea* be *yea*, and your *Nay*, *nay;* where there is evidently the Figure which the Rhetoricians call *πλοκή*, as in that Passage,

Ex illo Corydon, Corydon est tempore nobis. 2

From that Time Corydon was Corydon indeed.

And in another like it, *Ad illam diem Memmius erat Memmius.* ³ *To that Day Memmius was Memmius.* For the former *Yea* and *Nay* signify a Promise, the latter the fulfilling of that Promise. For *ναὶ*, or *Yea*, is a Form used by a Person promising, and is explained Rev. i. 7. by *Amen*, or *So be it*, and it is of the very same Signification in the Syriack, *ܐܡܝܢ*, answering to the Rabbinical *אמן*, as does the Arabick *آمين*, as among the Roman Lawyers ⁴ *Μάλιστα*, *Yes*, and *Quidni*, why not? are Particles of Speech that denote the Consent of the Person to the Agreement that is proposed to him. In St. Paul, 2 Cor. i. 20. it is taken for the Accomplishment of a Promise, when he says, that *All the Promises of GOD in CHRIST, are Ναὶ καὶ ἀμήν, Yea and Amen*, that is, are certain and undoubted. And from hence arises that old Way of Expression amongst the Jews, *Iusti Hominis*, ⁵ *Ναὶ est ναὶ, ἔ non, est non.* *An honest Man's Yea is yea, and his No is no.*

3. On the contrary, they whose Words and Actions disagree, are said to be *Ναὶ καὶ ἔ, Yea and Nay*, 2 Cor. i. 18, 19. That is, their *Yea* is *Nay*, and their *Nay* is *Yea*. So St. Paul himself expounds it; for when he said he did not *ελαφρῶς χρῆσασθαι*, *Use Lightness*, he adds, his Word was not *Ναὶ καὶ ἔ, Yea and Nay.* Festus relating the several Significations of the Word *Nauai*, writes thus, Some derive it from the Greek, ⁶ *Ναὶ καὶ ἔχει*, *Nai cai ouchi*, and say that it imports a *fickle inconstant Creature*. Now if *Ναὶ καὶ ἔ, Yea and Nay*, signifies Fickleness and Inconstancy, it will follow that *Ναὶ, ναὶ; ἔ, ἔ; Yea, yea, and Nay, nay*, signify Constancy.

4. So that our Saviour's Words imply, what ⁷ Philo the Jew expresses, *καλλίστον καὶ βιωφελέστατον καὶ ἀρμότερον, &c.* *It is the best Thing in the World, the most convenient, and most agreeable to a rational Nature, to abstain from Swearing, and to accustom oneself so to Truth, as that our Word may be taken as soon as an Oath.* ⁸ And in another Place, *ὁ τὸ πρᾶγμα λόγον ὅρκου ἔσω βέβαιον, ἀκλινὲς, ἀψάδιστα.* *The Word of a good Man ought to pass for a firm, unchangeable, and sin-*

XXI. (1) Rom. i. 9. ix. 1. 2 Cor. i. 23. xi. 31. Phil. i. 8. 1 Theff. ii. 5. 1 Tim. ii. 7. GROTIUS.

2 VIRGIL, *Eclg.* VII. v. 70.

3 Our Author has quoted this Example, either from AQUILA ROMANUS, an ancient Rhetorician, who gives it in the very Words here set down, p. 19. *Antiq. Rhet. Lat. Edit. Pitbæi.* or from MARTIANUS CAPELLA, p. 174.

4 Words used in replying to a Stipulation. See *Digest. Lib. XXXII. De Legatis & Fidecomm.*

III. Leg. XXXIX. § 1. and Lib. XLV. Tit. I. *De verborum obligat.* Leg. I. § 2.

5 See BUXTORF's *Florilegium Hebraicum*, p. 329.

6 You had better in this Passage of FESTUS write it *ἐχέ*, as it is often in HOMER, for this comes nearer the Word *Nauai*. GROTIUS.

7 *De Decalogo.* GROTIUS.

8 *De specialibus legibus.* GROTIUS.

cere Oath. And, as *Josephus* says of the *Essenes*, ⁹ πᾶν τὸ ρηθὲν ὑπὸ αὐτῶν ἰσχυρώτερον ὅρκῳ, τὸ δὲ ὁμνῆσαι αὐτοῖς περιττόν, *Every Word spoken by them was firmer than an Oath, and therefore they looked upon an Oath as superfluous.*

5. *Pythagoras* ¹⁰ seems to have borrowed this Maxim from the *Essenes*, or some of the *Jews* whom they followed, *Μὴ ὁμνῆσαι θεοὺς, ἀσκεῖν γὰρ αὐτῶν δεῖν ἀξιοπίστον παρέχειν*, ¹¹ *Not to swear by the Gods, for every one should take Care* ¹² *to be believed without his Oath.* *Curtius* tells us, the *Scythians* thus addressed *Alexander*, *Do not expect that the Scythians should oblige themselves to you by Swearing; they take an Oath of Fidelity in being always as good as their Word.* And *Cicero*, for *Roscius* the *Comedian*, *Whatever Punishment the immortal Gods have appointed for a perjured Person, the same is designed by them for the Liar and the Fraudulent; for they are not so much offended with Men for breaking their Words upon Oath, as for their Treachery and Perfidiousness, whereby they intend to cheat and circumvent others.* Remarkable is the Saying of *Solon*, ¹⁴ *Καλοκαταθίαν ὅρκῳ πιστότερον ἔχει*, *Be of that Probity, as to be believed more for your Honesty than your Oath.* And *Clemens Alexandrinus* says, that it is the Duty of a good Man, *τὸ πιστὸν καὶ ὁμολογίας ἐν ἀμεταπτώτῳ καὶ ἐδραμῷ δεικνύειν βίῳ καὶ λόγῳ*, ¹⁵ *To shew the Sincerity of his Promises by the Firmness and Uniformity of his Life and Conversation.* And *Alexis* the *Comedian*,

Ὅρκῳ βέλαιός ἐστιν ἂν νέυσω μένον.

If I do but nod it's as good as any Oath.

And *Cicero*, in his Oration for *L. Cornelius Balbus*, tells us, that when one at *Athens*, who was a Man of known Probity, had given in his publick Evidence, and was coming to the Altar to confirm it upon his Oath, all the Judges unanimously cried out, that he should not swear; because they would not have it thought, that his Oath ought to be depended on, more than his bare Word.

6. That Passage of *Hierocles* upon the golden Poem, does not disagree with what our Saviour advances, *Ὁ σέβας ὅρκῳ ἐν ἀρχῇ ᾠδαγγείας, &c.* *He who in the Beginning commanded us to reverence an Oath, did thereby forbid us to swear about Things* ¹⁶ *that are casual, and altogether uncertain in their Event and Issue. For such Things are trifling and bazardous, and therefore it is neither decent nor safe*

⁹ *Antiq. Jud. Lib. II. Cap. VII.*

¹⁰ For *Hermippus*, the *Pythagorean*, as *ORIGEN* against *CELSUS* (*Lib. I.*) asserts, said that *Pythagoras's* Philosophy was derived from the *Jews*: And both *JOSEPHUS* and *JAMBLICHUS* the *Pythagorean* have ascribed it to the *Hebrews*. *GROTIUS*.

The Passage of *JOSEPHUS* is in *B. I.* against *Apion*. But *Mr. LE CLERC*, with great Probability, conjectures, that *HERMIPPUS* wrote *ἰδαίων*, where we now read *ἰσδαίων*. See his *Bibliothèque choisie*, *Tom. X. p. 162, &c.* Our Author quotes *JAMBLICHUS*, but his Memory deceives him. He has confounded that Author, who says nothing like what he ascribes to him, with another Philosopher of the same Sect, whose *Life of Pythagoras* is printed in the same Volume; I mean *PORPHYRY*, who makes *Pythagoras* travel among the *Jews*, as well as the *Egyptians*, *Arabians*, and *Chaldeans*, *Num. 11. Edit. Kust.* Whereas *JAMBLICHUS* speaks only of his going into *Ægypt* and *Syria*, *Lib. I. Cap. III. IV.*

¹¹ *DIOGENES LAERTIUS, Lib. VIII. § 22.*

¹² *PHILO, Ἡδὴ καὶ ὅτε ὁμνῶς, &c.* *For he who is put to his Oath, is suspected of being false to his Word.* (*De Decalog.*) In *SOPHOCLES's* *OEdip. Colón.* *OEdipus* has expressed himself thus,

Οὐτοὶ σ' ὅρκῳ γ' ὥς κακὸν πισώσομαι.

I won't require your Oath, as I would a Rascal's.
(*ver. 642.*)

The Jews replies,

Οὐκ ἐν πείρῃ γ' ἂν ἔδεν ἢ λόφῳ φέροις,

Nor if you did, would you've more than my bare Word.
(*ver. 643.*)

M. ANTONIN, in his Description of a good Man; *Μήτε ὅρκῳ δέμελον*, *One who has no Occasion to swear*, (*Lib. III. § 5.*) *St. CHRYSOSTOM, De Statuis. XV. Εἰ μὲν πιστεύεις, &c.* *If you believe that he is an honest Fellow, do not lay him under the Necessity of an Oath; and if you know he is a Rogue, do not force him to be perjured.* *GROTIUS.*

¹³ *Lib. VII. Cap. VIII. Num. 28.*

¹⁴ *DIOGENES LAERTIUS, Lib. I. § 60.*

¹⁵ *Stromat. Lib. VII. Cap. VIII. p. 861. Edit. Potter.*

¹⁶ *St. CHRYSOSTOM* very well animadvertes upon this, in his twelfth *De Statuis*, *Ὅτι καὶ μὴ συναρπαδαίς μηδὲ ἀκῶν, &c.* *Tho' you did it without Compulsion, Passion, or Inconsiderateness, yet sometimes from the very Nature of the Thing will you be forced, with your Consent and Knowledge, to forswear yourself.* And presently after, *Σφαλερὸν μὲν ἐν, &c.* *It is dangerous for a Man even to swear to what relates to himself.* For we are often in Circumstances, wherein we are forced to do what we would not, or unable to do what we would. *GROTIUS.*

to swear about them at all. And Libanius highly commends a Christian Emperor, because *ἡπιόρκιας τοσέτον ὑποσάβων, ὥστε, &c.* he was so far from perjuring himself, that he dreaded even to swear the Truth. And Eustathius, upon that of the fourteenth *Odyss.* (v. 171.) *ἄλλ' ἤτοι ἔρκον μὲν ἐάσομεν,* But we will allow an Oath, says thus, *οὐ χρεία ἔρκου ἐν πῖσι ἀδήλοις, &c.* in doubtful Matters there is no Occasion for an Oath, by Way of Confirmation, but of Prayers for Success.

XXII. And therefore in many Places, instead of an Oath, it is customary ¹ to ratify a Promise by joining of the right Hands of the two Parties together, which was *πίσις βεβαιωμένη ὡς ἐν πῖσι Πέρσαις, the strongest Tie of Faith among the Persians;* or by some other Sign and Circumstance, and is so powerful an Engagement, that if the Promiser does not faithfully perform what he has promised, ³ he is no less detested than if he had been really perjured. And it used to be particularly said of Kings and great Persons, that their Word was as good as an Oath. For they ought to be such as to be able to say with *Augustus, Bonæ fidei sum,* ⁴ *I am a Man of my Word;* and with *Eumenes,* ⁵ *that they would sooner lose their Lives than be worse than their Word.* And very pertinent to this, is that of *Gunther the Genoese,*

*Nudo jus, & reverentia verbo
Regis inesse solet, quovis juramine major.* ⁶

*No solemn Oath affords more sacred Ties
Than does a Prince's Word.*

And Cicero, in his Oration for *Dejotarus*, says, in Commendation of *Julius Cæsar*, that his Hand was not more to be depended on in War and Battle, than in what he had promised by it. And it is observed by *Aristotle*, ⁷ that in the Heroes Days, if a King did but lift up his Scepter, it was as good as his Oath.

XXII. (1) This is mentioned by EUSTATHIUS, upon the 24th *Odyss.* ARISTOPHANES's Scholiast, *ad Nubes*, (v. 81.) CRANTZIUS, *Saxon.* XI. 27. In C. *Ad Aures de his quæ vi metusve causâ æquantur Juramentum & Fides interposita.* GROTIUS.

2 DIODORUS SICULUS, *Biblioth. Histor.* Lib. XVI. Cap. XLIII. p. 533. Edit. H. Steph. As to the Persians, see the President BRISSON, *De Regno Persico*, p. 107, &c. and Lib. II. p. 270. Edit. Sylburg. Another still more remarkable Passage might have been quoted from the Scholiast on ARISTOPHANES. The Poet, in his *Acharnenses*, v. 307. makes the Chorus say, that the *Lacedæmonians* keep neither *Altars, Faith, nor Oath* sacred. Whereupon the Scholiast says, that Treaties and Alliances were made in three different Manners; by Words, by Actions, and by the Hands. By Words, As when the Parties were sworn. By Actions, When Sacrifices were offered. By the Hands, when the Contractors joined their right Hands, which was called *Giving their Faith.* After which he quotes a Passage from HOMER, (*Iliad.* Lib. II. v. 341.) Nothing is more common among the Antients than the Custom under Consideration; and several modern Writers have quoted great Numbers of Passages on the Subject. Among others, see EVERHARD FEITHIUS, *Antiq. Homeric.* Lib. IV. Cap. XVII. MARTIN KEMPIUS, *De Osculis, Dissert.* XVII. § 2. with our Author's Notes on ZACHARY xiv. 13. TOBIT vii. 16.

3 Thus in *Holland*, where there are *Memnonites*, who, misunderstanding some Passages of the New Testament, think the Use of an Oath absolutely

prohibited by the Gospel, the Magistrates require of that Sect only a bare Affirmation, which in Regard of them is as Binding as an Oath, and subjects them to the Penalties inflicted for Perjury, if they lie or falsify their Faith. See Mr. HUBER's *Prælect. Jur. Civil.* Tom. II. in Tit. *De Jurejurando*, p. 335. Edit. Thomas.

4 ISOCRATES speaking of *Evagoras*, King of *Salamis*, *ὁμοίως τὰς, &c.* He kept his Word and Promise as religiously as his Oaths. SYMMACHUS, X. 19. Nothing is more to be depended on, than the Promises of Princes. And NICETAS of *Alexius*, Brother of *Isaac*, Lib. III. βασιλεῦσι ὡς ἐν πᾶσι, &c. Kings ought above any other Consideration to have the greatest Regard to the punctual Discharge of their Oaths. CICERO, for *Cornelius Balbus*, They say at Athens, that when one of their People, who was a Man of known Probity, had given in his publick Evidence, and (as it is a Custom among the Greeks) was coming to the Altar to confirm it upon his Oath, all the Judges unanimously cried out, that he should not swear. GROTIUS.

5 This is related by PLUTARCH, *Eumenes*, being solicited to abandon *Perdiccas*, replied he would sooner lose his Life than violate his Promise to that General. *Vit. Eumen.* Tom. I. p. 585. Edit. Wech.

6 Lib. III. ver. 510, &c. where the Poet puts these Words in the Mouth of *Frederick Barbarossa.*

7 *Politic.* Lib. III. Cap. XIV. p. 357. Tom. II. Edit. Paris.

C H A P. XIV.

Of the Promises, Contracts, and Oaths of those who have the Sovereign Power.

I. *The Opinion of those refused, who hold that Restitutions to the full which arise from the Civil Law, extend to the Acts of Kings as such; as also that Kings are not obliged by their own Oaths.*

I. 1. **T**HE Promises, Contracts, and Oaths of Kings, and of others who have a like Sovereign Power, have some particular Difficulties and Questions, concerning the Power they have in Regard to the Validity of their own Acts, the Right which their Subjects acquire thereby, and the Obligation they impose on their Successors. As to the first, the Query is, whether the King himself has Power to restore himself to the State he was in before, or to make void his own Contracts, or to absolve himself from his Oath, as in all these Cases he can his Subjects¹. *Bodin* thinks that where a King is over-reached by Fraud, by Mistake, or by Fear, he may for the same Reasons be restored to his own Rights, and this both in Things that affect and lessen his Royal Prerogatives, and in those that relate to his private Fortune, as any of his Subjects might to theirs. To which he adds, that a King is not obliged by his Oaths, if the Contracts agreed on be such, as may be revoked by the Civil Law, tho' the Contracts be agreeable to Honesty; and that he is not therefore bound, because he has sworn, but as any Man may be bound by just Covenants so far as another is interested in the Execution of them.

2. But we (as we have elsewhere distinguished) do here also distinguish between the Acts of Kings which they do as Kings, and the private Acts of those Kings. For what they do as Kings, is looked on as done by the whole Nation: But as the Laws made by the whole Body of the People,² could have no Power over such Acts, because the Community is not superior to it self; so neither can the Laws of a King. Wherefore Restitution, which receives³ its Power only from the Civil

I. (1) *BODIN's* Words, which our Author has not quoted very exactly, are these "But is not the Prince subject to the Laws of the Land, which he has sworn to observe? We must distinguish. If the Prince takes an Oath to himself, to observe his own Laws, he is not obliged by those Laws, nor by the Oath taken to himself; for even the Subject is not bound by the Oath he takes in these Contracts, from which the Law allows him to depart, tho' they are honest and reasonable. If a Sovereign Prince promises another to observe the Laws made by him, or his Predecessors, he is obliged to observe them, if the Interest of the Prince, to whom the Promise is made, be concerned, even though he took no Oath. But if the Prince, to whom the Promise is made, has no Interest in the Affair, neither the Promise nor the Oath can bind the Person promising. The same may be said, when a Promise is made to a Subject by a Sovereign Prince, even before his Election; for in that Case there is no Difference, as several imagine. Not that the Prince is obliged by his own Laws, or those of his Predecessors, but only by the just Agreements and Promises, by him made either with or without an Oath, in the same manner as a private Person would be. And for the same Reasons that a private Person may be released from an unjust and unreasonable Promise, or one that proves too burthensome to him; or in Case he has been circumvented by Fraud, Mistake, Force, or a just Fear, so as to sustain a very considerable Damage; for the same Reasons, a Prince may insist on Restitution in whatever affects the Diminution of his Dignity, if he is a Sovereign Prince. And

"thus our Maxim holds good, that the Prince is not subject to his own Laws, nor to these of his Predecessors, but only obliged by his just and reasonable Agreements, in which the Subjects in general or in particular are interested. Several Persons mistake in this Case, by confounding the Laws with the Contracts of Princes, which they call Laws, &c." Hence it is evident that this learned Politician doth not suppose that the Restitution *in Integrum*, which he grants to a Prince, acting either as a Sovereign, or as a private Person, is founded on the Civil Laws. He certainly draws it from natural Equity; and herein he is Right, whatever our Author may say, who has been justly censured on that Score by his Commentators. See *ZIEGLER*, on this Place; and *PUFENDORF*, *B. VIII. Chap. X. §. 2, &c.* *BODIN* had also good Reason for considering the Oath as having no proper Force to oblige, independently of the Quality of the Act, to which it is added; on which Point our Author has been sufficiently confuted, as I have observed on the preceding Chapter.

2 That is, if the Community or Body of the State, as such, doth something contrary to the Laws, it has made, if, for Example, they treat in a Manner not conformable to those Laws, the Engagement would not be less valid; because by establishing such Laws as the Rule of Contracts between private Persons, they did not tie up their own Hands. See *Chap. IV. of this Book. §. 12. Num. 1.*

3 It doth in some Respects only, as in Regard to the Time, Manner, and Extent of such Restitution; and thus it may take Place, without supposing a Superior who grants it.

Law, ought not to take Place in Regard to such Contracts. And therefore neither are those Contracts to be excepted, which Kings make in their Minority ⁴.

II. 1. If the People indeed have made a King, not with an absolute Power, but with the Restraint of some Laws, then what Acts he does contrary to those Laws, may be made void, ¹ either entirely, or in Part, because so far the People have reserved this Right to themselves. But if the King has a real and absolute Sovereignty, and yet holds not his Kingdom as his Property, that is, has no Power to alienate it, or any Part of it, or of its Revenues, all such Acts of his as shall tend to an Alienation, are void by the Law of Nature, because they relate to what is not his own, as we have proved already.

II. To what Acts of Kings the Law extends, explained by several Distinctions.

2. But the private Acts of a King are to be considered, not as the Acts of the Community, but as of one of its Members, and therefore done with a Design to follow the common Rule of the Laws; whence it is, that even the Laws which make void some Acts either simply, or if the injured Person desires, shall also take place here, as if it had been agreed on upon this Condition. Thus we see some Kings have taken their Advantage of the Laws against Extortion ². Yet a King may, if he pleases, exempt from those Laws his own Acts, as well as those of his Subjects; but whether he intended to do so, must be gathered from Circumstances. If he do so, then the Case shall be determined by the mere Law of Nature: Provided, where the Laws make void any private Act, not in Favour of the Actor, but as his Punishment, those are of no Force against the Acts of Kings, nor any other penal Laws, nor any Thing whatever that carries a Constraint along with it. For to punish and to force must proceed from distinct Persons. ⁴ Neither can the Compeller and the compelled be one Person, nor is it sufficient here to consider one and the same Person under different Respects.

III. But a King may, by a preceding Act, make void his Oath as well as a private Man, ¹ if by a former Oath he has deprived himself of the Power to take

III. When a King is obliged by his Oath, and when not.

⁴ Or if the Contract has been duly authorized by his Guardians, acting honestly. But otherwise all the Difference between a King in his Minority, and private Persons of the same Age, is that the Time of his Minority is commonly shorter. See the Passage of PUFENDORF, quoted in Note 1. and the late Mr. HERTIUS's Dissertation, *De Tutela Regia*, Sect. II. § 12. p. 478, Tom. I. *Commentat. & Opuscul.*

II. (1) Those, with whom a King treats, may, and commonly do know how far his Power extends in that Respect, by Virtue of the Fundamental Laws of the State. So that in this Case, it is their own Fault if they are not assured of the Consent of the People.

2 It is imagined our Author here had his Eye on Philip II. King of Spain, who, in 1596. abolished all the Debts contracted in his Name, and seized on all the Assignments, which had been given to his Creditors. But the same Prince, two Years after, recalled his Ordinance, and restored his Creditors to their full Right. "By the new Agreement made with them he declared and openly confessed that the aforesaid Merchants and Traders had dealt fairly and honestly with him, and laid the whole Fault on himself and his own extreme Necessity." These are the very Words of EMANUEL DE METEREN, in his *History of the Low Countries*, B. XVIII. at the End. See the following Book, Fol. 417. of the old French Translation, published at the Hague in 1618.

3 In Case of a Doubt, it ought to be presumed that the King, who treats as a private Person, doth it on the Foot of the Laws in Being. For, since he himself made, or at least, tacitly confirmed those Laws, he thereby acknowledged them to be just, and advantageous to the State. So that, it is his Duty to maintain them by his own Example; and he may consequently be judged to design to act by them himself, whenever he doth not very clearly

testify his Intention of making Use of his Right, as Sovereign, and setting himself above the Laws, which derive their Authority from him.

4 It is certain it cannot, properly speaking, be said that any one punishes or constrains himself; and if that Expression is sometimes used, it is one of those figurative Ways of speaking which are authorized by Practice in all Languages. Even tho' Punishment did not require two distinct Persons, it cannot easily be presumed that any Man would inflict it on himself. However, as the Laws which annul any Act by Way of Punishment of the Contractor, commonly suppose some Knavery, or some other culpable Disposition in that Contractor, and the Publick suffers some Detriment by the Thing itself; why should the Prince, who enjoys the Benefit of the Laws, made in Favour of the Contractor, be allowed to violate those made for punishing the Contractor, that is to set the bad Example of doing Things contrary to Justice or Publick Good? If therefore any one has, in the King's Name or by his Authority, entered into a Contract liable to be made void for the Reason last mentioned, or if he himself has so done knowingly and willingly; ought he not, in the former Case, to disclaim those who have acted as by his Order, and retract what he has done in the latter? Thus the Law will take Place in Regard to him, without prejudicing his Independence, and without any other Inconvenience. The Act, by which he submits to it, will not be a Punishment, properly so called, much less a Constraint. It will be only a Declaration by which he voluntarily retracts what he had done without considering well on it. He will thereby only discharge his Duty, in the same Manner as when he stands to an Engagement, into which he entered as a Private Person, conformably to the Laws in Being; tho' no Man can force him to it.

III. (1) See the foregoing Chapter, § 19.

such

such an Oath ; but by any after Act ² he cannot ; because here also is required a Distinction of Persons. For those which are made void by an after Act, had before in them this Exception, *Unless my Superior will not let me* ; which cannot be in the Oath of a King : And to swear that you shall be obliged to stand to what you promise, *Unless you will your self*, is very absurd, and contrary to the Nature of an Oath. And even tho' an Oath can confer no Right on another, by Reason of some Fault in that Person, yet he who swears, is bound before God, ³ as I said before ; and thus are Kings also obliged by their Oaths, no less than private Men, tho' Bodine be of another Opinion.

IV. How far a King is obliged to what he has promised without any Cause or Reason.

IV. We have also shewed already, that full and absolute Promises being accepted, do naturally transfer a Right to another, which respects Kings equally with private Men. And therefore their Opinion is to be condemned, who say that Kings are not bound by the Promises which they have made without any Cause or Reason for so doing ; which yet may be true in some Sense, as we shall see hereafter.

V. The use of what has been said of the force of the Laws about the Contracts of Kings.

V. As to what we have said before, that the Civil Laws of a Kingdom have no Power over the Agreements and Contracts of the King, it is no more than what *Vasquez* has observed. But his Inferences from thence, that his buying and selling at no certain Price, his letting or hiring without any Rent agreed on, or giving any Thing away in Fee, without a Writing under his Hand, ¹ shall be valid, I cannot allow. For these Acts are done by him not as a King, but as any other Person would do. And over such Acts as these not only the general Laws of the Nation, but even the particular Laws of the Place, where the King resides, have Power. Because the King, for some special Reason, is considered there as a Member of that Corporation. And this is the Case, unless (as I said before) it shall appear by good Circumstances, that it was his Intention, that his Actions should be exempted from the Power of those Laws. But the other Example brought by *Vasquez*, concerning a Promise any way made, ² is very well grounded, and may be explained by what has been said above.

VI. In what Sense a King may be said to be obliged to his Subjects by the Law of Nature only or by the Civil Law too.

VI. 1. What the *Civilians* generally maintain, that the Covenants which a King enters into with his Subjects, oblige by the Law of Nature only, and not by the Civil Law, is very obscure. ¹ For Authors sometimes abuse the Term of natural Obligation, by interpreting it to be what is naturally fair and honest, but not what is properly and strictly due : As for an Executor to pay entire Legacies, without deducting, as it was by the *Falcidian* Law allowed, ² a fourth Part, or to pay a just Debt, when the Creditor is incapacitated by the Law ³ to receive it, or to return a Kindness,

² *Consequenter* ; that is, so as to annul, by an Effect of his Will, an Oath, which would otherwise have been good and valid. See the foregoing Chapter, § 20. Mr. VITRIARIUS, in his *Institut. Jur. Nat. & Gent.* Lib. II. Cap. XIV. Num. 8. says, that a King may likewise make void his Oath by a posterior Act, when there is just Cause for so doing. But this just Cause is such only because it was tacitly included in the Oath, as a Condition for rendering it invalid. See § 12. Num. 3. of this Chapter.

³ This is a false Supposition, which we have rejected several Times.

V. (1) EMPHYTEUSIS. The Interpreters of the Roman Law are not agreed that it is essential to this Contract, that the Grant should be made in Writing ; and it is very probable that those who deny it are in the Right. At least this is not practised at present in several Nations, as our Author himself tells us in regard to his own Country, in his *Introduction to the Law of Holland*, written in *Flemish*, B. II. Chap. XL. See C U J A S, on the Title of the Code, *De Jure Emphyteutico*, with F A B R O T's Notes, Tom. II. Opp. p. 165. and *Recit. in Cod.* Tit. *De Pactis*, Tom. IX. p. 101. As also V I N N I U S on the *Institutes*, Lib. III. Tit. XXV. *De Locatione & Conductione*, § 3. and Mr. COCCEIUS's *Jus controversum Civile*, Tom. I. p. 443, 444.

² That is, without a Stipulation in Form.

VI. (1) Concerning this Distinction, see what PUFENDORF says, B. III. Chap. IV. § 5.

² Code, Lib. VI. Tit. L. *Ad Legem Falcidiam*, Leg. I. That Law, to which our Author refers, speaks of an Heir, who being well assured that three Fourths of the Estate will not discharge the Legacies, and that he might retrench from them as much as would make up the fourth Part which is his Due, yet pays the entire Legacies ; and is thereby supposed to renounce his Right, and make the Legatees a Present of what might lawfully be detained. See C U J A S. Tom. X. Opp. p. 536, 537. and ANTHONY FAURE's *Rational.* Tom. III. p. 328, &c. So that it contains nothing relating to what the Roman Lawyers call *Condictio indebiti*, or a Demand of what is not due ; for that Action takes Place only when a Man has by Mistake paid what he thought he owed. But the Case, which our Author means, is commonly found in Law IX. of the same Title of the Code ; though the Lawyer last quoted pretends that Law speaks of the *Trebellianic fourth Part* ; not to mention the celebrated Question concerning *Error of the Fact* ; which will ever be a Problem in the Civil Law.

³ *Digest.* Lib. XII. Tit. VI. *De Conditione indebiti*, Leg. XIX. That Law has chiefly in View the Case of a Son, who, becoming his own Master, has paid what he borrowed, while under another's Power, which he might have refused by Vertue of the

Kindness, ⁴ none of which can be recovered by an Action of false Debt. But sometimes indeed they construe it more properly to be what does really oblige us, whether it transfer a Right to another, as in Contracts; or transfers none, as in an imperfect Promise accompanied with a full and firm Resolution. *Maimonides* the Jew, *Duc. Dubit.* Lib. III. Cap. LIV. makes an apt Distinction between these three, he says, that whatsoever comes more than is due, falls under the Notion of חסד Bounty, ⁵ which other Interpreters upon *Prov.* xx. 28. call בלגת הטובה, ⁶ the excess or overplus of Goodness; that what is due in Strictness and Rigour, is called in Hebrew מנשפט Judgment; and that they stile what proceeds from a Principle of Honesty, צדקה Justice, that is Equity. The Translator of *Mat.* xxiii. 23. distinguishes between ελεος, κρίσις, πίστις, ⁷ where by the Word πίστις he Means what the *Hellenists* generally call δικαιοσύνη, righteousness: For κρίσις signifies what is strictly due, as you will find in *1 Macc.* vii. 18. and viii. 32.

2. A Man may also be said to be civilly obliged by his own Act, either in this Sense, that the Obligation arise not from the mere Right of Nature, but from a Civil Right, or from both: Or in this Sense, that an Action in the Civil Law may lie against him. We therefore say, that from the Promises and Covenants, which a King makes with his Subjects, there may arise such a true and proper Obligation, as may confer a Right upon them; for such is the Nature of Promises and Contracts, even between God and Man, as we have shewed already. If the King engages himself, not as King, but as any other Person would do, the Civil Laws shall oblige him. But if they be done by him, as a King, the Civil Laws do not affect him; which Difference was not well observed by *Vasquez*. Nevertheless an Action may arise from any of these Acts, so far as to declare the Right of the Creditor, but no Compulsion can follow, on account of the Condition of the Persons we are dealing with. For that Subjects should force him, to whom they are subject, is not lawful, which Equals may do against Equals by the Right of Nature, and Superiors against Inferiors by the Civil Law.

VII. But we must also observe this, that a King may two Ways deprive his Subjects of their Right, either by Way of Punishment; or by Vertue of his eminent Power. But if he do it the last Way, it must be for some publick Advantage, and then the Subject ought to receive, if possible, a just Satisfaction for the Loss he suffers, out of the common Stock. This therefore, as it holds in other Things, so it does also in that Right which is obtained by Promise or Contract.

VII. How a Right gained by Subjects may lawfully be taken away.

the *Macedonian Senatus consultum*. This appears from Law XL. of the same Title. But that there never is a natural Obligation, properly so called, as our Author supposes, if the Example be to the Purpose, is not true. See what I have said on *PUFENDORF*, B. III. Chap. VI. § 4. Note 5. But if, with *GRONOVIVS*, we here apply the Case of an Out-law, or Criminal, whose Goods have been confiscated, the same Distinction must be employed, which I have made in Regard to a *Depositum*, placed in the Hands of such a Person, in my Comment. on *PUFENDORF*, B. IV. Chap. XIII. § 4. Note 5. the Second Edition.

4 *Digest.* Lib. V. Tit. III. *De hereditatis petitione*, Leg. XXV. § 11. It cannot be certainly inferred from this Law, which our Author quotes after others, that, according to the Roman Laws, the Duty of Gratitude is one of those natural Obligations which hinder a Man from redemanding a Thing given by Mistake, as if really due. As to the Question in general, on which the Doctors are divided, the contrary Opinion to that here espoused by our Author seems best supported. See *HUGH DONEL*, *Comment. Jur. Civil. Leg.* XII. Cap. II.

5 Concerning the Signification of the word חסד. See Mr. *LE CLERC*'s Commentary on *Genesis* xxi. 23.

6 To this belongs what is done upon no other View or Account, but only the mere Exercise of

our Liberality and Munificence, as the Law expresses it, *1. D. de donationibus*, χρηστότης ἐκ πηγῆς πλεονείας ἀπορρέει τῇ ἡμετέρῃ, Generosity flows from the rich Fountain of Good Nature. *PLUTARCH* in his *Cato Major*. *GRÖTIUS*.

7 For the Sense of those three Greek Words, consult our Author and Dr. *HAMMOND* on the Passage of the Evangelist. Our Author lets us know in this Place that he takes the Gospel of St. *MATTHEW* as we now have it, to be a Translation. He was of Opinion, as appears from the Notes on the New Testament, that the Evangelist wrote in Hebrew, or the Language then spoken at Jerusalem; in which he is joined by a great Number of Authors, whose Reasons may be seen in Mr. *DUPIN*'s *Preliminary Dissertation on the Bible*, Tom. II. p. 23, &c. Edit. Holland. Dr. *MILL* likewise undertakes to shew the same in his *Prolegomena* to the New Testament. But it is highly probable that the pretended Original Hebrew, so often mentioned by the antient Fathers, who were but indifferent Critics, is a mere Chimera. See Mr. *LE CLERC*'s Dissertation *De Auctoribus Evangeliorum*, and his *Evangelical Harmony*, § 1. with his Preface to the Gospel of St. *MATTHEW*, in his Translation of the New Testament, printed at Berlin.

VII. (1) See *PUFENDORF*, B. VIII. Chap. V. § 7.

VIII. *The Distinction of Things gained by the Law of Nature and by the Civil Law, rejected.*

VIII. Nor must we by any Means allow that Distinction, which some make, of the Right acquired by the Law of Nature, ¹ and that by the Civil Law. For the King has an equal Right to both, nor can either of them be taken away without just Cause. For it is contrary to Natural Right, that whatever Property or other Right a Man has lawfully gained to himself, should be taken from him without a sufficient Reason. On the contrary, if a King should do it, he is without doubt obliged to make Restitution, and to repair the Damage; because he acts against the true Right of his Subjects. And here is the Difference between the Right of Subjects, and the Right of Foreigners, (that is, ² of such as are in no Respect Subjects) which Right of Foreigners can by no Means be under that Sovereign Dominion; ³ for as to Punishment, we shall see about that below; but the Right of Subjects must be under that Dominion, as long as the Advantage of the Publick wants and requires it.

IX. *Whether the Contracts of Kings are Laws, and when they are so.*

IX. From what has been said we may perceive, how false the Opinion of some is, who hold all the Contracts of Kings to be Laws. For from the Laws there arises no Right to any Man in regard to the King: And therefore if he should repeal those Laws, he wrongs no Man. However, if he does it without any just Cause, he is really to blame; but a Man acquires a real Right from Promises and Contracts. Besides, by Contracts the Contractors only are obliged, but by the Laws all Subjects are. But there may be a Mixture, partly of Contracts, partly of Laws, as a Treaty made with a neighbouring King, or with the Farmer of the Revenues, which is at the same Time published for a Law, so far as it contains in it what is to be observed by his Subjects ¹.

X. *How by the Contracts of Kings they who inherit all their Goods stand obliged.*

X. ¹ Let us now come to the Successors; and here we must distinguish ² between those who inherit all the Goods of the deceased King, as he who receives a patrimonial Kingdom, either by Will, or from an Intestate; and between those who succeed in the Kingdom only, as by a new Election, or by Prescript, and that either in Imitation of other common Inheritances, or otherwise; or whether succeeding by a mixt Right ³. For they who inherit all the Goods with the Kingdom, are without doubt obliged to perform all the Contracts and Promises of the late King. And that the Goods of the Deceased shall be obliged even for his personal Debts, is as antient as Property itself.

XI. *How by those Contracts they who succeed in the Kingdom may be obliged.*

XI. 1. But how far they ¹ who succeeded barely to the Crown, or to the Goods only in Part, and to the Crown entirely, are obliged, (*by the Contracts of the Predecessor*) does deserve as much to be inquired into, as it has been hitherto treated of without Order. ² 'Tis plain enough that such Sort of Successors, as such, are not directly, that is, ἀμέσως, immediately obliged; because what Title they have, they receive from the People, and not from him; whether that Succession fall like other common Inheritances, or differ very much from them, of which Distinction we have treated before.

2. But ἐμμέσως, *mediately*, that is, ³ on the account of the State, such Successors are obliged; which must be thus understood. Every Society, as well as every par-

VIII. (1) See below, B. III. Chap. XX. § 9.

2 For Foreigners, while they live in the Country, are to be considered as Subjects of the State. See Chap. II. of this Book, § 5. and Chap. XI. § 5.

3 Some maintain the contrary; and that, because, as our Author himself has said Chap. II. of this Book, § 10 it is lawful, in Case of Necessity, to seize and make use of the Property of Foreigners. But then it is done by Vertue of the general Right, which Necessity gives to all Men; not by Vertue of the Sovereign Dominion, which supposes the Person thus distressed a Subject. I find Mr. VANDER MUELEN confutes the learned GRO-NOUVIS on this Head.

IX. (1) As, if by Vertue of a Treaty of Commerce, the Subjects are obliged to deliver certain Goods or Commodities at a certain Price to the Subjects of another Nation, with which the King makes this Treaty.

X. (1) See the Authors quoted by REINKINGIUS, Lib. I. Claf. III. Chap. X. GROTIUS.

2 See PUFENDORF, B. VIII. Chap. X. § 8. and what our Author has said, Chap. VII. § 19. of this Book.

3 See Chap. XXI. of this Book, § 19.

XI. (1) See AYMONIUS published by Freher, p. 373. GROTIUS.

2 Thus Solomon was not obliged by the Promise which David had made to Shimei. GROTIUS.

See 1 Kings ii. 9. and what PUFENDORF says, B. IV. Chap. II. § 13.

3 See several Things to this Purpose, C. I. De solutionibus. It comes nearer to the Matter in Hand, what is mentioned, C. ABB. de Sententiis & re judicata; where there are these remarkable Words, *When both the Donation of the above-said Grandfather, and the Acquisition of the above-mentioned Places were made in the Name of the Kingdom.* See too TREUTL. Part I. Disp. VI. Thef. VII. Syr. de pace religionis, Concl. XIX. GROTIUS.

ticular Person, has a Power to oblige itself either by itself, or by its major Part. This Right they may transfer, either expressly, or by necessary Consequence, by transferring, for Instance, the Sovereignty : For in Morals, he who gives the End, gives all Things that conduce to the End.

XII. 1. But this is not without its Bounds and Limitations, nor indeed is an unlimited Power of obliging absolutely necessary to the good Government of a Nation; no more than it is to the Advantage of a Trust; but only as far as the Nature of that Power requires. ¹ *A Guardian, says Julian, is considered as Master of his Pupil's Estate, as long as he manages it discreetly, but not when he ruins his Ward*: In which Sense that of *Ulpian* is to be understood, ² every Society shall be obliged by the Acts of the Governour, whether the Agreement be advantageous, or prejudicial to the Society. We are not however to judge of the Engagements of a King, by the Rules of a Contract for managing Affairs (as some maintain) so that his Act shall then only be esteemed ratified, when the State receives a Benefit by it, for it would be very dangerous to the State it self, to reduce the Prince to such Necessities. And therefore it is not to be supposed, when the People conferred the Government upon him, that they designed to straiten him thus. But what the Roman Emperors declared in a Rescript with Respect to the Corporation of a Town, ³ that what was transacted by the Magistrates, should be of Force in doubtful Cases, but not so when that which is plainly due is rashly given away; the same Answer may be returned to our Inquiry, concerning the whole Body of the People, observing a Proportion accordingly.

2. As then every Law does not oblige Subjects; for besides those which enjoin Things unlawful, ⁴ some Laws are manifestly absurd and unreasonable, so also the Contracts of Princes do not oblige their Subjects, unless they carry any warrantable Reason, which in doubtful Matters ⁵ ought to be presumed, in Respect to the Authority of Governors : Which Distinction is much better founded than that which is usually alledged by many, about the greater or less Damage that may ensue. For in this Case we are not so much to regard the Success of the Contracts, as the Reasons whereon they were grounded, which if warrantable, the People themselves shall be obliged by them, if they should become free, and so shall their Successors too as the Heads of the People; for if the People whilst independent have made any Contract, he also who comes afterwards to possess the Sovereignty in a full and absolute Manner, shall be obliged to stand to it.

⁶ The Emperor *Titus* is much commended for this, that he would not suffer himself to be petitioned, to confirm any Thing that his Predecessors had granted; whereas

XII. (1) Agreeable to this is what CAMDEN has, Part IV. of his *Queen Elizabeth*, in the Year 1595. and what CROMERUS has about the Debts of *George King of Bohemia*, imprudently undertaken by WLADISLAUS, Lib. XXVII. GROTIUS.

2 *Digest*. Lib. II. Tit. XIV. *De Pactis*, Leg. XIV.

3 *Code*, Lib. II. Tit. IV. *De Transactionibus*, Leg. XII. See Mr. NOODT's Treatise *De Pactis & Transact.* Cap. XXVI. and Mr. SCULTING, on the Title *De Pactis*, § 25.

4 As the Law of *Cabades King of Persia* in PRO-COPIUS and AGATHIAS. The Subject of this Law is applied to Alienations by *Petrus* the Embassador of *Justin* the Second to *Chosroes*, speaking of some Things which *Justinian* seemed to have promised the *Saracens*, & πῶς ἐν τῷ ἐνδόξῳ, &c. For no State, I think ought ever to be condemned for the Practice of one Man; no, nor on the Account of some insignificant Law, tho' it were the King himself who abetted that Practice, and enacted that Law. GROTIUS.

I have given a great Number of Instances of unjust and unreasonable Laws in my two Discourses, one on the Permission of the Laws, the other on the Benefit of the Laws, which are added to the fourth Edition of the *Duties of a Man and a Citizen*. The Words of the Imperial Embassador here quoted may be seen in the Embassies of MENANDER the Protec-

tor, Cap. XII. of those of *Justin*, *Justinian*, and *Tiberius*. But it is *John*, and not *Peter* who speaks there. Our Author has confounded the Names; the Greek Writer had, a little before *John's* Discourse, mentioned *Peter*, who had been sent Embassador to the same *Chosroes* some Time before.

5 SIDONIUS, Lib. V. *Epist.* XVII. *Whatever a Prince has engaged for, his State is always to discharge*. See St. AMBROSE in his Praises of *Theodosius*; SYMMACHUS, Lib. IV. *Epist.* VII. and XIX. Lib. V. XXXVII. *Conc. Tolet.* V. Cap. VI. C. *Cæterum de donationibus*. CORIPPUS, Lib. II. says, that *Justinian's* Debts, who had left a great deal of Money unsatisfied behind him, were paid by *Justin*, who succeeded him in the Empire. GROTIUS.

6 The Story is in SÜETONIUS, Chap. VIII. in XIPHILINUS out of *Don*, and in VICTOR. You have something like it, C. *Justitiæ*. *Caus.* XXV. Quæst. I. GAIL. *Obs.* II. 60. 15. See also RADEVICUS's History. GUNTERUS LIGURINUS, Lib. V.

*Nexæ secuturi factum subvertere Reges
Aut revocare queant, &c.*

*Nor can the following Kings subvert the Deed,
Or e'er reverse it, he has left the Duke all safe
Sign'd with the Royal Seal.*

And

whereas *Tiberius*, and his immediate Successors, no otherwise esteemed the Grants of their Predecessors to be good, than as they themselves also had granted them to the same Persons. That excellent Emperor *Nerva*, following the Example of *Titus*, in his Edict recorded by *Pliny*, speaks thus, *Let no Man imagine that what he has obtained from another Prince, either privately or publickly, shall be by me revoked; that so if I confirm those Grants, he may be the more obliged to me; no Man's Congratulation stands in Need of new Petitions.* But when on the other Hand *Tacitus* had related of *Vitellius*, how he had torn the Empire in Pieces, without any Regard to Posterity; and that all the World flocked about him to obtain his extravagant Gifts, some with Money purchasing his Favour, he adds, *All wise Men looked upon those Grants as null and void, which could neither be given, nor received, without the Danger and Ruin of the State.*

4. This also may here be added, that if by any Accident a Contract made by a King appear to be not only disadvantageous, but also pernicious to the State; so that at the Time when the Contract was so made (if it had been extended to that Case) it had been judged unlawful and unjust; then may that Contract be not so much revoked⁹ as declared no longer obliging, as if it were made conditionally of being void in that Case, without which Condition it could not have been justly made.

5. And what is here said of Contracts is true also¹⁰ in the Alienation of the People's Money, and of any other Things which the King has a Power by Law to alienate for the Publick Good; for here also is this Distinction to be observed, whether there is any plausible Reason for giving, or otherwise alienating such Sort of Things.

6. But if the King shall by any Contract endeavour to alienate the Crown or any Part of his Kingdom, or of the Royal Patrimony, beyond what is permitted him, such a Contract shall be of no Force, as being made of what was not his own to dispose of. As much may be said of such Kingdoms as are limited or restrained; if the People have exempted certain Affairs, or certain Sorts of Engagements from the Power of the King. For to make such Acts valid, the Consent of the People by themselves, or their Representatives, is required, as we have shewed already, when we treated of Alienations. Which Distinctions being observed, it is easy to judge whether the Exceptions of Kings, who refuse to pay their Predecessors Debts, whose Heirs they are not, be just, or unjust, of which we may see many Examples in *Bodine*.

XIII. Neither is that, which many affirm, to be allowed without Distinction, that the Favours of Princes generously granted, may at any Time be revoked; for some a King may give out of what is his own; and which have the Force of perfect Donations, unless they were expressly granted, during Pleasure only.² Now these cannot be revoked, unless from Subjects by Way of Punishment, or for the Publick Good, for which also Satisfaction should be made, if possible: There are

XIII. Which of the free Grants of Kings are revocable, and which not.

And Lib. VIII.

Tanta tamen clari fuit indulgentia Regis, Ut quicunque bona, &c.

So Great the Indulgence of this famous Prince. That whoever possess'd the Grants of former Kings, Did still enjoy them, could they fairly prove By authentick Writings the Goodness of their Claims.

GROTIUS.

7 Lib. X. Epist. LXVIII. GROTIUS.

8 MARIANA XXIV. 16. quotes this and applies it to the extravagant Magnificence of *Frederic* King of *Naples*. *Galba* refused *Nero's* Grants, even those that were purchased, leaving them only a Tenth, *TACITUS*, *Hist. I.* and *PLUTARCH*. And *Pertinax* deprived the freed Men, of what under the Pretence of Sale, they had been enriched with in *Commodus's* Reign. Thus *Basil* the *Macedonian* Emperor revoked what the Emperor *Michael* had given away. *ZONORAS* speaking of him, ἐκινδύσαντες πάντων, *It was universally agreed on, that they who had received Money without just Reasons should re-*

fund, some all, some half. See the same Author in his *Istaicius Comnenus* of Grants made by *Lewis XI.* See *SERRANUS* in *Charles VIII.* of some of his Grants made even to Churches, and yet refused; see *PHILIP COMINÆUS*, *Lib. IX.* *MARIANA*, *Lib. X.* *Cap. XVI.* of some Grants repealed, which *Ramirus* King of *Arragon* had made. Of Grants of *Isabella* reversed even by her self, XXVII. 11. *CROMERUS* of the Will of *Casimir* King of *Poland*, partly allowed, and partly disapproved, 12: GROTIUS.

9 *C. Suggestum est de decimis.* You have an Instance of it in the Acts of *Alfonfus* and *Sanctius* in *MARIANA*, *Lib. XII.* *Cap. ultimo*: In *CAMDEN* in the aforesaid Year 1595. and 1597. in *Controv. Hanziatic.* GROTIUS.

10 You have several Things relating to this Affair in *Conc. Gall.* *Tom. III.* GROTIUS.

XIII. (1) See those cited by *REINKINGIUS*, *Lib. II.* *Clas. II.* *Cap. VIII.* *Num. 26.* GROTIUS.

See likewise *PUFENDORF*, *B. VIII.* *Chap. X.* *Sult.*

2 See *AFFLICT.* *Dec. CXXVIII.* *Num. 10:* GROTIUS.

also other Benefits, which only take away the obliging Power of the Law, without any Contract, and these are revocable. For as a Law absolutely taken away, may always be absolutely restored; so also being in regard to a particular Person taken away, it may be in regard to a particular Person restored. For no Right is here acquired to the Prejudice of the Legislator's Authority.

XIV. But by such Contracts as are made by Usurpers, ¹ or those who without any just Title invade a Kingdom, neither the People nor their lawful Princes shall be obliged; because such Invaders had no Right at all to bind them: However they shall be obliged for so much as turns to their Advantage, that is, in Proportion to what they are become the richer by that Means.

XIV. *Whether he whose the Crown really is, be bound by the Contracts of them who invade, or usurp the Kingdom.*

XIV. (1) Consult PUFENDORF, B. VIII. Chap. XII. § 3.

C H A P. XV.

Of publick Treaties, as well those that are made by the Sovereign himself, as those that are concluded without his Order.

I. **U**LPIAN has divided all Conventions into publick or private ¹. The publick he explains, not as some think, by a Definition, but by Examples. The first, *Such as are made in Time of Peace.* The second, *when Generals agree some Things between themselves.* By publick Agreements then he understands those which cannot be made, but by them who are invested with an Authority either Sovereign or Subordinate; by which they are distinguished, not only from the Contracts of private Persons, but also from the Contracts of Kings which they make in their private Affairs. Tho' even from these private Contracts a War is sometimes occasioned, but oftner from the Publick. Wherefore since we have largely treated of Conventions or Covenants in general; we shall now add something concerning this Kind, which is the most excellent of all others.

I. *What publick Conventions are.*

II. Now these publick Conventions, which the *Greeks* call *συνθήκας*, Conventions or Accommodations, we may divide into Leagues, Sponsions or publick Engagements, and other Agreements ¹.

II. *They are divided into Leagues, publick Engagements or Sponsions, and other Agreements.*

III. 1. The Difference between Leagues and Sponsions may be learnt out of the ninth Book of *Livy*, ¹ where he rightly tells us, that Leagues are such as are made by the Command of the Sovereign Power, whereby the whole Nation is exposed to the Wrath of the Gods, if they violate it. This used to be done among the *Romans* by the Heralds in the Presence of the King at Arms; ² but a Sponson is when publick Persons, having no Order from the Sovereign Power, yet promise something relating to it. We read in *Sallust*, ³ *The Senate with abundance of Reason decreed, that without theirs and the People's Orders no Treaty could be made.* *Hieronymus* King of *Syracuse*, according to *Livy*, ⁴ having contracted an Alliance with *Hannibal*, sent afterwards to *Carthage*, to turn that Alliance into a League. And therefore ⁵ that of *Seneca the Father*, (*since the Chief has made a League, the Roman People may*

III. *The Difference between Leagues and Engagements or Sponsions, and how far publick Engagements oblige.*

I. (1) *Digest.* Lib. II. Tit. XIV. *De Pactis*, Leg. V. See Mr. NOODT's Treatise *De Pactis & Transactionibus*, Cap. VII. where he explains this Division; as also Mr. SCHULTING on the Title *De Pactis*, § 2.

II. (1) See the Close of this Chapter, where you have a short Explication of what is meant by those Sort of publick Conventions, or Agreements.

III. (1) 'Tis where he is speaking of the shameful Accommodation, made by the two Consuls with the *Samnites*, after the Action at *Caudi* or *Caudium*. We likewise see there what Remarks our Author makes a little lower on the Circumstances, which accompanied Treaties made by Order of the People.

See SIGONIUS, *De antiquo Jure Italix*, Lib. I. Cap. I.

² *Pater patratus*. He was one of the *Feciales* or Heralds, who took the Oath in the Name of the People. *LIVY*, Lib. I. Cap. XXIV. Num. 6. See below, B. III. Chap. III. § 7.

³ *Bell. Jugurth.* Cap. XLIII. Edit. *Wass.*

⁴ *Lib. XXIV. Cap. VI. Num. 7.*

⁵ *Contr.* IV. 29. GROTIUS.

See on this the Note of the learned JOHN SCULTING, Father to the famous Lawyer, whom I have quoted several Times, and who is now Professor at *Leyden*.

be said to have done it, and to be included in it) relates to those antient *Generals*, who had received a special Commission for that Purpose. Indeed ⁶ in Monarchies the sole Power of making Leagues is in the King, according to *Euripides* in his *Supplikes*.

— τὸν δὲ δ' ὀμνύναι χρεὼν
Ἀδραστον ἔτ' ὅ κ' ἔμμεν' ὅτι τὴν ἅπλην
Πάσης ὑπὲρ γῆς Δαναῖδων ὀρκωμώσιν.

*Adraftus must swear ; the Crown of Greece is his,
His the Prerogative of binding all by Oath.*

For we must read it there, as we said, ὀρκωμώσιν and not ὀρκωμώσῃ.

2. Now as inferior Magistrates cannot oblige the People ; so neither can the lesser Part of the People oblige the Whole ; which makes for the *Romans* ⁷ against the *Galli Senones*, for the greater Part of the People was with the Dictator *Camillus* ; but as it is in *Gellius* ⁸ there is no treating with one and the same People in different Places at the same Time.

3. But let us enquire how far they are bound, who not being impowered by the People, do yet undertake for that which directly concerns them. Some perhaps may think, that if the Sponsors, or Persons engaging, use their utmost Endeavour to perform what they have undertaken, they are sufficiently disengag'd from their Word, according to what ⁹ we have said before, concerning Promises made by a third Person. But the Nature of the Affair under Consideration, which includes a Sort of Contract, requires a stricter Obligation. For no Man in Contracts will give or promise any Thing of his own, but he expects something to be allowed him in the Lieu of it. Whence it is, that by the Civil Law, which will not allow of one Man's Promise for another Man's Fact, ¹⁰ a Promise that engages that such

⁶ See what is below, *B. III. Chap. II. § 11*, &c. *SERVIVS* upon that Passage of the Second *Æneid*.

*But you, O Troy, preserve the Faith you gave,
If I to save my self, your Empire save.* DRYD.

Because what the King promises, the State does seem to promise. And where Æneas going to fight a Duel, first enters into a League with Latinus, he deos not, says he, bring in Turnus Swearing, because when the King is present, he has no Power to do it. GROTIUS.

⁷ This was not the Reason, on which the *Romans* went. The Fact was as follows. The *Gauls* after a complete Victory gained over the *Romans* near the River *Allia*, marched to *Rome*, and easily made themselves Master of the whole City, except the Capitol ; whither the Senate and such young Men as were able to bear Arms, had retired. The *Gauls* could not carry that Fortress by Storm ; but at last the Want of Provisions obliged the Besieged to capitulate. They agreed to give the *Gauls* a certain Quantity of Gold ; on which Condition they promised to draw off their Forces. During the Siege, the *Romans*, who had rallied at *Veii*, after their Defeat in the Battle of the *Allia*, had created *Camillus* Dictator, with the Approbation of the Senate, then shut up in the Capitol, into which Place a young Man, named *Pontius Cominius*, found Means to enter privately, and get off without being discovered. As they were on the Point of weighing the Gold, promised to the *Gauls*, the Dictator came up, with his Army, and seized it, telling them he was ready to give them Battle. It was to no Purpose that the *Gauls* replied, they demanded only what was their Due by Vertue of the Treaty. *Camillus* answered that, as he was invested with Sovereign Authority, in Quality of Dictator, no Person had a Power to make such a Treaty without his Orders. *LIVY, Lib. V. Cap. XLIX. Num. 2.* See also *PLUTARCH*, in *Camillus*, Tom. I. p. 143.

Edit. Wech: But *BUDÆUS*, in his *Specimen Jurisprud. Historicæ*, § 86. p. 855, &c. of the *Selecta Juris Nat. & Gent.* maintains that this was manifest Perfidiousness. Those who were in the Capitol, says he, at that Time represented the *Roman* People ; and *Camillus* in this Case was to be considered only as a private Citizen. Even supposing the Besieged could not treat validly, as they believed they could, they would still have been faulty in this Point. To which we may add that the *Gauls* were not obliged to know, or enquire, whether *Camillus* had been made Dictator. Nor could they know whether the greater or the smaller Number of the *Romans* was assembled in the Capitol ; and in the Senate they saw the most illutrious Part of the Citizens. That Victory, says *STEPHEN PASQUIER*, (*B. IX. Lett. X.*) can never be related but to the Shame and Confusion of the *Romans*. *Camillus* himself, as the learned *GRONOVIVS* observes on this Place, did not proceed on this Reason, since he would not accept of the Dictatorship till he was authorized by an Order from the Senate. I am much mistaken if our Author was not thinking of what was said on another Occasion, against passing certain Laws proposed. *LIVY, Lib. VI. Cap. XXXVI. Num. 9.*

⁸ *Not. Attic. Lib. XIII. Cap. XV.* from *MESALA, De minoribus Magistratibus*. But here is an extraordinary Case ; and besides, the People are here supposed to be assembled in two different Parts of *Rome* ; when this Regulation was made, there was no Thought of the People being assembled out of the City. So that the Passage, instead of favouring our Author's Way of Reasoning, makes against him : For all the People at *Rome* had treated with the *Gauls*.

⁹ In the eleventh Chapter and twenty second Section of this Book. GROTIUS.

¹⁰ *Digest. Lib. XLV. Tit. I. De verborum obligatione, Leg. XXXVIII.* See *PUFENDORF, B. III. Chap. VII. § 10.*

or such a Thing shall be confirmed and ratified ¹¹ by a third Person, does oblige the Promiser to pay Damages and Interest.

IV. *Menippus*, King *Antiochus's* Ambassador to the *Romans*, as ¹ *Livy* relates it, being guided by his own Interest more than by the Rules of Art, divided the Leagues of Princes and States into three Sorts, the first whereof is, when the Conqueror gives Laws to the Conquered; where it is in the Conqueror's Power, and left to his Discretion to determine what the Conquered shall have, and what he shall be deprived of. The second is, when two Enemies having had equal Advantage in War, make Peace on equal Conditions, so that by Vertue of their Agreements they may redemand and cause to be restored what is reciprocally due, and if either the one or the other has been disturbed in his Possession, during the War, the Difference is to be accommodated, either according to antient Right, or according to the mutual Profit and Advantage of both Parties. The third is, when they who never were Enemies, do enter into an Alliance, without giving or receiving Laws on either Side.

V. 1. But for our Part we shall make a more accurate Division, by saying ¹ that there are two Kinds of Leagues, either those that require such Things only, as are agreeable to the Law of Nature, or those that add something more to it. Leagues of the former Kind, are generally made between two Enemies upon the Conclusion of a War; and were formerly often made, and indeed were in some Sort necessary among those who before had never contracted any Engagement towards one another. And the Reason of it was, because as that Principle of Natural Right, which maintains that there is a Kind of Natural Relation between all Mankind, ² and therefore it is a heinous Crime for one Man to hurt another, was effaced of old before the Flood, so it was again some time after, by a general Corruption of Manners, so razed and obliterated, ³ that it was accounted lawful to rob and plunder Strangers, tho' no War was proclaimed, which *Epiphanius* calls *Σκυθισμός*, the *Scythian* Fashion.

2. Hence that Question in *Homer*, ⁴ *Are you free Booters?* Is a complaisant and inoffensive Inquiry, ⁵ which also *Thucydides* takes notice of; and in the old Law of *Solon* you have the Companies *Πη λείαν ερχομένων* of *free Booters*; ⁶ for as *Justin* says, Piracy was to the Days of *Tarquin* ⁷ an honourable Employment, it is the very same in that Maxim of the *Roman* Law, ⁸ where it is declared, that if there be

¹¹ This holds good in Regard to the Proxy of a Plaintiff, when the Commission doth not appear clearly, for such a Proxy is obliged to give Security for the Ratification of what he has done. *Institut.* Lib. IV. Tit. XI. *De satis dationibus.* Digest. Lib. XLVI. Tit. VIII. *Ratam rem habere, & de ratibatione.* Leg. XIII. See Mr. NOODT on the Title of the *Digest*, *De Procuracionibus*, &c. p. 130. and Mr. SCHULTING on the same, § 7.

IV. (1) *Lib. XXXIV.* Add *DIODORUS SICULUS, Exc. Leg. IV.* GROTIUS.

V. (1) See *PUFENDORF, B. VIII. Chap. X.* &c.

2 See the Law quoted in the *Preliminary Discourse*, § 14.

3 *CÆSAR* speaking of the *Germans*; *Robberies* that are committed without the Bounds of each respective State have no Manner of Disreputation in them. (*De Bello. Gall. Lib. VI. Cap. XXIII.*) This is confirmed by *TACITUS* in his Account of the Customs of *Germany*, and by *SAXO, Lib. XIV.* and in several other Places. The same is reported of the *Tyrhenians* by *SERVIVS*, upon the eighth and tenth *Æneid*, and of other Nations upon the first *Æneid*; and of the *Portuguese* by *DIODORUS SICULUS, (Lib. V. Cap. XXXIV.)* with whom agrees *PLUTARCH* in his *Marius*; *τὸ ληστεύειν ἔπαιον τότε τῶν ἰβήρων ἐπὶ καλλιῶν ἡγεμένων*, the Spaniards even to that Day looked upon Robbery as a very honourable Employment. Just so the *Jews* deny that there is any Satisfaction to be made to an injured Person, if

he is neither a *Jew* nor a Confederate of the *Jews*. GROTIUS.

Our Author probably, takes the Fact last mentioned from *BABA KAMA*, with the Comment of the Emperor *CONSTANTINE, Cap. I. § 2. p. 13.* We meet with a great Number of Instances of these barbarous Notions and Practices, in a Dissertation of *JAMES THOMASIVS*, intituled *Historia Latrocinii gentis in gentem*, Tom. VII. *Observat. Hallens.*

4 *Odyss. III.* Where the Scholiast says, *ἐκ ἁδοξόν ἦν παρὰ τοῖς παλαιῶς τὸ ληστεύειν ἀλλ' εὐδοξόν*, Robbing was formerly so far from being Infamous, that it was counted Reputable and for a Man's Honour, (on ver. 71.) GROTIUS.

5 *Lib. I. (Cap. V. Edit. Oxon.)* Where he subjoins *ἐκ ἐχονός πω αἰσχύνῃ τετὶς τὸ ἔργον, φερόντος ὅτι καὶ δόξης μᾶλλον.* This was an Affair that instead of being scandalous, rather carried a Reputation with it. GROTIUS.

6 *Digest. Lib. XLVII. Tit. XXII. De Collegiis & Corporibus, Leg. IV.* The learned *SALMASIVS* finding here *διχομένων*, has corrected it, as it stands in the Text of our Author. But his Conjecture is too bold, and by no Means necessary; as is made appear by Mr. *DE BYNKERSHOEK*, in his *Observ. Jur. Lib. I. Cap. XVI.* Where he likewise explains and corrects some other Words in this Law, in a Manner different from the best Interpreters.

7 *Lib. XLIII. Cap. III. num. 1.*

8 *Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin. &c. Leg. V. § 2.*

any Nation with whom the Romans have no Tye of Friendship or Hospitality, or Alliance, they are not to be reputed professed Enemies, but yet whatever they find in their own Country belonging to the Romans shall be lawful Prize, and if they take a Roman, he shall become their Slave; and the same is to be observed, if any one of them falls into the Hands of the Romans; in which Case too the Right of Postliminy shall be allowed. Thus the *Corcyreans* formerly, before the *Peloponnesian War*, were no Enemies to the *Athenians*, yet had they neither Peace nor Truce with them, ⁹ as appears from the Speech of the *Corinthians* in *Thucydides*. So *Salust* speaks of *Bocchus*, ¹⁰ *Nobis neque bello, neque pace cognitus, known to us neither by Peace or War*. From hence to pillage Barbarians, or Strangers, was thought by *Aristotle* ¹¹ a very laudable Practice, and the Word *Hostis*, an Enemy, in the old Latin signifies no more than a Foreigner ¹².

3. Under this Kind I comprehend also Leagues, which provide for the Freedom of Commerce and Entertainment of Strangers on both Sides, as agreeable to the Law of Nature, whereof we have treated elsewhere; thus we find this Distinction used by *Arco* in *Livy*, ¹³ in an Harangue of his to the *Achæans*, where he does not insist upon any Confederacy, but only so good an Understanding, as might secure each other's Rights; that they might not protect and give Sanctuary to the fugitive Slaves of the *Macedonians*. All such Agreements the Greeks strictly call *εἰρήνη*, Peace, and oppose them to *προνόμια*, to Treaties properly so called, as you may see in several Places, particularly in the Oration of *Andocides* upon the Peace with the *Lacedemonians* ¹⁴.

VI. And into those that add something to it; and these are either upon equal Terms:

VI. 1. The Conventions which add something to the Law of Nature, are concluded either on equal or unequal Terms. The equal are those, *αἰ ἴσως ἡ κοινως ἐν ἀμφοτέροις ἔχουσι*, which are alike on both Sides, as *Isocrates* speaks in his Panegyrick. To which that of *Virgil* alludes.

*Both equal, both unconquer'd shall remain
Join'd in their Laws, their Lands, and their Abodes.* Dryden.

And these the Greeks sometimes call *συνθήκας* simply, Alliances, sometimes *συνθήκας πρὸς ἴσιν ἢ ἐμίσια*, Alliances upon the square; as you may find in *Appian* and *Xenophon*; and those upon unequal Conditions more properly, *προνόμια*, Leagues, and in respect to Inferiors, *προσάγματα*, Injunctions, or *συνθήκας ἐν τῶν πρὸς ἀγμάτων*, Treaties of Injunction; which *Demosthenes* ² says are to be carefully avoided by all those who love Liberty, because they come very near a State of Slavery.

⁹ Lib. I. Cap. XL. Edit. Oxon.

¹⁰ Bell. Jugurth. Cap. XXII. Edit. Waff.

¹¹ War, says the Philosopher, is in its own Nature a gainful and enriching Employment. Hunting is a Branch of it; which is employed against wild Beasts; and such Men, as being born Slaves will not submit to be what they are by Nature. Politic. Lib. I. Cap. VIII. See also PLUTARCH, De fortunâ vel Virtute Alexand. p. 329. Tom. II. Edit. Wech. and STRABO's Geography, Lib. I. p. 116. Edit. Amstel.

¹² This has been observed by CICERO, among others, which he proves from the Laws of the Twelve Tables, De Officiis, Lib. I. Cap. XII. See the Commentators on that Place.

¹³ Lib. XLI. Cap. XXIV. (XXIX. 15, 16. Edit. Cleric.)

¹⁴ There is, says the Orator, a wide Difference between a Peace (*εἰρήνη*) and Treaties (*προνόμια*.) The former is made, on equal Conditions, between two People, who lay down their Arms: By the latter the Conqueror imposes Laws on the vanquished, p. 271. Edit. Wechel. Such as Demolition of their Walls, the surrender of their Ships, and recalling their Exiles; as ANTIPHON observes, in the Words immediately following. So that the Difference between those Terms doth not consist precisely in what our Author says; the Distinction relates rather to the publick Agreements mentioned in the following Paragraph.

VI. (1) So PLINY says, that the Parthians lived with the Scythians upon one and the same Foot. And Pompey in LUCAN speaking of the same Nation of the Parthians says:

— Solus
Ex æquo me Parthus adit.
With me
The Parthian only comes upon the Square.
GROTIUS.

² This Passage certainly belongs to ISOCRATES; tho' PUFENDORF, who quotes it, has not observed the Mistake. The Words are these: *Those, who would preserve their Liberty, ought to avoid Treaties of Injunction* (or Treaties forced on them) *as approaching to Slavery*. In Archidam, p. 126. Edit. H. Steph. Our Author had read, in the Oration here quoted, what DEMOSTHENES says, that the Rhodians, instead of making, as they might have done, an Alliance on equal Terms with the Athenians; who, however, were more powerful than they; chose rather to fall into Slavery, by admitting into their Fortresses Barbarians, who were Slaves; that is Mausolus, King of Caria, Vassal to the King of Persia; which Mausolus assisted the Chiefs of the Rhodians in seizing the Government, and thus in some Manner reigned at Rhodes; as did his Widow Artemisia, after his Demise, supported by those Oppressors of the Publick Liberty, who were her Creatures, p. 79. Edit. Basil. 1572.

2. Both

2. Both these Leagues are made either for the Sake of Peace, or for the Sake of some Alliance. Treaties of Peace, upon equal Terms, are generally made for the restoring of Prisoners, or Goods taken in War, and for mutual Security, of which I shall treat hereafter, when I come to speak of the Effects and Consequences of War. Treaties of Alliance upon equal Conditions, respect either Commerce, or the Joining of Forces, and Sharing the Expence of the War, or some other Matters. Treaties of Commerce may be various; as that no Custom shall be paid on either Side, which was in the old League between the *Romans* and *Carthaginians*,³ except only what was given to the Notary and the Crier; or that no more shall ever be demanded than what is at present paid, or that a certain Rate shall be fixed.

3. So also, in a Confederacy of War, that each Party shall contribute an equal Number of Foot, Horse, or Ships, and that either in all Wars, without Exception, which the *Greeks* call ⁴ Συμμαχίαν, *A Conjunction of Arms*, which *Thucydides* thus explains, τὰς ἀλλὰς ἐχθρὰς καὶ φίλους νομίζεν, *To look upon those who are Enemies and Friends to one, to be so to the other*. And this Expression we often meet with in *Livy*, or only for the Security of their Countries, which the *Greeks* call ὀπμαχίαν,⁵ *A defensive League*, or a Confederacy for one particular War, or against such a particular Enemy, or against all Enemies whatever, excepting their Allies, as in the League between the *Carthaginians* and *Macedonians*, mentioned by *Polybius*.⁶ Thus the *Rhodians* entered into Articles with *Antigonus* and *Demetrius*, to assist them against all Enemies whatsoever, except *Ptolomy*.⁷ The like equal Leagues may be made in Respect of other Things; as, that⁸ neither Party shall erect any Forts on the other's Borders, that neither shall protect the other's Subjects,⁹ nor grant an Enemy leave to march through their Country.

VII. 1. From what has been said of equal Leagues, we may easily understand what is meant by unequal ones; which Inequality may respect either the stronger or the weaker. That of the stronger is, when Assistance is promised, but none required again, or when more is promised on that Side than on the other. Unequal Conventions on the weaker Part, or, as *Isocrates* speaks in his *Panegyrick*, τὰ τὰς ἐτέρης ἐλάττωνα ὥστε τὸ δίκαιον, *Where one Side is depressed more than is just and reasonable*, are those which we said are called προαίμαλα, *Injunctions*, or ἐπιτάγματα, *Commands*. And these are such as do either lessen, or not lessen, the sovereign Jurisdiction of the inferior Power.

VII. Or upon unequal, which are again divided.

2. An Alliance that lessens the sovereign Jurisdiction is such an one as was the second League between the *Romans* and the *Carthaginians*,¹ in which it was provided, that the *Carthaginians* should make no War without the Leave of the *Romans*. And from that Time, as *Appian* observes, Καρχηδόνιοι Ῥωμαίοις ὑπήκουον ἑνωσόνδοι, *The Carthaginians by that League became dependent on the Romans*.² To this also may be referred a conditional Surrender, but that is not so much the less

³ POLYBIUS, *Lib. III. Cap. XXII. Edit. Amstel.*

⁴ The Antients termed it ἐμειχίαν, *An Union of Spears*. ZOSIMUS, *Lib. V. (Cap. XLII. and Lib. IV. Cap. LVI. Edit. Cellar.)* GROTIUS.

⁵ Thus THUCYDIDES tells us, the *Athenians* made such a defensive Alliance (ὀπμαχίαν) with those of *Corcyra*, (*Corfu*) *Lib. I. Cap. XLIV.* It appears from what goes before, that the Term ὀπμαχία is opposed to Συμμαχία, in the Sense given by our Author. See the Scholiast on this Place.

⁶ *Lib. VII. Cap. II. p. 703. Edit. Amst.*

⁷ PLUTARCH, in *Vit. Demetrii*, *Tom. I. p. 899.*

⁸ See an Instance of this in PROCOPIUS, *Perf. I. (Cap. II.)* GROTIUS.

This is allowed, unless the contrary is expressly stipulated. See below, *Chap. XXII. of this Book, § 5. Num. 2.*

⁹ We have, in TESMAR's Notes on this Place,

some Instances from THUCYDIDES, M. DE THOU, CAMDEN, BUCHANAN, and others.

VII. (1) This was one of the Conditions imposed on them by *Scipio*, as *LIVY* informs us, *Lib. XXX. Cap. XXXVII. Num. 4.* See also DION CASSIUS, *Excerpt. Legat. XVI.* POLYBIUS, *Hist. Excerpt. Lib. XV. Cap. XVII.* Our Author, however, doth not express himself exactly in this Place, when he gives us this Clause, as being of the second League between the *Romans* and *Carthaginians*. He means the Treaty made after the second *Punick War*, as he himself speaks in the following Chapter, § 14. where he likewise mentions this burthenfome Condition. For there had been several other Treaties between the *Romans* and *Carthaginians*, before this; as may be seen in POLYBIUS, *Hist. Lib. III. Cap. XXII. &c.*

² This must have been taken from the *Excerpta Legationum*, collected by FULVIUS URSINUS; for I find it not either in *The History of the Punick Wars*, nor in the *Excerpta*, collected by Mr. DE PEIRESC, and published by HENRY DE VALOIS.

fening the fovereign Jurifdiction, as the perfect transferring of it to another, of which we have treated elfewhere. Yet is fuch an Agreement fometimes called by the Name of a *Treaty*, as *Livy*, in his ninth Book, *The Theates in Apulia requested, that they might be admitted to a League, not to be upon equal Terms, but under the Dominion of the Romans.*

3. In an unequal Alliance, that does not leffen the Sovereignty, the Terms impofed, are either permanent or not. Thofe that are not permanent, are fuch as oblige the Payment of the Forces employed in the prefent Service, ³ the demolifhing Fortifications, the quitting fome Places, ⁴ the giving Hoftages, the delivering up Elephants and Ships. ⁵ The Conditions that are permanent are fuch as oblige all Reverence and Honour to the other's Power and Majefty. How far fuch an Alliance extends, we have elfewhere fhewed. Next to this, is, that they account the Friends and Enemies of the other Party theirs, that they allow no Paffage through their Country, nor Provisions, to any Troops that belong to thofe they are at War with; as alfo thefe lefs confiderable Articles, as that they fhall not fortify fuch and fuch Places, nor lead an Army thither, nor have above fuch a Number of Veffels, nor build any City, nor traffick, nor levy Soldiers in certain Places, nor fight againft their Allies, nor fupply their Enemies with Provisions, nor receive thofe who come from fuch and fuch Parts; that they renounce all former Treaties with others: Of all which you may fee Inftances in *Polybius*, *Livy*, and other Authors.

4. Unequal Leagues are made, not only between the Conquerors and Conquered, as *Menippus* fuppofed, but alfo between People of unequal Power, even fuch as never were at War with one another.

VIII. Alliances made with thofe who do not profefs the true Religion are allowed by the Law of Nature.

VIII. Concerning Leagues, it is often difputed whether they may be lawfully made with thofe who are not of the true Religion, which is not to be doubted in Refpect to the Law of Nature only. For the Right of making Alliances is common to all Men, and admits of no Exception on the Account of Religion. The Queftion is then, whether by the Law of GOD it be lawful or not? which has been the Subject of frequent Controverfy, ¹ not only among Divines, but among fome Lawyers too, of which Number are *Oldradus* and *Decianus*.

IX. Nor univerfally forbidden by the Hebrew Law.

IX. 1. Let us then firft confider, what the Divine Right of the Old Testament directs in this Affair, and afterwards we will confult that of the New. We find that inoffenfive Leagues, and fuch as tended to no one's Injury, might, before the Time of *Mofes*, be contracted with People who were not of the true Religion. We have an Inftance of this in ^a *Jacob's Treaty with Laban*, not to fay any Thing of ^b *Abimelech*, becaufe it does not fully appear that he was an Idolater. Nor did the *Mofaick* Law make any Alteration here: Let the *Ægyptians* be a Precedent, who doubtlefs were Idolaters, yet the *Hebrews* ^c were ftrictly forbid to abhor, or have any Averfion to them. But we muft except the feven Nations, who were by the ALMIGHTY himfelf devoted to Death, and the *Israelites* ^d appointed to execute that Sentence; for they perfifting in their Idolatry, and refufing Subjection, the *Jews* were commanded not to fpare them: To whom alfo the *Amalekites* ^e were added by the Divine Decree.

³ Thus the *Samnites*, being fubdued by *Lucius Papirius* the Dictator, fued for a Peace, which was granted, on Condition of Cloathing the Roman Army once; and paying them for the Service of one Year. *LIVY, Lib. VIII. Cap. XXXVI. Num. 11.* The learned *GRONOVIUS*, from whom I have taken this Example, gives us fome others.

⁴ Thus King *Antiochus*, being conquered by *Scipio Africanus*, bound himfelf by a Treaty of Peace, not to enter *Europe*, and to quit all that Part of *Asia*, which lies on this Side of Mount *Taurus*. *LIVY, Lib. XXXVII. Cap. XLVI. Num. 14.* See the Treaty made between the Romans and *Carthaginians*, after the *Sicilian War*, in *POLYBIUS, Lib. III. Cap. XXXVII.*

⁵ This Stipulation was made by the *Romans*, in the Treaties of Peace, already mentioned, with King *Antiochus* and the *Carthaginians*, but in fuch a Manner that the burthenfome Condition was attended with fomething permanent; for they obliged the Vanquifhed to keep no Elephants for the Ufe of War. *LIVY, Lib. XXX. Chap. XXXVII. Num. 3. and Lib. XXXVIII. Cap. XXXVIII. Num. 8.*

VIII. (1) *Viz. ANTONINUS, CAJETANUS, TOLETUS, MOLINA, VALDESIUS, MALDERUS. GROTIUS.*

^a *Gen. xxxi. 44.*

^b — *xxi. 27, 28, 29.*

^c *Deut. xxiii. 7.*

^d — *vii. 1, &c.*

^e — *xxv. 17, &c.*

2. As to Leagues of Commerce, and the like, either for a mutual Advantage, or that of one Party only, that such might be made with Pagans, is allowable by the Law; for we find nothing against it. On the contrary, we have the Examples of ^f *David* and ^e *Solomon*, who made a League with *Hiram* King of *Tyre*, where it is remarkable, that it is said in Holy Writ, that this League was made by *Solomon* according to the Wisdom that GOD had given him.

3. The Law of *Moses* indeed does especially command them to do Good to their own ^h Nation, Ἀγαπᾶν τὸν πλησίον, *To love their Neighbour*. Besides, the peculiar Way of Living, and Form of Manners, prescribed to the *Jews*, could not well suffer them to have any familiar Conversation with Strangers. But hence it does not follow, that it was not lawful for them to do Good to Strangers, or that it was not also commendable, tho' the corrupt Interpretations of the modern Rabbins infer the contrary: Whence *Juvenal* observes of the *Jews*,

Non monstrare Vias eadem nisi sacra colenti. (Sat. 14. v. 103.)

*Ask them the Road, and they shall point you wrong;
Because you do not to their Tribe belong.*

Dryden.

Where the Instance of not directing a Stranger in the Way, implies a Refusal of the least and most trifling Favours, Favours that cost them neither Pains nor Charge, which *Cicero* and *Seneca* acknowledge we should do to utter Strangers. And *Tacitus*, speaking of the same *Jews*, says, *Inviolable in their Faith, always ready to assist one another, but to all the World besides they bear a mortal Hatred*. Thus we read in the New Testament, that the *Jews* used *Not συσχεῖσθαι, συρεθίσαι, κολληῖσθαι, προσέρχεσθαι*, ⁱ *to have any Dealings, not to eat, not to converse with, or come unto one of another Nation*. And *Apollonius Molo* objected to them, Ὅτι μὴ παρεδέχοντο τὰς ἄλλας, &c. *That they receive none, who entertain Notions of GOD different from them, nor will they have any Thing to do with those whose Method of Living is not intirely correspondent to theirs*. And the Courtiers of *Antiochus*, in *Diodorus*, accuse the *Jews*, Μένες ἀπάντων ἐθνῶν, &c. *That they are of all People the most unsociable to Strangers, and take them all for Foes*. And then there follows, Μηδενὶ ἄλλῳ, &c. *They will admit no other Nation to their Table, nor even give them a good Wish*. And presently they are charged with *μισανθρωπία*, *A detesting of all Mankind*. And in *Philostratus*, *Tyaneus* speaks thus of the *Jews*, οὐ βίον ἀμικλὸν ἐυρόντες, &c. *They have found out so unconversable a Way of Living, that they will not so much as eat with other People*. And accordingly in *Josephus*, very frequently, the τὸ ἀμικλόν, τὸ ἀσύμφυλον, ἡ ἀχάριτος ἀμιξία, the *Jews* Unsociableness, and Inhospitallity, are thrown in their Teeth.

4. But CHRIST has, by his own Example, taught us, that this is by no Means the Meaning and Design of the Law, when he, who was himself the strictest Observer of it, did not scruple ^k to receive Water at the Hands of the Woman of *Samaria*. Nor did *David* ^l formerly make any Difficulty in retreating to People of another Religion, nor was he ever blamed for it. And *Josephus* introduces *Solomon*, when he dedicated the Temple, and begged of GOD that he would hear the Prayers even of Foreigners, when offered up there, delivering himself thus, Ἡμεῖς οὐκ ἀπάνθρωποι ἢ φύσιν ἐσμεν ἐδὲ ἀλλοτρίως πρὸς τὰς ἐκ ὁμοφύλων ἐχόμεναι, *For we are not inhuman in our Natures, nor are we averse to those, who are not of the same Nation and Family with ourselves* ¹.

5. From this Rule we are to except, not only the seven Nations before-mentioned, but also the *Ammonites* and *Moabites*, of whom it is written, *Deut. xxiii. 6. Thou shalt not seek their Prosperity, (for so in this Passage, you had better render פְּרוּסָה, than their Peace) nor their Good, all thy Days for ever*. In which Words they were forbidden to make any League of Friendship with them; yet it gives them no Right to make War against them, without just Cause; or, perhaps,

^f 2 Sam. v. 11.

^e 1 Kings v. 12.

^h Lev. xix. 18. Deut. xxii. 1.

ⁱ John iv. 9. Acts x. 28. xi. 3.

^k John iv. 7.

^l 1 Sam. xxvii. 8c.

IX. (1) *Antiq. Jud. Lib. VIII. Cap. II.*

this Place may be rather understood, according to the Opinion of some of the *Hebrew* Doctors, to prohibit seeking Peace from them, but not the accepting of it when they themselves offered it: It is certain they were forbid to make War against the *Ammonites*, Deut. ii. 19. nor did *Jephtha*^m fight against them, till he had tried all the Ways of an equitable Accommodation; norⁿ *David*, till provoked by intolerable Affronts. The remaining Question then is, whether it be lawful to enter into a confederate War with Infidels.

6. That this also was not unlawful before the Law, appears from the Example of² *Abraham*, who with his Army assisted the wicked^o *Sodomites*: Nor do we read, that the Law of *Moses* did in general alter any Thing in this Affair. Of the same Opinion were³ the *Asmoneans*, who were both very skilful in the Law, and great Respecters of it, witness their religious keeping of the Sabbath, wherein, however, they allowed the Use of Arms in their own Defence, but no otherwise: And yet these very People^p made an Alliance with the *Lacedemonians*, and the *Romans*, with the Consent both of Priests and People; nay, they offered up solemn Sacrifices for their Prosperity. But as to the Authorities alledged against this Opinion, they may have their particular Reasons.

7. For if there were any Kings or Nations (besides those mentioned in the Law) that were so wicked, that GOD, by his Prophets, had declared his Intent to destroy them, as hated by him, to undertake their Protection, or to join in Confederacy with them, was without Doubt unlawful. To this Purpose is that of the Prophet⁴ to *Jehosaphat*, for making a League with *Abah*; *Shouldst thou help the Wicked, and love them⁵ that hate the LORD? Therefore is Wrath upon thee from before the LORD.* For *Michaiah* the Prophet had before foretold the ill Success of that War. And that of another Prophet to *Amazia*. *Let not the Army of Israel go with thee, for the LORD is not with Israel*; to wit, *with all the Children of Ephraim*. But this was not from the Nature of the Alliance, but on the Account of the peculiar Quality of the Person, as may be evinced from hence, that GOD did sharply rebuke and threaten⁶ *Jehosaphat*, for entering into a Treaty of Commerce with *Abazia* King of *Israel*, tho' that Treaty was no otherwise than what *David* and *Solomon* had made with *Hiram*, on which Account we told you, they were not only not reproved, but even commended. For as to that Clause, that *Abazia* did *very wickedly*, it is to be understood of the whole Course of his Life, which had rendered GOD an Enemy to him, and all his Undertakings: As this Story is explained in the Book called *The Constitutions of Clement VI.* Chap. 18.

8. And this also must be observed, that the Case of those, who being descended of *Jacob*, had forsaken the LORD whom they knew, was far worse than that of mere Strangers; for against such Apostates, all the rest of the People were,⁶ by the Law of *Deut. xiii. 13.* commanded to take up Arms.

^m Judges xi. 16.

ⁿ 2 Sam. x.

² He also made a League with *Eshcol* and *Aner*, (Gen. xiv. 13.) As *David* did with *Achis* and *Naashan*; *Solomon* with the *Ægyptians*; *Asa* with *Benhadad*. GROTIUS.

^o Gen. xiv.

³ You have Commendations of them in the *Chaldee Targum*, in the Books of the *Maccabees*, and in the Epistle to the *Hebrews*. Several Christian Emperors and Kings, following them as their Precedent, entered into Treaties and Alliances, either with those who were no Christians at all, or at least not very sound ones; as *Constantine* with the *Goths* and *Vandals*; *Justinian* with the *Lombards*; *Theodosius*; *Honorius*, *Leo*, *Heraclius*, *Basil*, *Isaacius*, *Angelus*, *Palæologus*, with the *Saracens*, *Alani*, *Gepidæ*, *Franks*, *Suevi*, and *Vandals*; *Alfonfus Hispanensis*, *Ramirus*, *Alfonfus Castus*, *Sanctius Castellæ*, *Ferdinand* the holy, Kings of *Spain* with the *Moors*; so *Peter* King of *Leon*; the wise *Alfi-*

nus, King of *Castile*; *Rodolphus Hatsburgensis* with the *Tartars*. Consult JOHANNES DE CARTHAGENA, Lib. III. Cap. I. *De jure belli Romani Pontificis*, Cap. I. and Pope *Julius* the second made Use of *Turkish* Troops. GROTIUS.

^p 1 Mac. viii. and xii.

⁴ JOSEPHUS, Ἡλιᾶτο· ὃ πρὸς ἄχαιον συμμαχίας ἀνθρώπων ἀσεβῆ καὶ πονηρόν, He blamed him for entering into a League with *Abah*, an irreligious and wicked Man. GROTIUS.

⁵ GRATIAN returned this Answer to his Uncle *Valens*, who desired his Assistance against the *Scythians*, Ὡς ἔ· δὲ τῷ ἐχθρῷ τῷ θεῷ συμμαχεῖν, One ought not to engage in any Treaty with a Man who is an Enemy to GOD. GROTIUS.

⁶ 2 Chron. xix. 2.

^r — xx. 37.

^s — xx. 37.

⁶ Add *Joshua's* Example, Chap. xxii. GROTIUS.

9. Sometimes the Leagues themselves are blamed, for the wicked Disposition of those who made them ; so the Prophet reproves *Aſa*, ^t for applying himself to the *Syrian*, in distrust to GOD ; which he shewed by sending the Things consecrated to GOD, unto this *Syrian* ; so he was also blamed ^u in his Sickness, for putting his Confidence more in the Physicians than in GOD. And therefore it no more follows from this History, that it is in itself, and in general, an ill Thing to enter into an Alliance with such People as the *Syrians*, than that it is so to consult a Physician. For the bad Disposition of the Mind, sometimes makes that unlawful which is not so in itself. As *David's* ^w numbering the People ; *Hezekiah's* shewing his ^x Treasures. So in one Place the Confidence the *Jews* ^y had in the *Ægyptians* is reproved ; when yet *Solomon* ^z was allowed to be related to them by Marriage.

10. To which must be added, that the *Hebrews* under the old Law, had the express ^{aa} Promises of GOD for Victory, provided they kept the Law, and therefore they had the less Reason to have Recourse to human Assistance. There are also many excellent Sentences in *Solomon* ^{bb} to dissuade us from associating with the Wicked ; but these are the Advices of Prudence, and not Precepts of a Law ; and these very Advices themselves, as most of those Maxims which regard Morality, have several Exceptions to them.

X. 1. But the Gospel has made no Alterations in this Respect ; nay, it gives a greater Encouragement to such Leagues, by Vertue of which, those who are not of the true Religion may be relieved in a just Cause ; forasmuch as we are to do Good unto all Men, when an Opportunity offers ; and this not only as a Thing commendable, and left to our Liberty and Discretion, but as what we are commanded and obliged to. For by the Example of GOD, ^a who makes his Sun to arise on the Just and on the Unjust, and sends his Rain on the Wicked as well as the Righteous, we are taught to exclude no Man from the Benefit of our Kindness. Excellently does *Tertullian* say, *As long as GOD confined his Covenant to Israel, it was with Reason that he had them shew Mercy to their Brethren only. But as soon as ever he gave to CHRIST the Heathen for his Inheritance, and the utmost Parts of the Earth for his Possession, and what Hosea had spoken began to be fulfilled ;* ¹ The Nation which were not my People, is now my People, and she who had not obtained Mercy, has now obtained Mercy. From that Time has CHRIST extended his Law of Charity to all Mankind, excluding none from his Compassion any more than from his Call.

2. Which, however, must be understood with some Degrees of Allowance, for we are to do Good unto all Men, but especially to those of the same Religion. So in *Clement's* Constitutions, Πᾶσι ἐν δίκαιον δίδοναι ἐξ ὁμείων πόνων προσημῆεν ἡ τὰς ἀγίας. *We must give of our Labours to all, but prefer the Saints.* ² A perfect Liberality (says *St. Ambrose*) must be regulated by the Religion, the Occasion, the Place, the Time, in such a Manner as that you may chiefly exercise it towards those of the Household of Faith. ³ So *Aristotle*, Οὐ γὰρ ὁμοίως προσήκει Συνήθων, καὶ ὁμοίων Φρονήσεων, *For there is no Reason that we should take the same Care of Strangers as of Friends* ⁴.

3. Nor is our living together, and our familiar Conversation with Men of another Religion forbid ; nor are we even denied all Manner of Commerce with those who are more inexcusable than these, such as are Apostates from, and Contemners of, the Rule of Christian Discipline, but only an unnecessary Familiarity, and not ^b what may give one Hopes of their Conversion. For as to that of *St. Paul*, ^c *Be not unequally yoked with Unbelievers ; for what Fellowship hath Righteousness with*

^t 2 Chron. xvi. 2, 7.

^u ——— xvi. 12.

^w 2 Sam. xxiv.

^x 2 Kings xx. 13.

^y Is. xxxi. 1.

^z 1 Kings iii. 1.

^{aa} Deut. xxviii. 7.

^{bb} Prov. i. 15. xiii. 20. xxii. 24. xxiv. 1.

^a Matt. v. 45.

X. (1) *Adversus Marcionem*, Lib. IV. Cap. XVI.

² Lib. VII. Cap. III.

³ Offic. Lib. I. Cap. XXX.

⁴ Ethic. Nicom. Lib. IV. Cap. XII. p. 54. Tom. II. Edit. Paris.

^b 2 Thess. iii. 15.

^c 2 Cor. vi. 14, 15, 16.

Unrighteousness, and what Communion has Light with Darkneſs, and what Concord hath CHRIST with Belial, or what Part hath he who believeth with an Infidel? It relates to thoſe who were preſent at their Idol-Feaſts, and ſo did either really commit Idolatry, or at leaſt ſeemed to do ſo. Which is plain from the following Words, ^d *What Agreement hath the Temple of GOD with Idols?* And to this Effect is what you have in the firſt Epiſtle to the *Corinthians*, *Ye cannot be Partakers of the Table of the LORD, and of the Table of Devils.*

4. Nor muſt we conclude, that it is unlawful to make Treaties and Alliances with Pagans and Infidels, becauſe we are not to put ourſelves voluntarily under their Government, or to intermarry with them; for in both theſe Caſes there is evidently more Danger of being expoſed to the Temptation of renouncing the true Religion, or at leaſt more Difficulty in maintaining the Profeſſion of it, than in the other Affair. Beſides theſe Engagements are more laſting, and there is a greater Freedom of Choice in Marriages; whereas Leagues muſt be entered into, according as the Conjunction of Time and Place requires. But as there is no Harm in doing Good to Infidels, ſo neither is there any in deſiring their Aſſiſtance, as ^e Saint Paul did that of *Cæſar*, and of the Tribune.

XI. Cautions
about ſuch
Leagues.

XI. 1. And therefore this is not a Thing in itſelf evil, or always unlawful, but only ¹ in Regard to Circumſtances. For which Reaſon we ought to take particular Care, that by our too intimate Converſation we do not infect or ſcandalize the Weak; and to remedy this it will be very proper, that the Dwelling of ſuch People ſhould be in ſome ſeparate Place, as the *Iſraelites* lived by themſelves, and at a Diſtance from the *Ægyptians*; for that of *Anaxandridas* is not without its juſt Grounds,

οὐκ ἐν συναίματι Συμμαχεῖν, &c.

*Under your Colours I cannot, muſt not march;
For neither your Manners, nor your Laws, agree
With ours; but are vaſtly different.* ²

And to this Purpoſe is what we have elſewhere alledged, concerning the Scruple which the *Jews* and *Chriſtians* had, about carrying Arms under the Command of Pagans.

2. But if ſuch a Confederacy ſhould very much augment the Power of the Infidels, it were better to abſtain from it, unleſs upon abſolute Neceſſity; and what *Thucydides* ſaid in a like Caſe, is very much to the preſent Purpoſe, ³ *Ἀνεπιφθόρον ὅσοι ὡπλίσθη ἡμῶν ἐπὶ τῷ, &c.* They are not to be blamed who are treacherouſly invaded, as we are by the Athenians, if they endeavour to get the Aſſiſtance, not only of the Greeks, but of the Barbarians. For every Right is not enough to juſtify us in the doing that which may, if not directly, yet indirectly, prejudice our Religion. For we muſt firſt ſeek the Kingdom of GOD, (*Matt. vi. 33.*) that is, the Propagation of the Goſpel.

3. It were to be wiſhed, that many Princes and People, who at this Day have the Government in their Hands, would be mindful of that generous and pious Advice which *Fulk*, Archbiſhop of *Rheimes*, ⁴ once gave to *Charles the Simple*, *Who would not tremble to conſider, that you ſhould ſeek the Friendſhip of GOD's Enemies, and make Uſe of the odious Arms and Alliances of Pagans, to the Ruin and*

^d 2 Cor. x. 21.

^e Acts xxv. 11. xxii. and xxiii.

XI. (1) See *Phartazas's* Speech to the *Lazi* in *AGATHIAS*, Lib. III. and *SAXO*, Lib. IX. in the Words of *Lewis* the French King to *Harold*. It is impoſſible that there can be any real Friendſhip and Agreement between Perſons of a different Perſuaſion in ſacred Matters; and therefore whoever addreſſes himſelf to another for his Aſſiſtance, ſhould be ſure, in the firſt Place, to take Care that he is of the ſame Religion; for they whom different Forms of Worſhip, and different Notions of GOD, have ſet at a Diſtance from each other, can never perform great Exploits together. GROTIUS.

2 ATHENÆUS has preſerved this Fragment, which evidently regards a Difference in Religion, as appears from the following Verſes. *Dipnoſophiſt*. Lib. VII. Cap. XIII. p. 299, 300. Edit. Caſaubon, 1657.

3 FRODOARD, or FLODOARD, *Hiſt. Eccleſ. Remenſis*, Lib. IV. Cap. VI.

4 We have an Inſtance in MANCAFA, in NICETAS's Account of the Affairs of *Iſaac Angelus*, Lib. XI. where the Piety of *Emanuel Duke of Savoy* is highly applauded, who, when he could have recovered *Cyprus*, by the Aſſiſtance of the *Turks*, ſcorned the Proffer. GROTIUS.

Deſtruction of Chriſtianity? For there is very little Difference between confederating with Infidels, and the renouncing of GOD to worſhip Idols. And Alexander in Arrian, ſays, Ἀδικεῖν μετὰ λα τὰς ἐχθρομένους, &c. That they were guilty of the moſt enormous Baſeneſs, who would bear Arms for the Barbarians againſt Greece, contrary and in Prejudice to the Rights and Laws of the Greeks. 5.

XII. I ſhall here add this, that ſince all Chriſtians are Members of one Body, which are commanded to have a Fellow-feeling of each other's Sufferings, as that Command affects every ſingle Perſon, ſo ſhould it every Nation as they are a Nation, and all Kings as they are Kings. Nor ought any one to ſerve CHRIST in his Perſon only, but alſo to the utmoſt of that Power he is entrusted with. But this neither Kings nor People can well do, ¹ whiſt an Enemy of the true Religion invades the States of Chriſtendom, ² unleſs they heartily aſſiſt and ſtand by one another; which cannot be done conveniently, without a general League and Confederacy to that very Purpoſe; and ſuch a League has formerly been made, and the Roman Emperor ³ was unanimouſly choſen Head of it; all Chriſtians then are obliged to contribute either Men or Money, according to their Ability, to this common Cauſe; and how can they be excuſed who reſuſe it, I cannot ſee, unleſs they are hindered by an unavoidable War, or ſome ſuch great Calamity.

XII. All Chriſtians obliged to enter into League againſt the Enemies of Chriſtianity.

XIII. 1. Another Queſtion which uſes to ariſe, is, Whether of them, ſuppoſing ſeveral Nations engaged in War with another, we are obliged to aſſiſt, they being all of them equally our Allies ¹? In the firſt Place, we muſt remember what I ſaid before, that nothing can bind us to an unjuſt War. And therefore ² he of the Confederates is to be preferred who has the juſter Cauſe, if it be againſt one who is not our Confederate; nay, tho' it be againſt another Confederate. Thus Demotheſenes, in his Oration about Megalopolis, ³ ſhews, that the Athenians were obliged

XIII. If ſeveral of our Allies are at War, which of them we ought to aſſiſt; explained by Diſtinctions.

⁵ That Hiſtorian ſays, that after the Battle of the Granicus, Alexander ſent the Grecians he took in Darius's Service, in Chains to Macedonia, with Orders to make them work like Slaves, "Be cauſe," adds he, being Grecians, they had born Arms "for the Barbarians, againſt Greece." *De Exped. Alexandri*, Lib. I. Cap. XVII. Edit. Gronov. Our Author, tho' he quotes the Original, doth not give the Words exactly. See what the ſame Hiſtorian ſays in the Cloſe of his firſt Book.

XII. (1) Our Author ſuppoſes, without Doubt, that this Enemy of Chriſtianity has taken Arms unjuſtly againſt ſome Chriſtian Power. He could not be of Opinion, that the Intereſt of Religion ought to be made an Exception to the general Rule, which he lays down for all Sorts of War. He likewiſe ſuppoſes this Enemy not only to be a Turk, a Pagan, or of ſome other Religion different from Chriſtianity; but alſo, that he has plainly ſhewn his Deſign on all Chriſtians, as ſuch, and only wants an Opportunity of oppreſſing them all Manner of Ways. Otherwiſe it would not be the common Cauſe of all Chriſtians; as he conſiders it a little lower. See SILHON's Reflections, in his *Minifter of State*, Part II. Book I. Diſcourſe IV. Beſides, it has been juſtly obſerved, that, according to the preſent Diſpoſitions of Chriſtian Princes, ſuch an Alliance would not be of great Service. See a Diſſertation by Mr. BUDEUS, *De ratione ſtatūs circa Fœdera*, printed at Hall, 1696.

² Upon this Subject ſee MARIANA, *Lib. XXX. PARUTA, Lib. IV. BIZAR, VII. and XII. GROTIUS.*

³ Our Author, as GRONOVIVS obſerves, means Frederick III. The learned Commentator refers us to a Diſſertation, written by BOECLER, *De Paſſagiis*, to be found in *Tom. I.* of a Collection publiſhed ſome Years ago. But, tho' that Emperor had the Thing very much at Heart, and was very preſſing with the Pope to engage the other Powers in it; nothing was concluded, much leſs executed.

See NAUCLERUS's *Chronicle*, Tom. II. p. 482, 491, 504. Edit. Colon. 1564.

XIII. (1) See PUFENDORF, *B. VIII. Chap. IX. § 5.*

² See below, *B. II. Chap. XXV. § 4.* And in the Form of the Oath of Fealty it is ſaid, *If I ſhall underſtand that you have a Mind to make an offensive War upon juſt Grounds, and I ſhall be either generally, or particularly, required thereunto, I will, to my utmoſt, give you my Aſſiſtance.* GROTIUS.

³ In the Oration quoted by our Author, DEMOSTHENES undertakes to perſuade the Athenians to aſſiſt the Megalopolitans, a People of Arcadia, againſt the Lacedemonians. As if no one doubted that, if once the Lacedemonians made themſelves Maſters of Megalopolis, they would fall on Meſſena, the Orator remonſtrates to the Athenians, that it was their Buſineſs to ſend ſpeedy Relief to the Meſſenians, their Allies, againſt thoſe other Allies, both by Vertue of their ſolemn Treaties, and for their own Intereſt. Mr. THOMASIVS, in a Diſſertation, *De ſponſione Romanorum Caudinū*, (which is the ſixth of thoſe printed at Leipſick) § 22. &c. maintains, that all Treaties of Alliance, by which a real Confederacy is contracted, but particularly thoſe made for War, of themſelves imply this tacit Condition, that no Succours are to be ſent to any one, not even to another Ally, againſt the Power with which the Contract is made. The Reaſon is, that the War breaking; or at leaſt very much diſturb ing the Union of the Allies for a certain End, it implies a Contradiſtion, according to our able Lawyer, that one ſhould engage to take Arms againſt an Ally, even tho' done with a Deſign of ſuccouring another Ally in a juſt Cauſe. And as it may be objected, that every one is bound, by the Law of Nature, to defend thoſe who are injured, or unjuſtly attacked, if it is in his Power, Mr. THOMASIVS answers, that this is no more than an imperfect Obligation, or a Duty of Humanity, which ought to give Place to expreſs and formal Engagements,

obliged to help their Confederates the *Messenians*, against their other Confederates the *Lacedemonians*, if the *Lacedemonians* were unjust Aggressors; which holds true, unless it be expressed in our Articles not to send Aid against such an Ally. In the Agreement which *Hannibal* made with the *Macedonians*, was this Clause, *We will be Enemies to your Enemies, if you except the Kings, Cities, and maritime Towns which are in League and Amity with us* ⁴.

2. But if our Confederates engaged in War, have each of them an unjust Cause, (which may sometimes happen) we are then to stand Neuters. So *Aristides* in his fifth *Leuætric*, εἰ μὲν ἐπ' ἀλλὰς ἐκάλεον, &c. *If either of our Allies had desired our Assistance against Strangers, we would presently have complied with the Request; but if they want us to be employed with one against the other, we will not concern ourselves at all* ⁵.

3. If our Confederates be engaged in a just War against one who is not our Ally, and require our Assistance; if we are able, we ought to send each of them either Men or Money, as is practised in the Case of personal Creditors. ⁶ But if a Prince be demanded personally to assist both, having so promised; because his Person cannot be divided, it is reasonable that he ⁷ should prefer him with whom he has been the longest in Alliance, as the *Acarnanians* told the *Lacedemonians*, in *Polybius*. ⁸ The like Answer was returned to the *Campanians*, by the Roman Consul, *When we enter into new Treaties and Friendship, we ought to take special* ⁹ *Care that we do not violate and infringe the old.*

ments. But it only follows from the Reason alledged, that there are some Cases in which an Alliance is broken, or in great Danger of being so; and that the Case in Question is one of that Sort. Whoever treats for an Alliance, and has, or may have other Allies, is, and ought to be supposed, tacitly to agree, that the Power with which he treats will have a Regard for those who are, or shall be, united to him by the like Ties; and be far from thinking of hurting them. Every one's Interest requires this, as well as his Duty, and the Sentiments he is supposed to entertain. So that assisting an Ally, in a just War, against another Ally, is no more than making Use of a Right included in the Alliance with both; and this Right can cease only by an express Renunciation, such as our Author mentions immediately after, a Renunciation, which is just and reasonable only so far as the Interest of him who makes it, requires he should take Care of himself, preferably to others. Mr. BUDEUS, who declares for the Opinion here opposed, in his Dissertation intitled *Jurisprudentiæ Historiæ Specimen*, § 92. seems not intirely consistent with himself, or with what he says in the foregoing Paragraph.

4 POLYBIUS, *Lib. VII. Cap. II. p. 702. Edit. Amstel.*

5 The Orator doth not go on the Supposition of the War being unjust on both Sides: His Reason is this, "Not that we decline doing Service to either; but are unwilling to hurt either." The Tendency of the whole Discourse is to shew, that there was not more Reason for succouring the *Lacedemonians* than the *Thebans*; because the *Athenians* had not received more Good or Harm from one than from the other; and that, moreover, it was their Interest to let them fight. So that the Question here turns on what Prudence demanded, not on the justice or Injustice of the War.

6 By *Personal Creditors* are meant those whose Right extends to the Person of the Debtor; and is not confined to such and such mortgaged Goods, in Opposition to such Creditors as have a Pledge or a Mortgage. Personal Creditors are in the *Roman Law* called *Chirographarii*, because they commonly have some Bond, or Note of Hand, for Security of the Debt. And when there are several such

Creditors, if the Debtor's Estate is not sufficient to satisfy them all, each has his Share assigned, in Proportion to the Largeness of the Debt, without any Regard to the Time when it was contracted: Whereas Creditors on Mortgage are not only preferred to all personal Creditors; unless these latter have some particular Privilege; but he whose Mortgage is of the oldest Date, takes Place of the Rest; so that if nothing remains, the posterior Creditor loses all. Even in the Case of privileged personal Creditors, if the Privilege is of the same Nature, no Regard is paid to Priority or Posteriority of Time. *Digest. Lib. XLII. Tit. V. De rebus auctoritate judicis possidendis. Leg. XXXII. Code, Lib. VIII. Tit. XVIII. Qui potiores in Pignore habentur, Leg. VIII.*

7 See *Lib. IV. Cap. XXXI. De Feudis. GROTIUS.*

Our Author here quotes the *Feodal Law*, according to CUYAS's Edition. In the common Edition the Passage occurs in *B. II. Tit. XXVIII.* where it is said, that *A Vassal ought to assist his Lord against all others, and even against his own Brother, and Son; but not against one who has been his Lord longer; for he is to be preferred to all others.* This Decision is founded on the same Principle which our Author lays down for a Preference between two Allies; a Principle manifestly reasonable. See PUFENDORF, *B. III. Chap. VII. § 11.*

8 Not the *Acarnanians*, but the *Etolians*, make this Reflection by the Mouth of *Cblæneas*, their Ambassador, who speaking against the *Acarnanians*, remonstrates to the *Lacedemonians*, that by joining the *Etolians*, they would do nothing to the Prejudice of a more antient Alliance. *Lib. IX. Cap. XXV. p. 784, 785. Edit. Amstel.*

9 Χρή φίλοις καὶ ἐχθροῖν συμμαχεῖν, ἢ καὶ φίλων, *Friends ought to join their Forces against Enemies, and not against Friends*, says *Ptolemy* to the *Athenians*, in APPIAN, *Excerpt. legat. GROTIUS.*

The Passage quoted in this Note, has no Relation to the Case under Consideration; but to that spoken of in Note 3. and may help to confirm the Opinion there examined.

4. But this will also admit of the Exception, unless the latter League has something in it beyond a bare Promise, ¹⁰ for it may include, in some Sort, the transferring of Property, and imply somewhat of Subjection. ¹¹ And thus in the Case of a Sale, we say the first Purchase is preferred, unless the latter has actually transferred the Property. So *Livy* reports of the *Nepefines*, ¹² that the Faith given upon their Surrender, was more obliging than that of former Leagues. Some distinguish between these more nicely; but what I have said, as they are nearer to Simplicity, so are they to the Truth.

XIV. A League made only for a Time, upon the Expiration of that Time, is not presumed to be tacitly renewed, ¹ unless such Acts intervene as can bear no other Construction; ² for a new Obligation must not easily be presumed.

XV. If either Party break the League, the other is freed, ¹ because each Article of the League has the Force of a Condition. Thus we find in *Thucydides*, *ἀόριστον τὰς συνθήκας ἔχει οἱ, &c.* The League is violated, not by those who being deserted apply themselves to others for Assistance, but by those who do not perform in Deeds, what they promised upon their Oaths. ² And in another Place, *ὅτι δὲ ἂν τῶν ὁρκισθέντων, &c.* If either Party offend against the Articles they have sworn to, never so little, the League is broke. ³ But this is only true, in Case it be not agreed on to the contrary, which sometimes is done, that a League solemnly sworn to should not be esteemed broke upon every slight Offence.

XVI. There may be as many Sorts and Subjects of Sponsions, as there are of Leagues. ¹ For these differ only in the Capacities and Power of the Persons who make them. But there are two Questions generally started about Sponsions: The first is, how far the Persons engaging are obliged, in Case the Prince or the State should disapprove of the Engagement, whether they are obliged to indemnify the other Party, or whether to put Affairs into the same Posture they were in before the Engagement, or whether their Persons are to be delivered up. The first seems agreeable to the Civil Law of the *Romans* ²; the second to Equity and Reason; which the Tribunes of the People, *L. Livius* and *Q. Melius*, urged in the *Caudine* Controversy. The third is approved by Use and Custom, as appears by the Examples of the two remarkable Sponsions made at *Caudium* and *Numantia*. But this is always to be laid down as a Maxim, that the Sovereign is, in no Manner obliged by Treaties thus concluded without his Order. And therefore it was very well said of *Posthumius* to the *Romans*, ³ *You have promised the Enemy nothing; nor have you ordered any of your Citizens to engage for you; and therefore you have nothing to do with us, to whom you gave no Order; nor with the Samnites, with whom ye made no Agreement.* And again, *I absolutely deny, that any Contract can oblige the People, which is made without their Order.* ⁴ Nor is it with any less Judgment and Reason said, that *If the People may be thus obliged to any one Thing they may be so to all.*

2. And therefore the People of *Rome* were neither obliged to indemnify the *Samnites*, nor to put Affairs into the same Posture they were in before. But if the

¹⁰ See RADEVICUS, I. 7. GROTIUS.

¹¹ By an Edict of *Theodorick*, Cap. CXXXVIII. GROTIUS.

¹² *Lib. VI. Cap. X. Num. 4.* This Case is not entirely to the Purpose. The *Nepefines* having asked Assistance of the *Romans*, their Allies, and receiving none, were obliged to surrender to the *Etrurians*; after which they would not revolt from the Obedience promised to the Conqueror, who had made himself Master of the Town. In Order to propose a Question agreeable to the Subject before us, the Question should have been, whether the *Etrurians* would have thought themselves obliged to assist the *Nepefines*, after their Surrender, preferably to some other Ally, with whom they had before treated on an equal Foot?

XIV. (1) See PUFENDORF, B. VII. Chap. IX. § II.

2 Thus, for Example, if one Ally has agreed to give another a certain Sum yearly, and the Payment of the same Sum is made the Year after the

Expiration of the Term of the Alliance, the Alliance is renewed for that Year. On the same Principle the *Roman* Lawyers have decided, that if a Man, who had lent Money for a certain Time, and pays the Interest due on such Money, after the Time is expired, and the Creditor receives it; the latter is supposed to prolong the Term of Payment for that Time. *Digest. Lib. II. Tit. XIV. De Pæcis, Leg. LVII.*

XV. (1) See PUFENDORF, B. III. Chap. VIII. § 8. and what our Author says, B. III. Chap. XX. § 35. as also a Dissertation by Mr. BUDEUS, *De contraventionibus Fœderum*, Cap. III. § 14.

2 *Lib. I. Cap. LXXI. Edit. Oxon.* See likewise Cap. CXXIII.

3 *Lib. IV. Cap. XXIII.*

XVI. (1) See PUFENDORF, B. IV. Chap. IX. § 12, 13.

2 See above, § 3. Num. 6. Note. II.

3 *LIVY, Lib. IX. Cap. IX. Num. 16, 17.*

4 *Ibid. Num. 4, 7.*

Samnites would have any Dealings with the People of *Rome*,⁵ they should have kept their Army at the *Furcæ Caudinæ*, and have sent Embassadors to *Rome*, to treat with the Senate and People, concerning a League and a Peace, that they themselves might have judged at what Price they would purchase the Preservation of their Army. And then if they had not stood to their Agreement, they might justly have said, as they actually did say, what *Velleius* relates,⁶ that the *Numantines* alledged, that the Violation of the publick Faith was not to be expiated by the Blood of a single Person.

3. It may more plausibly be said,⁷ that the whole Army was obliged by that Agreement; and certainly, this would be entirely just, if the Sponsors had made the Contract by their Order,⁸ and in their Name; as we read that was which⁹ *Hannibal* made with the *Macedonians*. But if the *Samnites* were contented with the Word and Honour of¹⁰ the Sponsors, and¹¹ the six hundred which they desired

5 THOMASIVS, in his Dissertation *De Sponsione Romanorum Caudinâ*, § 84, &c. confutes our Author's Opinion. I own, says he, that the *Samnites* acted imprudently; as appears from the Reflections made by *Herennius Pontius*, their General's Father, *Livy*, *Lib. IX. Cap. III. Num. 5*, &c. and those of *Oflus Calavius*, *ibid. Cap. VII. Num. 3*, &c. and from what *Livy* himself says, *ibid. Cap. XII*. But it doth not thence follow, that the *Romans* were blameless. He, who knowing a Man to be a bad Debtor, lends him Money, without requiring a Pledge or Security, certainly acts imprudently. But the Debtor who refuses Payment, is not less guilty of Dishonesty. The *Roman Army*, which was shut up in the Defiles of *Caudium*, made the greatest Part of the People, as *Lucius Lentulus*, the first Lieutenant-General said, *Cap. IV. Num. 13, 14*. Even though no Presumption could be framed, that the Rest of the *Romans* who were at *Rome*, would not consent to the Treaty made by the Consuls, who commanded the Army, might not the Army have obliged themselves validly, in the Extremity to which it was reduced? And ought not the whole Body to have ratified a Treaty made by the Majority, for the Preservation of that Majority? (See what our Author says, § 3. of this Chapter, *Num. 2*.) One single Town, which makes but a very small Part of a large State, may surrender, and submit to the Power of a victorious Enemy, when nothing but certain Ruin is before them. (See *Chap. VI*. of this Book, § 5.) Why could not the *Roman Army*, which was the greatest Part of the *Romans*, in a like Case, engage themselves not to take Arms any more against the Enemy; especially since it was not thereby cut off from the Body of the State, and might be useful to it in all other Respects, without a Violation of the Treaty? But, even tho' the *Roman People* were not directly obliged by the Treaty made with the *Samnites*, they were engaged indirectly; which our Author cannot deny, without destroying a Principle which he himself lays down, *B. III. Chap. XXII. § 3*. The *Romans* having reaped a considerable Advantage from the Treaty in Question, by the Preservation of their Army, ought to have renounced that Advantage, if they were not disposed to stand to it, and have sent back their Troops to the Defiles of *Caudium*, and left them to the Discretion of the *Samnites*, as the General of that People very justly observed, *Cap. XI. Num. 4*. *Livy*, who makes *Pontius* reason in this Manner, expresses a Doubt concerning the Conduct of the *Romans* on that Occasion. He says, that when the *Samnites* sent back the Authors of the Treaty, whom the *Romans* offered to deliver up to them, the Promise of those Authors was disengaged, and perhaps, adds the Historian, the publick Faith. *Ibid. Num. 13*.

6 *Lib. II. Cap. I*.

7 The *Numantines* thought it equitable, that if the Engagement was not approved of, the Army which was set at Liberty upon that Engagement, should be delivered up to them. GROTIUS.

Our Author, probably, had his Eye upon that Passage of *OROSIUS*, *Is the Justice of the Numantines to be commended? The Senate itself did tacitly approve of it, when the Numantines sent Embassadors to them, requiring either that the Peace should be preserved inviolable, or that all who had been allowed their Lives, should be sent back*. *Hist. Lib. V. Cap. V*. Besides, Mr. THOMASIVS has written a Dissertation, *De Sponsione Romanorum Numantinâ*, which is the fourteenth of the same Collection, where he reasons on the same Principles. See also Mr. BUDEUS's *Jurisprud. Histor. Specim. § 71*.

8 The Speech of *Lentulus*, in *Chap. IV*. of *Book IX*. of *Livy*, shews plainly, that the Agreement was made in the Name, and by the Order of the whole Army. That Lieutenant-General speaks in their Name. They were present; their bare Silence ought to be considered as a real Approbation of all that was done.

9 It appears from the Title of this Treaty, that it was made by *Hannibal*, in Conjunction with his Officers, the Senators of *Carthage*, who were with him, and all the Soldiers. See *POLYBIUS*, *Lib. VII. Cap. II. p. 699. Edit. Amstel*.

10 These were two Consuls, two Quæstors, four Prefects, and twelve Tribunes, as *APPIAN* relates it. These were all by the Treaty of *Caudium* surrendered; but by the Treaty of *Numantia*, only one Consul; the Rest were spared on the Account of *Tiberias Gracchus*, as *PLUTARCH* says in the Lives of the *Gracchi*. GROTIUS.

11 *Pontius* the Son, in *APPIAN*, τ τε ππτων, &c. I will pick out some of the Principal of the Cavalry for Hostages of these Articles, till the whole Body of the People ratify and confirm them. The Portuguese, in a like Affair, judged it sufficient that the Hostages were left to the Discretion of him who had them in his Custody. *MARIANA XXI. 12*. If they accept of those who are delivered up to them, they are looked upon to remit the Penalty. *POLYBIUS, Excerpt. CXXII. GROTIUS*.

The Passage of *POLYBIUS* here referred to, speaks of the *Roman Senate*, who would not receive the Murderer, and the other Accomplices in the Assassination of one of their Embassadors; because, says the Historian, they were resolved to reserve to themselves the Right of revenging such an Action when they judged proper; whereas, had they punished the others, it might have been thought they had been satisfied, *p. 1324. Edit. Amst.* See below, *B. III. Chap. XXIV. § 7*.

Note

fired for Hostages, they might even thank themselves. On the other Hand, if the Sponsors had pretended to have had a publick Commission for contracting with them, ¹² they had then been obliged to have made Restitution and Satisfaction for the Damage occasioned by their Fraud. But if that did not appear, they were still obliged to make good what the other Party might reasonably be supposed to have suffered on the Account of not ratifying the Treaty, according to the very Nature of the Affair. And in this Case, not only their Bodies, but also their Estates, would have been obliged to the *Samnites*, unless some Penalty had been particularly expressed, in that Agreement, in lieu of it. For as to the Hostages, it was positively agreed, that they, if the Treaty was not confirmed and complied with, should answer it with their Heads. ¹³ But whether the same Punishment was to be inflicted on the Sponsors, is what we are in the Dark about. For when the Penalty is stipulated after such a Manner, the Result of it is this, that if the Fact engaged for cannot be performed, nothing else can be demanded from that Obligation; because in this Case, something that is certain is agreed on, instead of some uncertain Compensation, that might possibly accrue. And it was the general Opinion of those Times, that one's Life might lawfully be engaged on such Occasions.

4. But among us who think otherwise, it is my Sentiment, ¹⁴ that by Vertue of an Agreement made without the Order of the sovereign Power, the Estate of the Sponsor stands first engaged for Damages and Interest, and if that be not sufficient, his personal Liberty. ¹⁵ *Fabius Maximus*, when the Senate refused to ratify an Agreement made by him with the Enemies, sold his own Land for two hundred thousand *Sefferces*, and so discharged his Promise. But the *Samnites* very justly ordered, that ¹⁶ *Brutulus Papius*, who had broke a Truce, should, Body and Goods, be delivered up to the Enemy.

XVII. 1. Another Question is, Whether if the sovereign Power be acquainted with the Agreement, and yet is silent, it shall not be obliged to stand to it? Here we must first distinguish, whether the Agreement were purely and simply made, or whether upon Condition of its being ratified by the sovereign Power; for if it were conditional, that Condition not being performed, (for Conditions ought to be ¹ expressly performed) the Sponsion is of no Force. Like that of *Lutatius* with the *Carthaginians*, ² which the People of *Rome* declared was not made by their Order; and therefore a new Treaty was made by publick ³ Deliberation.

2. In the next Place we should know, whether there has been any Thing on the Part of the Sovereign besides bare Silence; for Silence alone is not enough to prove a Consent, without some Thing or Deed, which probably would not have been, if that Agreement had not been approved of, as we have declared already, when we treated of relinquishing a Property. But if any such Acts happen, which cannot probably be referred to another Cause, then it may justly be supposed to be ratified, as *Cicero*, for *Balbus*, well observes in the Case of those of *Cadis*.

XVII. Whether a Sponsion or Engagement not disapproved of, does by its being known and passed over in Silence lay an Obligation; this explained with some Distinctions: Where also of *Lutatius's* Treaty.

Note 1. And as to what regards Hostages, Chap. XX. of the same Book, § 58.

¹² It appears evidently, that, on the contrary, "the Consuls declined treating, because they had "no Commission from the People." *LIVY, Lib. IX. Cap. V. Num. 1.*

¹³ *LIVY, Lib. IX. Cap. V. Num. 5.*

¹⁴ See Chap. XXI. of this Book, § 11.

¹⁵ *DIODORUS SICULUS*, in *Excerpt. Peires.* *VALERIUS MAXIMUS*, IV. *Cap. VIII. GROTIUS.*

It is not *DIODORUS* of *Sicily* that speaks of this Action of *Fabius*, in the *Excerpta* of Mr. *DE PETERESC*, but *DION CASSIUS*, to be seen p. 597 of that Collection.

¹⁶ *DION, Excerpt. legat. V. GROTIUS.*

XVII. (1) *Disertè*. That is, when the Sovereign doth not expressly ratify the Treaty made in his Name, without his Order. In Reality, when we speak of *Ratification*, in a Case like this, we

certainly mean an express Ratification; and that the rather, because a short Time is usually fixed for the Ratification; so that, in the Interval, it is impossible to have a Conjecture strong enough drawn from Silence. Besides, by annexing the Condition of Ratification, a Doubt was implied, whether the sovereign Power would think proper to ratify the Treaty. Whereas, when a Treaty has been made purely and simply, the Party seems to have supposed, either that he had a Power to treat, or could easily obtain a Ratification; and the Treaty is confined to no Term.

2 For *Lutatius* had inserted this Clause, that the Agreement should be good and valid, only in Case it was approved of by the Roman People. *LIVY, Lib. XXI. Cap. XIX. Num. 3.* See also *POLYBIUS, Lib. III. Cap. XXI.*

3 See likewise *POLYBIUS, Lib. I. Cap. LXII. LXIII.*

3. The *Romans* pleaded Silence ⁴ against the *Carthaginians*, upon the Agreement made by *Asdrubal*; but because it was expressed in negative Terms, *That the Carthaginians should not pass the River Iberus* ⁵, it could scarcely be allowed, that a bare Silence should be enough here to ratify another's Fact, since no Act properly theirs could follow, till the *Carthaginians*, attempting to pass that River, should be forbid by the *Romans*, and should obey accordingly. For such an Act has the Force of a positive Act; nor must it be reckoned among such as are merely negative. Now if that Agreement made by *Lutatius* had consisted of many Parts, and it had always appeared, that the *Romans* had observed the other Parts, tho' deviating from common Right, this had been Conjecture enough to prove that the Agreement was firmly ratified.

4. It now remained, that we should speak of such Agreements as Officers and Soldiers make, not concerning those Things which belong to the sovereign Power, but such as relate to their own private Affairs, or for which they have a Permission granted them. But we shall have a better Opportunity to treat of these, when we come to the Incidents of War ⁶.

⁴ LIVY, *Lib. XXI. Cap. XIX. Num. 3.*

⁵ That is, should not pass over it, in Order to make War. POLYBIUS, *Lib. III. Cap. XXIX.*

⁶ These are treated of in *Chap. XXII. and XXIII. of the third Book.* Mr. THOMASIVS, in his Dissertation *De Sponsione Romanorum Caudina*, § 47. criticises this Division of our Author as unexact; for, says he, these Agreements made by Generals, or Soldiers, concerning their private Affairs, are therefore *private*, not *publick* Agreements.

But our Author places them among publick ones, because, tho' they most commonly relate only to the private Concerns of the Generals, Officers, or Soldiers, they make them as publick Persons, and on Account of the War, which is a publick Affair. Add to this, that several Questions arise here, which have some Relation to publick Agreements; as will appear from the Chapters already referred to.

CHAP. XVI.

Of Interpretation, or the Way of explaining the Sense of a Promise or Convention.

I. How Promises do outwardly oblige.

I. 1. IF we respect the Promiser only, he is obliged to perform freely, what he was willing to be obliged to. *When you promise*, says Cicero, ¹ *we must consider rather what you mean than what you say.* But because the inward Acts and Motions of the Mind are not in themselves discernible, and there would be no Obligation at all by Promises, if every Man were left to his Liberty, to put what Construction he pleased upon them, therefore some certain Rule must be agreed on, whereby we may know, what our Promises oblige us to; and here natural Reason will tell us, that the Person to whom the Promise is given, has a Power to force him who gave it, to do what the right Interpretation of the Words of his Promise does require. For otherwise no Business could come to a Conclusion, which in moral Things is reckoned impossible. Perhaps it was in this Sense that *Isocrates*, treating of Agreements, in his Prescription against *Callimachus*, said, *Τέτα νόμος κοινῷ πάντες ἄνθρωποι ἀλλήλοισιν ἐχέμεν*, (as the learned *Peter Faber* has judiciously corrected that Passage) *We always make use of this Law, as a Law that is common to all Mankind*, ² not only the *Greeks*, but the *Barbarians* too, as the same Author had a little before expressed it.

I. (1) *De Offic. Lib. I. Cap. XIII.* These Words probably are not CICERO's Words; for neither they, nor some that go before them, are to be found in most Manuscripts, nor in the oldest printed Editions.

² Neither this Passage, nor the Sequel of the

Oration from which it is taken, contains any Thing that gives Reason to think the Orator speaks of the Manner of explaining Agreements. He supposes the Sense of them clear, and on that Foot considers the Obligation of standing to them, as acknowledged by all Nations.

2. And

2. And to this agrees that Clause in the antient Form of Leagues, mentioned by *Livy*, ³ *Without any Trick or Collusion*, ⁴ *just as the Words are now used and understood*. The best Rule of Interpretation is to guess at the Will by the most probable Signs, ⁵ which Signs are of two Sorts, Words and Conjectures; which are sometimes considered separately, sometimes together.

II. If no Conjecture guides us otherwise, the Words are to be understood according to their Propriety, ¹ not the grammatical one, which regards the Etymon and Original of them, but what is vulgar and most in Use, for

II. Words to be understood as commonly taken unless there are good Conjectures to the contrary.

Use is the Judge, the Law, and Rule of Speech.

Rosc.

And therefore it was a foolish pitiful Shift that ² the *Locrians* made Use of, when, having put some Mould into their Shoes, and carrying some Heads of Garlick privately on their Shoulders, they swore they would keep the Articles of the Treaty, as long as they carried those Heads on their Shoulders, and trod on that Earth, and then threw the Earth out of their Shoes, and the Heads of Garlick from their Shoulders, as if by that poor Means they were absolved from their Oaths; which Story is in *Polybius*. We have also several Examples of the like Treachery in *Polyænus* ³, which there is no Occasion to mention, because no Body doubts them. But *Cicero* ⁴ well observed, that this is not the Way to prevent Perjury, but to render it more criminal.

III. But ¹ Terms of Art, which the common People are very little acquainted with, should be understood as explained by them who are most experienced in that Art, as what *Majesty* is, what *Parricide*; which the Professors of Rhetorick refer to the common Place of Definition. ² For, as *Cicero* says in his first of the *Academicks*, *The Terms of Logick are not common Words, but peculiar to that Subject, as indeed are the Terms of almost every Art*. So when in Treaties the Word *Army* is used, it is to be understood of a Multitude of Soldiers, that publicly invade another's Dominions. For Historians generally distinguish between those who plunder a Country privately, like Robbers, and those who do it openly with regular Troops. Wherefore the best Way to judge what Numbers make an Army, is by the Strength of the Enemies. *Cicero* reckons six Legions, with some Auxiliaries, an Army ³. *Polybius* said a compleat Roman Army was 16000 Romans, and 20000 Allies, ⁴ but a less Number may sometimes do it. *Ulpian* calls him a General who commanded, tho' but one Legion, with its Auxiliaries ⁵; that is, as *Vegetius* expounds it, 10000 Foot, and 2000 Horse ⁶. And *Livy* makes a just Army 8000 ⁷

III. Terms of Art are to be explained according to the respective Art they belong to.

³ Lib. I. Cap. XXIV. Num. 7.

⁴ The *Hebrews*, upon the thirtieth of Numbers, observe, that Vows are to be interpreted as they are commonly taken. GROTIUS.

⁵ PUFENDORF has treated on this Subject, *B. V. Chap. XII.* where he only explains and ratifies our Author's Thoughts; and the Notes are of Use in correcting them both.

II. (1) It is very well remarked by PROCOPIUS, *Vandal. I.* where he treats of the Word *Confederates*, that τῶν ἑσέων τὰς προσηγορίας, &c. Time does not mind to keep up the same Denominations that were at first imposed; but even Things themselves are turned and altered just as People please, without any Regard to what they were formerly called. GROTIUS.

2 POLYBIUS, *Lib. XII.* just as the *Bœotians*, who promising to restore a City, did restore it, not standing, but ruined and demolished. THUCYDIDES, *V.* And as Sultan *Mahomet*, who having taken *Eubœa*, cut a Person asunder in the Middle, whose Head he had promised should be safe. GROTIUS.

3 See, for Example, *Lib. II. Cap. VI.* and *Lib. VII. Cap. XXXIV.*

4 *De Offic. Lib. III. Cap. XXXII.*

III. (1) St. AUGUSTIN, in *Rhetoric*. As Artizans and Mathematicians, as well as Philosophers,

give Names to several new Things; we must understand these Names, not so much from the vulgar Acceptation of the Words, as in Regard to the Nature and Circumstance of the Precept. GROTIUS.

2 CICERO, *De Inventione*, *Lib. I. Cap. VIII.* and *Lib. II. Cap. XVII.* where it is termed *Constitutio definitiva*. QUINTILIAN, *Institut. Orat. Lib. VII. Cap. III.* calls it *Finitio*.

3 *Paradox VI.*

4 Our Author certainly had his Eye on that Passage of *B. III. Chap. LXXII.* where the Historian says, that the compleat Roman Army, when the two Consuls were obliged to join their Troops, was composed of 16000 Roman Foot, and 20000 Foot of the Allies. But besides those they had Horse, as appears from what follows. See CASAUBON's Note on *Lib. I. Cap. XVI. p. 21.*

5 *Digest. Lib. III. Tit. II. De his qui notantur Infamia. Leg. II. § 1.* See Mr. NOODT's Commentary on that Title, *p. 114.*

6 *De re militari, Lib. III. Cap. I.*

7 In the first Edition of this Work the Author quotes *Lib. XXV.* the Passage occurs *Cap. VI. Num. 14.* But the Remains of the Army, after the Defeat at *Cannæ*, consisted only of 4000 Men, both Horse and Foot; as the same Historian had said, *Lib. XXII. Cap. LIV. Num. 1.*

The like may be said of a *Fleet*. So ⁸ a *Fort* is a Place so strong as to be able to keep off an Enemy's Army for some Time.

IV. We use Conjectures where Words are ambiguous, or seem contradictory, or because such Conjectures do naturally offer themselves to us.

IV. 1. Conjectures are necessary, when Words and Sentences are, *πολύσημα*, Of several Significations, which the Rhetoricians call, *ἐξ ἀμφιβολίας*, Doubtful, and Ambiguous. But the Logicians are nicer in their Distinctions; for if a Word can have several Significations, they call it, *ἑμμανυμία*, An Equivocation; if a Sentence *ἀμφιβολία*, An Ambiguity.¹ And we must also use Conjectures, when in any Contracts there is, *ἐναντιοφανεία*, A seeming Contradiction. For we must needs have Recourse to Conjectures, when several Parts seem to clash with one another, in Order to reconcile them if we can; but if that cannot be, then the last Clauses which the Contractors agreed on, shall set aside the former. Because it is impossible, that at one and the same Time a Man can intend two Contraries; and it is so much the very Nature of Acts which depend upon the Will, that we may at any Time, by a new Act of the Will, go off from them, either on one Side only, as when a Law or a Testament is revoked by him who made it; or on both Sides, where the Consent of several is required, as in Contracts and Agreements. This the Rhetoricians call, *ἐξ ἀντινομίας*,² A Contrariety of Laws. In which Cases, the manifest Obscurity of the Words justifies our Recourse to Conjectures.

2. And sometimes the Conjectures themselves are so plain, that they carry us to a Sense contrary to the more common Acceptation of the Words. This the Greek Orators call *περὶ ῥῆς καὶ Διανοίας*,³ the Letter and the Design, the Latin ones, *Ex scripto & sententia scripti*, From the Writing, and the Meaning of the Writing. The principal Heads from whence these Conjectures arise, are the Matter, the Effect, and the Circumstances or Connection.

V. From the Subject-Matter.

V. First, ¹ From the Matter, as the Word *Day*, (if a Truce be made for thirty Days) ought not to be understood of natural Days² but of artificial ones, as agreeable to the Subject-Matter. So the Word *Giving*³ is taken for a Forbearance,

⁸ SERVIUS, upon the first *Æneid*, *Arceis*, (Forts) are so called from *arceo*, to repel, because an Enemy is repulsed from thence, that is, hindered and kept back. GROTIUS.

IV. (1) See HERMOGENES, *Partit. Orat.* Sect. IV. and XIV. QUINTILIAN, *Instit. Orat.* Lib. VII. Cap. IX. and the Author of the *Rhetoric*, addressed to *Herennius*, Lib. I. Cap. XII.

² See HERMOGENES, *Partit. Orat.* Sect. XII. QUINTILIAN, *Instit. Orat.* Lib. VII. Cap. VII.

³ See HERMOGENES, *Partit. Orat.* Sect. XI. CICERO, *De Inventione*, Lib. II. Cap. XLII. and the Author of the *Rhetoric*, addressed to *Herennius*, Lib. I. Cap. XI. as also QUINTILIAN, *Instit. Orat.* Lib. VII. Cap. VI.

V. (1) TERTULLIAN, *De pudicitia*. An Expression (Sermo) must be understood according to the Nature of the Subject spoken of. He has the same in his Book *De Resurrectione Carnis*. GROTIUS.

These Words are in Cap. XXXVII. of the Treatise last mentioned, with this Difference, that our Author reads *Sermo*, instead of *Sensus*. But, in the Book *De Pudicitia*, Cap. VIII. &c. TERTULLIAN only applies this Rule to some Passages of Scripture.

² See an Example of a Quibble made in such a Case, in the Chapter of PUFENDORF, which answers to this, § 7.

³ Our Author had here quoted in his Margin, a Law which says, that "If, by Reason of a barren Year, a Proprietor of a Farm abate some Part of his Rent, making Use of the Word *Donation*, it is a Sort of Forbearance, and not properly a Donation." *Digest.* Lib. XIX. Tit. II. *Locati Conducti*, Leg. XV. § 5. The Lawyer's Meaning is, that tho' the Proprietor has abated some Part of his Rent, on the Account here specified; if the following Years prove plentiful, he has still a Right to demand that whole Year's Rent,

as is evident from the Words immediately preceding. The Declaration which he made, of being willing to abate of the Rent, was not according to the Roman Lawyers, an absolute Cession, or a pure and simple Donation, but a Sort of Forbearance; by which he consents not to exact the Whole or Part of the Rent of that bad Year; in Case that the uncertain Income of other Years is not sufficient to indemnify the Farmer for the Loss he has sustained. So that the Word *Give* ought thus to be understood, agreeably to the Nature of the Thing, and the Intention of the Person speaking. See CUYAS, *Observat.* Lib. XX. Cap. IV. and ANTHONY FAURE, *Rational.* Tom. V. p. 560, 561. But, to judge of the Matter by the Law of Nature alone, this Decision is not sufficiently grounded, for forming a general Rule, which admits of no Exception. On the contrary, I should think that if a Proprietor abates his Tenant some Part of his Rent, in Consideration of the Barrenness of the present Year, without adding any Thing insinuating that this is done only conditionally, he is not supposed to have reserved to himself any Right of demanding what he has abated, how great Plenty soever the following Years may produce. It is an Act of Generosity, and ought naturally to be understood thus; because the Reserve in Question makes a great Diminution in the Value of it. The Farmer therefore has no Reason to suppose it implied; it was the Landlord's Business to explain himself. This is more particularly reasonable, when he made Use of the Word *Giving*. If the Roman Lawyers have given a different Decision of the Case, they have proceeded on refined Principles, which they have confounded with the Maxims of natural Equity, and the Rules of a good Interpretation. Besides, the Barrenness here mentioned, ought, in my Opinion, to be understood according to the Distinction which I have made, Chap. XII. § 18. Note 4.

according

according to the Nature of the Affair it is employed in. So the word *Arms* sometimes signifies Instruments of War, sometimes armed Soldiers, and is to be interpreted either in this or that Sense, as the Matter in hand requires. So he who has promised to restore Men, must restore them living, and not dead; not to trick and cavil as the *Platæans* did ⁴. So when People are required to lay down their Iron, (*Ferrum*) they satisfy the Order, if they lay down their Weapons without their Buckles, as *Pericles* with his Shifts and Quirks pretended ⁵. And by a free going out of a City, is meant a safe Conduct, contrary to what *Alexander* did ⁶. And by leaving half the Ships, is meant half of the number of the Ships, whole, not cut in two, as the *Romans* basely dealt with *Antiochus* ⁷. The same Judgment may be formed in other like Cases.

VI. Secondly, from the Effect, where the main Thing to be observed is, whether if the Word taken in its common Sense does produce an Effect contrary to Reason. For where a Word is ambiguous, ¹ we must rather take it in that Sense which is liable to no Absurdity. It was then an idle Cavil of *Brasidas*, ² who having promised to depart out of the Land of the *Bæotians*, said afterwards, that the Place where his Army was encamped, did not belong to the *Bæotians*, as if his Promise had referred to the Possession which the present Fortune of War had given him, and not to the antient Limits of the *Bæotians*; in which Sense the Agreement itself had been vain and of no Effect.

VI. From the Effect.

VII. Lastly, from ¹ the Circumstances and Connexion of the Words with others, ² either spoken in the same Place, or only by the same Person. That which proceeds from the same Will, tho' delivered in some other Place, or upon some other Occasion, has thereby a Connexion, which gives Room for reasonable Conjectures; for in a dubious Case, the Will is presumed to be consonant to itself. Thus in *Homer*, ³ what *Menelaus* and *Paris* concluded on, that *Helena* should be the Conqueror's, must be so explained from the Sequel, that the Conqueror should be he who killed the other ⁴. And *Plutarch* gives the Reason *ἡ δὲ δῖα καὶ τῷ μηδὲν*, &c. *Judges are guided by that which is plain, letting what is obscure and less evident quite alone* ⁵.

VII. From the Circumstances and Connexion.

VIII. Among the Circumstances of Place, the principal and most weighty ¹ is the Reason of the Law, which some confound with the Intent of it; ² whereas it is but one of those Signs, by which we trace out the Intent of the Law. Now of all Conjectures this is the strongest, when it manifestly appears, that the Will was

VIII. To this belongs that Conjecture which is drawn from the Motive, and when and how this Conjecture is of Service.

⁴ See THUCYDIDES, *Lib. II. Cap. V. VI. Edit. Oxon.*

⁵ The Fact is related by FRONTIN; as I find it also quoted in OBRECHT's Notes. *Stratagemat. Lib. IV. Cap. VII. num. 17.*

⁶ See DIODORUS of Sicily, *Lib. XVII. Cap. LXXXIV.* POLYÆNUS, *Stratag. Lib. IV. Cap. III. num. 20.* and PLUTARCH, *Vit. Alex.* all which Authors the learned GRONOVIVS quotes in this Place.

⁷ VALERIUS MAXIMUS ascribes this to *Q. Fabius Labeo*, *Lib. VII. Cap. III. § 4.* But, as it has been already observed, *LIVV, Lib. XXXVIII. Cap. XXXIX.* relates the Thing in a different Manner.

VI. (1) These are the very Terms of a Law, quoted by our Author in his Margin. *Digest. Lib. I. Tit. III. De Legibus, &c. Leg. XIX.* See Mr. Noodt's Commentary on the first Part of the *Digest*, p. 23. col. 1.

² Our Author here mistakes the Person. *Brasidas* was General of the *Lacedæmonians*; nor doth he say this to the *Bæotians*. They are the Words of a Herald at Arms, sent to them by the *Athenians*, who had promised to quit their Territories. See THUCYD. *Lib. IV. Cap. XCVIII. Edit. Oxon.*

VII. (1) Our Author's Expression is, *Conjuncta sunt aut origine aut etiam loco.*

² St. AUSTIN against *Adimantius*, Chap. XIV. excellently well observes, that they pick and cull out

little scraps of Scripture to impose upon the Ignorant, without taking together what goes before, and what follows, which would let them into the Meaning and Design of the Writer. GROTIUS.

³ *Iliad. Lib. III. ver. 92, 93.*

⁴ *Agamemnon* explains this of killing his Man, ver. 281. thus *Priam* understands it, ver. 309.

⁵ *Symposiac. Quæst. Lib. IX. Quæst. XIII. p. 743. Edit. Wech.*

VIII. (1) CICERO in the behalf of *A. Cæcina*: *There is no great Difference in the Reason of the Thing, but only in the Manner of it, whether I am dispossessed by your Agent, he who is the stated and universal Agent of every Body, who is out of Italy and Abroad on the Government's Account, a Sort of Lord and Master, that is, one who manages and acts uncontrollably in Right of some other; or by your Tenant, or Neighbour, or Client, or Freeman, or any other Person whatever, who has done me this Injury and Disservice by your Order, and in your Name.* GROTIUS.

See the Notes of FRANCIS HOTOMAN.

² Our Author seems to have had in View a scholastic Lawyer of *Middlebourg*, whom he frequently quotes in this Chapter. It is NICHOLAS EVERHARD, who expressly says, *The Reason of the Law and the Intention of the Law, seem to be the same*, p. 382. But, immediately after, he says, *The Intention of the Law is gathered from the Reason of the Law.*

moved to such a Thing by some one Reason as its only Cause ; for there may often be many Reasons, ³ and sometimes the Will by Vertue of its Freedom, without any Reason at all determines, ⁴ and this is sufficient to create an Obligation. Thus a Present, or Deed of Gift, made in Prospect, and on the Account of Marriage, ⁵ is revocable and void, if no such Marriage does ensue.

IX. The Distinction of Significations into such as are loose and extensive, and such as are strict and precise.

IX. But we must know that many Words have several Significations, one more strict and precise, the other more loose and extensive, which may happen upon several Accounts, either because the Name of the Genus is peculiarly applied to one of the Species, as in the Words ¹ Cognation and Adoption ; and in Nouns of the Masculine Gender, which are taken for the Common, where the Common is wanting ; or because Art allows a Term a less confined Signification than vulgar Use indulges. As Death in the Civil Law extends to ² Transportation or Banishment, ³ whereas in the common Acceptation it signifies quite another Thing.

X. The Distinction of Promises into favourable, odious and mixt or middle ones.

X. We must also observe, that of Things promised some are favourable, others odious, and others of a mixt or middle Nature ¹. The favourable are those that carry

³ And consequently what agrees with one, may not agree with another ; and, on the contrary, what seems to clash with one may be conformable to another.

⁴ See what I have said above, on Chap. XI. of this Book, § 21. Note 1.

⁵ Digest, Lib. XXXIX. Tit. L. *De Donationibus*, Leg. I. § 1. The Words are these : *But when we say that, if the Bridegroom make a Present to the Bride, with this Intention, that, a Marriage ensuing, it may be taken away, it may be demanded ; we say nothing contrary to what is before advanced : But we grant such a Donation was made between those Persons, as may become void conditionally.* This Instance seems misplaced ; for it relates to tacit Exceptions implied in a Promise, in Consequence of the manifest Intention of the Promiser ; not to the Explanation of the Words of the Promise. Here the Sense is perfectly clear, and no Ambiguity in the Word *Donation*. But the Donation is void, because it was made only on Supposition of a Marriage, which doth not ensue.

IX. (1) See the Chapter of PUFENDORF, which answers to this, § 11. Notes 1, 2. and for the following Example, Note 3.

² *Deportati*. Such as were banished for Life into an Island, so that they forfeited all the Rights of a Citizen, and their Estates were confiscated. In other Respects, they enjoyed their Freedom, and all the Advantages allowed by the Law of Nature and Nations. This was termed *minor* or *media capitis diminutio*. Much more were those who lost their Liberty and were condemned to work in the Mines or Quarries (which was called *Maxima capitis diminutio*) considered as dead. See Digest, Lib. XVII. Tit. II. *Pro socio*, Leg. LXIII. § 10. as also Lib. XXXVII. Tit. IV. *De bonorum possessione contra tabulas*, Leg. I. § 8.

³ See GUICCIARDINI, Lib. XVI. where there is a Discourse about some Agreements of Charles V. relating to the Dutchy of Milan. GROTIUS.

The Passage runs thus. " For the Agreement " and Promise of protecting and defending Francis " *Sforza* in the Dutchy of Milan, did not deprive " the Emperor of a Power of proceeding against " him, as against his Vassal, and declaring the Fief " confiscated for the Crime with which he stood " charged ; viz. having conspired against his Majesty. And Mr. de Bourbon, named to that " Dutchy, in Case of his Death, succeeded him on " his being deposed, because the Laws speak of " natural Death and civil Death, and reckon he dies " of the latter, who is condemned for such a " Crime." P. 341. Edit. Genev. 1645.

X. (1) I do not retract what I have advanced,

either after others, or of my own Head, in the Notes on § 12, &c. of the Chapter in PUFENDORF, which answers to this, concerning the Want of Solidity and Usefulness in the Distinction here made by our Author. In Order to clear him however of some Part of the Criticism there made, I must say, that he doth not seem to have applied his Distinction equally to Promises and to Laws, as the other Writer, who borrowed it of him, doth. He does indeed, in this Chapter, sometimes produce Instances taken from the Laws ; but this is done but seldom ; and not so as to give us Reason to suppose he pretends that all the Rules he lays down may be applied to the Explication of the Laws ; since his main Design is only to shew the Manner of interpreting Agreements and Promises ; in short, all voluntary Engagements. As to the Substance of the Question, I shall at present only add some Reflections, occasioned by what I have lately observed in a new Edition of the Abridgment of PUFENDORF, *De Officio Hominis & Civis*, printed at Glasgow in 1718. under the Direction of Mr. CARMICHAEL, Professor of Philosophy in that University. That able Man, who has added a Volume of Notes and Supplements, larger than that of the Text, says, in his Remarks on B. I. Chap. XVII. That the Distinction of *Favourable* and *Odious*, which I have rejected after others, is founded in the very Nature of Things ; some of them being more desirable than others ; or rather, Things having different Faces, so that according as they are viewed, some of them ought to be considered as Objects of our Desires, and others as Objects of our Aversion. This, says he, is dictated by common Sense ; so that it is in vain to seek for fixed Definitions of the *Favourable* and the *Odious*. It is not less certain, that this Distinction ought to be allowed some Weight in the Explication of a doubtful Speech ; so that, as far as the Use of Terms and other Circumstances permit, it is conjectured that the Intention of the Person speaking was such or such, according as the Question turns on something favourable or odious. To this I answer, *First*, That not one of those, who have rejected the Distinction under Consideration, ever thought of denying that some Things are more desirable than others ; but the Question is, whether that Quality can be of service here for settling sure Rules of Interpretation. Now I am not yet convinced that it can. *Secondly*, One and the same Thing may, indeed, be considered as *Favourable* or *Odious* in that Sense, according to the Disposition of the Person, whose Words are to be explained. Let us, for Example, suppose a *Donation*, which, according to the Principles of the Partisans of the Distinction before us, belongs to the

carry in them an Equality, and respect the common Advantage, ² which the farther it extends, the greater is the Favour of the Promise, as in those that make for Peace, the Favour is greater than in them that make for War; and a defensive War has more Favour allowed than one undertaken upon any other Motive. Others are odious, such as those that lay the Charge and Burden on one Party only, or on one more than another; and those which carry a Penalty along with them, ³ which invalidate some Acts and alter others. And if any be of a mixt Nature, as altering something of what was before agreed on, but yet for the sake of Peace, it shall according to the greatness of the Good, or the manner of the Alteration be reputed sometimes favourable, sometimes odious, yet so that if other Circumstances are equal, the favourable shall have the Preference.

XI. The Difference of Acts due in Equity, and those due in strictness of Law, ¹ if we mean only the Roman Law, does not belong to the Law of Nations; but yet may it in some Sense be properly enough referred hither; as for Instance, if in any Countries there be some Acts which have one certain common Form; that Form, ² as far as it is not changed, may be understood to be in such an Act: But in other Acts which are in themselves indefinite, such as a free Donative, or a free Promise, we should stick rather to the Words.

XII. 1. These Things premised, we must observe these following Rules; in Cases not odious ¹ we must understand the Words in their full Extent, as they are generally taken; and if they are ambiguous, then they must be taken in the largest Sense, as the Masculine is to be taken for the common Gender; and an indefinite Expression shall be understood universally ². Thus these Words, *unde quis dejectus est, from whence a Man has been ejected*, ³ shall be extended to the restoring of him who is by Force and Violence kept out and hindered from coming to his own; for the Expression in its largest Sense will admit of this Construction, as Cicero pleads in his Oration for Cæcina.

2. In a Matter altogether favourable, if he who speaks be versed in the Law, or speaks by the Advice of those who are, the Words shall then be taken in their larger Sense, so as to include that Signification also which is used among the Lawyers, or which the Law has imposed upon them ⁴. But we are not to run to Significations evidently improper, unless otherwise some gross Absurdity would follow,

the Class of *odious* Things. I say, if we consider it as an Act burthenfome to one of the Parties only, it will be a Thing but little desirable, or even such as many are averse to. But if you view it as an Effect of good Will or Friendship, which it must be acknowledged is sometimes the Motive for giving; in this Regard it will be a very desirable Thing: Here will be Room for presuming that the more the Donor bestows, the more he is pleased; so that the Signification of the Terms is to be extended by this latter Reason, and contracted by the former. But how shall this be reconciled? *Thirdly*, It is owned that there often is a Mixture of the favourable and the odious; which renders the Application of the Distinction still more impracticable. *Fourthly*, No Notice is taken of the Reasons I have employed for shewing that in all the Examples produced, the Interpretation may be made without the Assistance of this Distinction; which therefore is entirely useless, even though it had a clear and fixt Foundation. I hope then that it will not be taken amiss, if I leave it here, till it is so established that we may know how to make Use of it.

² *Quæ communem spectant utilitatem*. The Terms are ambiguous, and may signify the common Advantage of the Parties. But it appears from the two Instances, alledged by our Author immediately after, and from some which occur elsewhere. (*B. III. Chap. XX. § 21.*) that he designed to speak of the Advantage of human Society in general.

³ That is, something burthenfome to which a Man has subjected himself, in Case that certain Things are done or not done; as when he engages to pay a Sum of Money, or to demand no Part of

what he otherwise had a Right to, &c.

XI. (1) See PUFENDORF, *B. V. Chap. II. § 8.*

² The Author designs to speak of what he before called, *Jura multis populis seorsim communia. Law common to several Nations separately*. I believe his Meaning here is this. If two Persons of different Nations treat together concerning Things, in Regard to which the Civil Laws of the two Countries are the same; and the Agreement is made either by Letters, or in a Place which has no Proprietor, (for when the Affair is concluded in the Country of either of the contracting Parties; we are to judge of the Affair by the Civil Laws of that Country, tho' they differ from those of the other, as has been said above, *Chap. XI. of this Book. § 5. num. 2, 3.*) In that Case I say, each of the Parties is and ought to be supposed to follow the common Custom of the two Countries; unless they have expressly declared they would treat on a different Foot.

XII. (1) That is what he before called *Things of a mixt or middle Nature*, which have something of the *Favourable* and something of the *Odious*, but so that the former is predominant. It would be very difficult to specify and compare the different Degrees of each; from which single Consideration we may infer how useless this Distinction would be, even supposing it founded in the Nature of Things.

² See *Note 3. on § 13. of the Chapter in PUFENDORF*, which I have already quoted several Times.

³ Consult *Note 5. on the same Place*.

⁴ See an Instance of this in *L. cum virum. C. de Fidei commissis. GROTIUS.*

XI. The Difference between Contracts due in Equity, and such as are due in strictness of Law, rejected, as to the Acts of States and Princes.

XII. Out of these Distinctions some Rules are formed, that may direct us in our Interpretations of the Meaning of Words and Promises.

and the Agreement itself would be to no Purpose. On the other Hand, Words are to be taken even more strictly than the Propriety will bear, if it be necessary in order to avoid an Injustice, or an Absurdity; and without such a Necessity, if there be a manifest Equity, or Advantage in the Restriction, we are to confine ourselves within the narrowest Bounds of their Propriety, unless Circumstances persuade us otherwise.

3. But in an odious Matter, even a figurative Speech is allowed to avoid a Grievance: Therefore in a Donation, and when a Man recedes from his Right, tho' the Words be general, yet are they usually confined to those Things only which were probably then thought of⁵. And in Things of this Kind, that is sometimes understood to be only possessed, which we have Hopes of keeping. Thus a Body of Troops promised by one Party only, is presumed to be raised at the Charge of that Party which desires it.

XIII. *Whether under the Name of Allies future ones are comprehended and how far they are so; where also of the Romans Treaty with Asdrubal, and such Controversies as these.*

XIII. 1. 'Tis a remarkable Question, whether by Allies¹ are meant those only who are so at the making of the League, or they also which come in afterwards; as in that League made between the Romans and Carthaginians after the Sicilian War, where it was agreed, *That the Allies of the one should not be molested by the other*². Hence the Romans inferred, that tho' the Treaty made with Asdrubal of not passing the River Iberus was of no Advantage to them, because the Carthaginians had not ratified it, yet if the Carthaginians should approve and countenance the Fact of Hannibal, in besieging the Saguntines, whom the Romans after that Treaty had taken into their Alliance, they might justly declare War against them, as Violators of their League. Livy sets down the Reasons thus, ³ *The Security of the Saguntines was sufficiently provided for, the Allies on either Side being excepted; for neither was it added that this should regard only those who were then so, nor that none should afterwards be admitted. And since it was lawful for them to admit new Confederates, who could think it reasonable, either that no People should be received upon any Merit whatsoever, or that being received, they should not accordingly be defended; only that none of the Allies of the Carthaginians should be either tempted to revolt, or received into Protection if they voluntarily did so?* Which seems to be taken almost Word for Word out of Polybius. What shall we say to this? The Word Allies, no doubt of it, might with the greatest Justness and Propriety of Speech, admit both that stricter Signification which imported those who were actually so at the Time of the Treaty, and also that larger one which comprehended those too who should hereafter become so. But which of these Interpretations is the better, may easily be discovered from the Rules before-mentioned, according to which we say, that future Allies were not implied, because the Question here is about breaking the League, which is an odious Matter,⁵ and about the depriving the Carthaginians

The Reader may also consult HUBERT GIPHANIUS, concerning the Case mentioned in this Law, and others of the like Nature, in *Cod. Tit. Familiae erciscundae*, p. 194, &c. as likewise Mr. HERTIUS's Dissertation, *De Praelegatis*, § 18. p. 325, 326. Tom. III. *Comment. & Opusc.* &c.

⁵ See Note 7. on § 13. of the Chapter in PUFENDORF, which answers to this.

XIII. (1) See PUFENDORF, B. VIII. Chap. IX. § 10.

² POLYBIUS, *Lib. III. Cap. XXVII.*

³ *Lib. XXI. Cap. XIX. num. 4, 5.*

⁴ Which Clause was added in the Peloponnesian Treaty of Peace made between the Lacedaemonians and the Athenians, THUC. *Lib. V.* GROTIUS.

The Clause here meant by our Author relates to some Towns, given up by the Lacedaemonians to the Athenians, in Vertue of a Treaty, which the latter were obliged to leave in quiet Possession of their Liberty, on the Consideration of a Tribute to be paid as before. It was stipulated that those Towns should be allied to neither of those People; but if the Athenians could engage them to enter voluntarily into their Alliance, they were allowed to do it. Cap. XVIII. *Edit. Oxon.*

⁵ But, says Mr. BUDDIUS, in his *Jurisprud. Histor. Specimen*, § 100. It was on the other Hand, a favourable Matter to the Romans and to the Saguntines, that the Town should be preserved, or that after it was demolished, Precautions might be taken against what the Roman Commonwealth had to fear on that Account. For my Part, without any Regard to the uncertain Distinction of the *Favourable and the Odious*, I say, no Presumption is hastily to be formed of a Sense, tending to justify any Thing, from which the Violation of a Treaty may ensue; but then, as there is no Room for thinking that the Parties desired the Treaty should hold good, whatever might happen, it should be considered whether, by following a certain Sense, some Reason may not be found why they probably would not rather chuse that the League should be broken, or be in danger of being so, than be secured from a Rupture by the Favour of another Sense. But whoever enters into an Alliance, knows, without Doubt, that it may easily become as advantageous, or more advantageous, and sometimes even necessary, to ally himself with others, without any Prejudice to the Engagement, by which he has deprived himself of a Power to do or not do certain Things. So that

nians of their Liberty of bringing those by Force of Arms to Reason, ⁶ who were believed to have injured them, ⁷ a Liberty which by the Law of Nature was their Due, and therefore not rashly to be supposed renounced.

2. And was it not lawful then for the *Romans* to make an Alliance with the *Saguntines*, or to defend them after they had done it? Yes, certainly they might, not by Vertue of the Treaty, but by the Law of Nature, which by that Treaty they had not renounced. So that the *Saguntines* were in Regard to both Parties, as if in that Treaty there had been no Article at all relating to Allies, in which Case the *Carthaginians* had done nothing contrary to the Stipulation, if they employed the Arms, which they looked upon to be highly just, against the *Saguntines*, nor the *Romans* if they defended them. As in *Pyrrhus's* Time, when it was agreed between the *Romans* and the *Carthaginians*, ⁸ that if either of the two People should enter into an Alliance with *Pyrrhus*, it should be with the Reserve, of having the Power and Freedom to send Assistance to that State which *Pyrrhus* should attack. I do not say that the War on both Sides in this Case could be just; ⁹ but I deny that this was any Violation of the League ¹⁰ in so doing. As *Polybius* rightly distinguishes concerning the Succours sent to the *Mamertines*, whether it were just, and whether the League would allow it ¹¹.

3. And this is what the *Corcyreans* tell the *Athenians* in *Thucydides*, ¹² that notwithstanding their League made with the *Lacedemonians* they might send them Succours, because they were allowed by that League to form any new Alliances when they pleased. And the *Athenians* afterwards acted on that Principle, ordering the Commanders of their Ships not to fight against the *Corinthians*, unless they saw them going to invade the *Corcyreans*, or their Territories, and this they did that they might not violate the Treaty. In effect, it is no ways contrary to, or incompatible with a Treaty, for one of the Allies to defend those who are injured by the other, ¹³ so long as the Peace is in other Respects maintained. *Justin* writing of those Times, says the *Athenians* broke that Truce in Favour of their Allies, which they had made in their own Name, as if they would contract less Perjury by helping their Allies, than by engaging in open War themselves ¹⁴. We meet with the very same Thing in one of *Demosthenes's* Orations concerning the Isle of *Halonessus*, where it appears, that by a certain Treaty of Peace between the *Athenians* and *Philip* it was stipulated, that the Cities of *Greece* that were not included in that Treaty, should remain free, and that those who were included in it, might, if they were

that he is supposed to reserve to himself a Liberty of making such Alliances, provided he has not expressly renounced that Liberty; and consequently, there is good Reason to believe that when it is reciprocally stipulated, that neither of the two Nations shall molest the Allies of the other, each of the contracting Parties understands that Clause of its future Allies, as well as of the present. See what I have said on the preceding Chapter, § 13. Note 3.

6 No such Thing. But as the *Carthaginians* might, without breaking through their Engagements, take Satisfaction for the Injury done them by some of the Allies of the *Romans*, and even of those who were so at the Time of the Treaty; the *Romans*, on the other Hand, might without any Violation of the Alliance, undertake the Defence of their new Allies, when they thought them unjustly attacked. So that the whole Question will be whether the War was just or not. The *Carthaginians*, by attacking *Saguntum*, violated the Article of the Treaty under Consideration, supposing that Town had done them no Injury. But if, on the contrary, it had given them just Reason for a War, the Infraction of the Treaty lay on the Side of the *Romans*, who protected it.

7 The *Romans* to the *Samnites* who had a mind to invade the *Sidicines*, and asked the *Romans* leave to do it, made this Answer, There was nothing stipulated that could hinder the *Samnites* from the Privilege of making Peace or War. *Livy*, Lib.

VIII. And so it is a Clause in the Treaty with *Antiochus*, If any of the Roman Allies shall take upon them to attack *Antiochus*, let him be at Liberty to repel the Violence; provided that he does not by the Right of War seize upon any of their Cities, nor contract any Alliance with them. *Livy* XXXVIII. *POLYBIUS* in exc. legat. XXXV. *GROTIUS*.

The *Sidicines* were in no Manner allied to the *Roman* People, as is observed by the *Samnites* in the Close of the preceding Chapter. As to the Clause of the Treaty with *Antiochus*, it relates only to the Right of Self-Defence, which ought to be supposed tacitly excepted in all Agreements.

8 *POLYBIUS*, Lib. III. Cap. XXV.

9 *PROCOPIUS*, *Persic.* II. ἐφρακέ τε ὡς αὐτὸς ἔλπει, &c. He asserted that he had no Ways infringed any Articles that were between the *Persians* and the *Romans*, because neither of them had inserted him in them. *GROTIUS*.

10 It seems to me to have been an Infraction of the Treaty. See what I have said in Notes 5 and 6 on this Paragraph.

11 Lib. III. Cap. XXVI.

12 Lib. I. Cap. XXXV. Edit. Oxon.

13 Thus after the Times mentioned there, the *Corcyreans* decreed, Ἀθηναίοις μὴ, &c. That they would indeed, according to their Agreement, assist the *Athenians* with their Troops, and yet still be Friends to the *Peloponnesians*. *GROTIUS*.

14 Lib. III. Cap. VII. num. 14. 15.

invaded,

invaded, help them if they would. This is an Instance drawn from an Alliance upon equal Terms.

XIV. *How it is to be understood, that one Party shall not make War without the other's leave.*

XIV. We shall here give an Instance in unequal Leagues, as suppose it be stipulated that one of the Confederates shall not make War without the other's Consent; as we took Notice before, that it was agreed on between the *Romans* and *Carthaginians* after the second *Punic* War, and also in the League between the *Romans* and the *Macedonians*, before the Reign of King *Perseus* ¹. Now since under the Terms of making War, all Wars may be comprehended, or only offensive Wars, and not defensive; in this dubious Case we must take the Expression in its stricter Sense, lest our Liberty be too much restrained ².

XV. *About the Words, that Carthage shall be free.*

XV. What the *Romans* promised, ¹ *That Carthage should be free*, is of the same Kind, tho' it could not reasonably be understood of absolute Independence from the Nature of the Act, (for they had long before lost the Right of making War, and several other Privileges) yet some Sort of Liberty it left them, at least so much as not to be obliged by another's Order, to change and translate their City. It was then a false Construction which the *Romans* afterwards put upon that Promise, that by *Carthage* was meant the Citizens, not the City (which tho' improper, may however be granted, because of the Attribute free, which agrees rather to the People than to the Town ².) For in the Words, *To be left free*, ἀσέβονον, *to be governed by their own Laws*, as *Appian* ³ says, was a manifest Sophistry.

XVI. *What Treaties are to be esteemed Real and what Personal; this explained by Distinctions.*

XVI. I. There is another Question which often arises, and may properly be referred to this Chapter, concerning Contracts real and personal ¹. When we act with a free People, no doubt of it the Contract made with them is in its own Nature Real; because the Subject is a Thing permanent and durable ². Nay, tho' that Republican State should be turned into a Monarchy, the Treaty will hold good, because the Body of the People is still the same, tho' the Head be changed, and (as I said before) the Sovereign Power does not cease to be the Power of the People, because it is exercised by the King; we must except this Case, where it appears that the Motive for so doing was peculiar to that Form of Government only, as when free States enter into an Alliance for the Defence of their Liberties.

2. But if a Contract is made with a King, it is not therefore presently to be reputed Personal, for as it is well observed by *Pedius*, and *Ulpian*, ² the Person is often inserted in the Contract, nor that the Contract is Personal, but to shew, by whom that Contract was made. If it be added to the Treaty, that it shall stand for

XIV. (1) *That he (Philip) should not wage War out of the Territories of Macedonia, without the Consent of the Senate.* *Livy*, Lib. XXXIII. Cap. XXX. num. 6. See also Lib. XLII. Cap. XXV.

2 Or rather, because the Right of Self-Defence is a Natural Right, of which no Man can be supposed to divest himself by any Agreement..

XV. (1) *Diodorus Siculus*, in his 27th excerpt. *legat.* relates this Matter thus, νόμους, χώρας, ἱερὰ, τάφους, ἐλευθερίαν, that their Laws, their Country, their Religion, their Sepulchres, and their Liberty, should be continued to them. *Grotius*.

2 When we speak of a City, tho' it is considered as a Body of People, we always suppose the Place and Buildings as the Habitation of that People. This is the natural Sense which immediately offers itself to every one; and from which we therefore ought never to depart, without an express Declaration, or plain Reasons, taken from such Circumstances as necessarily oblige us to confine ourselves to the Idea of a Multitude of Persons united by the Bonds of civil Society, but considered as having no fixt Dwellings. But this cannot be the Case here; whatever Mr. *Cocceius* may say, in his *Autonomia Juris Gentium*, Cap. XV. § 14, 15. All he there advances may be reduced to this: That the *Carthaginians* were become dependent on the *Romans*, having preserved no more than the Liberty of governing themselves by their own Laws; and that a People may remain entirely free, tho' they have no City, as a Family tho' in Possession of no House. But all this doth not destroy our Author's Reasons,

much less the Reflection I have just now made, which is drawn from the ordinary Use of Terms. For how dependent soever the *Carthaginians* might be, the Question here is, whether, without any Prejudice to Honesty, the Treaty can be so explained as to understand by *Carthage*, the *Carthaginians*, independently of the City, in which they were settled. Now, can it be said that, if at the Time of the Treaty, it had been asked what was meant by the Word *Carthage*, the two Parties would have agreed on that Sense of it? A Man must be very obstinate, who pretends to justify a Perfidy so manifest, as that of the *Romans* in the Case before us. And yet the Author, who approves of it, makes no Difficulty of representing the contrary Opinion of *Grotius* and *Pufendorf*, as the Result of great Ignorance of the Law of Nations; tho' in this, as well as other Places, he himself offers only frivolous Reasons, and most commonly censures our Author without understanding him.

3 *De Bell. Punic.* p. 79. Edit. *Amst.* (48. H. Steph.)

XVI. (1) On this Question, see *Pufendorf*, Lib. VIII. Cap. IX. § 6, &c.

2 See Chap. IX. of this Book, § 3.

3 *Digest.* Lib. II. Tit. XIV. *De Pactis*, Leg. VII. § 8. The *Roman* Lawyers require that, in Cases of Doubt, a Presumption be made that the Agreement is real, and not barely personal. See Mr. *Noodt's* excellent Treatise, *De Pactis & Transact.* Cap. IV. and Mr. *Schulting*, on the Title *De Pactis*, § 15.

ever, or that it is made for the good of the Kingdom, or with him and his Successors, for this Clause *ἕως τοῖς ἐκγόνοις*, and to his Posterity, is what is usually expressed, as *Libanius* says in his Defence of *Demosthenes*, or if it be, for such a limited Time, it will from hence fully appear, that the Treaty is real. Such does ⁴ the Treaty between the *Romans* and *Philip* King of *Macedon* seem to have been, which when *Perseus* his Son denied to be obligatory on him, occasioned a War ⁵. There are also other Words which may prove a Treaty to be real, and sometimes the Matter itself will afford a Conjecture not altogether improbable.

3. But when the Conjectures are equal on both Sides, all that we have to do, is to conclude, that those Treaties which are favourable, are real; and that the odious are personal ⁶. Treaties made for the Preservation of Peace and Commerce are favourable, nor are those for War always odious, as some think, but the *ἐπιμαχίαι*, that is, such as are entered into for mutual Defence, come nearer the favourable; *ἑσπυμαχίαι*, or offensive, nearer the odious and burthenfome. Besides in a Treaty that allows any War, it is presumed that a Regard was had to the Prudence and Probity of him with whom it was made, as being a Person not thought capable of engaging either in an unjust or a rash War.

4. And whereas it is said, that Societies are dissolved by Death, ⁷ I do not say any Thing of that here, for this belongs to private Societies, and depends upon the Civil Law. And therefore whether ⁸ the *Fidenates*, ⁹ *Latins*, *Hetrurians*, and *Sabines* did right or wrong, in going off from their Treaty, upon the Death of *Romulus*, *Tullus*, *Ancus*, *Priscus* and *Servius*, cannot properly be determined by us, because the Words of the Treaty itself are not extant. Nor much different is that Controversy in *Justin*, whether the Cities which had been tributary to the *Medes*, ¹⁰ did upon the change of the Empire change their Condition; for we must consider whether in that Convention they had particularly made choice of the Protection of the *Medes*. But *Bodine's* Argument is by no Means to be allowed, that the Treaties of Princes do not oblige their Successors, because the Force of an Oath extends no farther than the Person of him who takes it. ¹¹ For the Oath may bind only the Person, and yet the Promise that is along with it, may bind the Heir.

5. Nor is it true, what he takes for granted, that all Treaties are grounded upon Oaths, for generally speaking there is Power enough in the very Promise to bind, tho' for the greater Reverence and Solemnity, those Promises are confirmed by Oaths. When *P. Valerius* was Consul, the People of *Rome* had sworn to meet at the Summons and Order of the Consul; he dying, *L. Quinctius Cincinnatus* succeeded him;

⁴ *LIVY*, *Lib.* XLII. 'Tis presumed that a Regard is had to the Prudence and Honesty of the Person one is treating with. See *PARUTA*, *Lib.* V. and VII. *GROTIUS*.

⁵ *LIVY*, *Lib.* XLII. *Cap.* XXV. *num.* 10.

⁶ As this Distinction is not very certain, it is better to say, with Mr. *THOMAS IUS*, (*Jurispud. Divin.* *Lib.* III. *Cap.* VIII. § 27.) That, in Case of a Doubt, all publick Treaties made with a King are to be considered as *real*; because, in Case of a Doubt, a King is supposed to act as Head of the State, and for the good of the State.

⁷ *Digest.* *Lib.* XVII. *Tit.* II. *Pro Socio*, *Leg.* LII. § 9.

⁸ See *DIONYSIUS HALICARNASSENSIS*, *Lib.* III. *GROTIUS*.

⁹ The same Author in his third Book mentions *The Apulians* and the *Latins*; and in his fourth, *Turnus Herdonius*, and the *Latins*. *AMMIANUS*, *Lib.* XXVI. *Sapor* King of *Persia* seized upon *Armenia*, endeavouring, but unjustly, by Force of Arms, to bring it again under his Jurisdiction; pretending, that after the Decease of *Jovian*, who was the Person he had concluded the League and Peace with, nothing ought to hinder him from recovering what he could prove belonged to his Ancestors. See such another Instance of *Justinian's* Treaty with the *Saracens* in *MENANDER PROTECTOR*. Add to this what the *Switzers* plead after the Death of *Henry III.* in

THUANUS, *Lib.* CLVII. *Anno* MDLXXXIX. See also a remarkable Passage in *CAMDEN* at the Year MDLXXII. where he speaks of the antient League of the *French* with the *Scots*. *GROTIUS*.

¹⁰ *Lib.* I. *Cap.* VII. *num.* 2. Where the Historian tells us those Cities thought their State or Condition changed and therefore revolted from *Cyrus*. *BOECLER*, in a Corollary, at the End of his Dissertation intituled *Miles Captivus*, *Tom.* I. *Dissert.* p. 990. conjectures that by the Tributary Cities, here mentioned, we are to understand conquered Cities, reduced under the Dominion of the Conqueror; which is sometimes the Meaning of that Term; and thus the Question is easily decided. But on that Foot one would think there would have been no Pretext for withdrawing themselves from *Cyrus's* Government; at least the Pretext would have been very trifling. Besides, supposing the Word *Tributariae*, when alone, sometimes implies a true and perfect Submission; of which however no Example is produced; it is more natural in this Place to take it in its ordinary Signification, and according to the Practice of the antient Eastern Kings, who frequently were satisfied with demanding some Tribute of the conquered Cities and Nations, and left them in Possession of the other Branches of their Liberty.

¹¹ See *PUFENDORF*, *B.* IV. *Chap.* II. § 17. with the Notes.

and then some of the *Tribunes* took upon them to quibble, as if the People were no longer obliged by that Oath. Whereupon *Livy* gives his Judgment in the following Terms, *There was then none of that general Disrespect for the Gods which possesses the present Age : Nor did every one, as now-a-Days they do, make their Oaths and their Laws stoop to the Construction that best served their Turns ; but rather suited and accommodated their Manners to them*¹².

XVII. *League with a King remains good, tho' he be expelled his Kingdom.*

XVII. And it is certain too, that a League made with a King is valid, tho' that King or his Successors be expelled the Kingdom by his Subjects ; for tho' he has lost his Possession, the Right to the Crown still remains in him, according to that of *Lucan*, concerning the Roman Senate :

— *Non unquam perdidit Ordo
Mutato sua jura loco* —

*Nor has the Order ever lost its Rights
Upon any Change of Place.*

Pharsal. Lib. 5. Ver. 29, 30.

XVIII. *But it does not reach the Usurper of the Crown.*

XVIII. But on the other Hand, if with the Consent of the true King we make War on an Usurper, or any other Person who oppresses a free People, before that People has sufficiently declared their Approbation, we do nothing against any Article of Alliance ; because tho' they have got Possession, yet have they no Right. And this is what *T. Quintius* urged to *Nabis* : *We never entered into any Friendship or Confederacy with you, but what Engagements we have are with Pelops the just and lawful King of Sparta*². For in Treaties these Qualities of King, Successor, and such like, properly imply a Right, whereas the Term Usurper always imports an odious Cause.

XIX. *To whom the Promise is due, when made to him who shall first do such or such a Thing, if it be done by many at once.*

XIX. 'Twas a Question formerly of *Chrysippus's*, *Whether a Reward promised to him who first gets to the Goal, and two get there together, is due to both, or to neither*¹. And here indeed² the Word first is ambiguous, for it may either signify him who out-runs all the rest, or him whom none out-runs. But because the Rewards of Virtue and Excellence are Things of a favourable Nature, ³ the juster Opinion

¹² *Lib. III. Cap. XX. num. 5.*

XVIII. (1) So *Valens* would not allow of the Gothick King's Excuse, who said that he had sent some Auxiliary Troops to *Procopius* who had usurped the imperial Dignity. *AMMIANUS* in his twenty seventh Book calls it a very trifling Excuse. You have the same Story in the Greek Writers, but under the Name of *Scythians*, for so they called the *Goths*. So that *Justinian* denied that he should break the Articles of Alliance made with *Gizerick*, if he took up Arms against *Gelimer*, who had deprived *Ilderich* the rightful King, both of his Crown and his Liberty. See Cardinal *TUSCHUS*, pp. upon the Word *Tyrannus*. Concl. CCCVI. Num. 6. *CACHERANUS*, *Decif. LXXIX. Num. 35. GROTIUS*.

The Excuse, made by the King of the *Goths*, was not grounded on their Obligation of sending Succour to the Possessor of the Empire, whether lawfully so or not, by Vertue of their Alliances : He produced a Letter from *Procopius*, to whom he was made to believe the Empire belonged, by Vertue of his Relation to *Constantine*. *AMM. MARCELLIN*, *Lib. XXVII. Cap. V. Justinian's Declaration*, in Regard to *Gelimer*, King of the *Vandals*, may be found in a second Letter which he wrote to that Prince, as produced by *Procopius*, *De Bell. Vandalic. Lib. I. Cap. IX.*

² *LIVY*, *Lib. XXXIV. Cap. XXXII. num. I.* *BOECLER*, in his Dissertation *De Actis Civitatis*, Tom. I. p. 870, 871. charges our Author with Want of Exactness in this Place, as this was only a Pretext made Use of by the *Romans*, who had treated with *Nabis*, as a lawful King. But our Author says nothing tending to approve of the Application of the Maxim to the present Case. It is sufficient

for his Purpose that the Person, whose Words he produces, supposes this Maxim as true in itself.

XIX. (1) See the Chapter in *PUFENDORF*, which answers to this, § 14.

² See *ALBERICK DE ROSATO*, *De Statutis qu.* 106, 107. *GROTIUS*.

³ Properly speaking, the Business is not here to explain the Word *First*, or enquire whether it may be applied to one or more. In Affairs of this Sort, it is commonly supposed that only one Person out-runs the rest ; it being very uncommon for several to reach the Goal at the same Time. So that it may be said in general, that when a Reward is proposed for the Man, who shall do such or such a Thing first, only one Person is thought of who shall be before the rest : The Competition of two or more, who may be equally first in Regard to the rest, is out of the Question. So that the whole Business is to know what would probably have been the Will of the Person, who gives the Prize, had he thought of this Case. In Order to this, it is to be considered whether the Thing in Question can be repeated or not, at the same Time. If it can, as in the Case of running to a certain Place, even tho' no mention had been made of several Races one after another, it is highly reasonable to believe that the Person, who proposed the Prize for the Race ; designed that, if two reached the Place appointed at the same Time, they should start again. This is an almost certain Method for satisfying his Intention : as it is a hundred to one that this Case will not happen twice together. Rewards being most honourable, when fewer deserve them, it is to be presumed that, when a Man, considering a Thing as difficult, designed to reward the Person, who should

Opinion is, that they should share the Prize betwixt them. ⁴ *Scipio*, *Cæsar* ⁵ and *Julian* acted more generously, in giving the entire Reward to each of those who had at one and the same Time scaled the Walls; and let this suffice for the Interpretation to be given to the proper or improper Signification of Words.

XX. 1. There is also another Way of interpreting by Conjectures, founded upon something else besides the Signification of the Words in which the Promise is expressed; and this is done two Ways, either by enlarging or restraining them. But we have oftner less Reason to enlarge the Sense than to restrain it. For as in all Things, the want of any one necessary Cause, is enough to hinder the Effect, whereas all must concur to produce it; so in an Obligation, that Conjecture that enlarges the Obligation is not rashly to be admitted, but with a great deal more Caution than in the Case above-mentioned, where Words are allowed a large Signification, tho' that Signification is not so much in Use; for here we look for a Conjecture, which the Words of the Promise do not directly imply, and therefore this Conjecture ought to be extremely certain, to form an Obligation from it. Nor will a Parity of Reason do here, but it must be exactly the same; nor is this always enough for such an Enlargement, because, as I said before, Reason does often so incline, as that the Will however is of itself a sufficient Cause without that Reason.

XX. A Conjecture freely offering itself may either enlarge the Sense; and when it may do so:

2. To justify such an Enlargement, we ought to be sure that the Reason under which that Case, which we would comprehend, falls, was the only and powerful Motive that inclined the Promiser, and that the Reason was in its general Sense considered by him; because otherwise the Promise would be either unjust or useless. This Part is commonly treated of by the *Rhetoricians*, in their common Place, *περὶ τῆς ῥῆσις καὶ διανοίας*, about the Letter, and the Design, of which they give us one Instance, and that is, *When we always express the same Intention*. And hither also that other Head, *κατὰ συλλογισμὸν*, about Reasoning, may be referred, where we gather, as *Quintilian* says, *What is not written, from what is written*. And what the Lawyers teach us ¹ of Things done fraudulently.

3. Take

should first perform it, he intended that the Recompence proposed, should, if possible, fall to one Person. And that the rather, as when two Persons reach the Goal at the same Time, this Action renders their Skill or Agility somewhat doubtful, and gives Reason to suspect one of them has not exerted himself to the utmost of his Power. But, when the Thing, for which the Recompence is to be bestowed, cannot be repeated at the same Time, as in the Case of scaling the Walls of a Town besieged, it should be considered whether the Prize can conveniently be multiplied, or not. If it can be done without laying too heavy a Burthen on the Person who promised it, as when the Prize is a Crown of small Value, or other Things of the like Nature, which are looked on as bare Marks of Honour; there is very good Reason to presume that the Promiser would easily have consented to that Multiplication. But if the Prize cannot be thus conveniently multiplied, the Enquiry should be, whether it is such as may be divided or possessed jointly, or whether it is indivisible. In the former Case, it is presumed that the Intention was that the Competitors should share the Prize equally, as they have equally deserved it. In the latter it was certainly designed that they should then take the only Method left on such Occasions; which is to cast Lots for the Prize, or leave the whole to one of the Parties, on Consideration of some Satisfaction to be made to his Competitor. So that without having Recourse to the Distinction of *favourable* and *odious*, the Case before us, and others of the same Sort, may be decided by reasonable Presumptions of the Donor's Intention. PUFENDORF, in the Chapter which answers to this, has handled the Question somewhat differently from our Author; but not with all the Distinctions, and on the Foundation I have here employed.

4. " *Scipio*, having praised *Lelius*, called him to the Assembly and declared, he was very well satisfied that *Q. Trebellius*, and *Sext. Digilius* had scaled the Walls together; and that he presented them both with *Mural Crowns*, in Consideration of their Bravery." *LIVY*, *Lib. XXVI. Cap. XLVIII. Num. 13.* This Fact is also related by *ZONARAS*, who took it from *DION. CASSIUS*, *Excerpt. Periegr. p. 602.* where the learned *DE VALOIS* has added what was wanting in the Fragments of the Original Author, from the more perfect Text of the Copist.

5 I know not whence this Fact of *Cæsar* is taken. As to *JULIAN*, I believe our Author had his Eye on a Passage of *AMMIAN MARCELLINUS*, which doth not precisely speak of the same Sort of Crowns, nor doth it take notice of any Dispute concerning the disposal of the Prize. The Historian tells us that, after a Battle with the *Persians* near the Town of *Ctesiphon*, the Emperor, calling several by their Names, whom he observed to signalize themselves in that Action, gave them Naval, Civic, and Castrense Crowns, *Lib. XXIV. Cap. VI. p. 443. Edit. Vales. Gron.* Our Author was induced to suppose the Case here the same as that which happened under *Scipio*, because the *Corona Navalis*, and the *Corona Castrensis* were usually given, the former to him, who first boarded the Enemy; the latter to him who first entered the Enemy's Camp; as may be seen in *JUSTUS LIPSIUS*, *De Militiâ Rom. Lib. V. Dialog. LVII.* and *CHARLES PASCAL*, *De Coronis, Lib. VII. Cap. III. &c.*

XX. (1) *SENECA* in his *excerpt. controuv. VI. 3.* has very well observed, that a Circumscription always jobs a Piece of Reguery upon you under the Appearance of Law; what you can discover is lawful; what lies concealed is designed to trick you. *QUINTILIAN*, *Controuv. CCCXLIII.* For we never run

3. Take for an Example ² an Agreement that such a Place should not be walled round, an Agreement made at a Time, when no other Fortifications were in use; that a Place ought no more to be inclosed by Ramparts or Piles of Earth, if it appear that the only Reason, why Walls were prohibited, was to prevent its being fortified. Another Instance that is often brought, is of a Man, who supposing his Wife to be with Child at his Decease, disposes of his Estate to such a one, *in case that posthumous Child should die*, which Clause may be extended also to signify, *or in case no such Child should be born*, for it is plain, that the Reason why he did not absolutely make him his Heir, was because he thought he might have a Child of his own to inherit; and this is what we meet with not only among the Lawyers, but also ³ in Cicero, and Valerius Maximus ⁴.

4. Cicero in his Oration for Cæcina argues this Matter thus. *What? Is this sufficiently provided for by the Letter? No. Upon what then do we proceed? The Design; which if it could be apprehended without Words, we should not use any Words, but because that cannot be, Words were therefore found out, not to hinder the Effect of the Will, but to declare the Intention.* And a little after in the same Oration he says, that ⁵ *Where there is manifestly one and the same Reason of Equity, that is, where the Case agrees with the Reason which was the only Motive of him who speaks, the same Rule ought to be established.* So likewise the Interdict, *From whence you shall have ejected me by Force of Arms*, takes Place also against all manner of Violence, which affects our Life and Person, *because such an Attempt*, says he, *is generally made by Force of Arms; but if by any other Means I am exposed to the same Danger, the Law allows me the same Right.* Quintilian the Father brings this Example in one of his Declamations, *Murder* ⁶ *seems to imply the shedding of Blood by the Sword, but if a Man be killed by any other Means, we yet appeal to the same Law; for if a Man fall among Thieves, or be thrown into the Water; or tumbled headlong from a high Precipice, his Death shall be revenged by the same Law, as it would have been had he been killed with a Sword.* The same Argument is used by *Isæus* ⁷ in the Affair of Pyrrhus's Estate, where because by the Law of Athens a Will could not be made without the Daughter's Consent, he infers, that no more could an Adoption without her Consent.

XXI. And

to this Law, (Circumscription he means) but when a just Right is shuffled out by some Knavery or other: You have a Precedent in PLINY's Natural History, Lib. XVIII. *Because by the Law of Licinius Stolo only 500 Acres were allowed to any Man; and he himself was condemned upon his own Law, when he thought by the little shift of putting in his Son for a Share, to get more into his Hands.* There is the same Story in VALERIUS MAXIMUS, VIII. Chap. VI. 3. See another Instance in TACITUS, Annal. XV. of some pretended Adoptions. Another you have in EMANUEL COMNENUS's Novel, in the *Jus Græco-Romanum*. GROTIUS.

² *Fuscus Arellius* in SENECA's tenth Contro. Lib. XI. *For it was, no doubt, the Intention of their Oaths, that they should not whilst living be separated, when they so particularly took care, that even Death should not divide them.* GROTIUS.

³ *De inventione* II. GROTIUS.

⁴ I am satisfied our Author here confounds the Case under Consideration with one directly contrary to it, related by CICERO and VALERIUS MAXIMUS, which has been mentioned, Chap. XI. of this Book, § 6. Num. 2. See also QUINTILIAN, *Instit. Orat.* Lib. VII. Cap. VI. I know no Place in VALERIUS MAXIMUS, where that Writer speaks of the Will made in Favour of *Curius*. Nor doth any Thing of this Kind occur, where it ought to be looked for, *De ratis Testamentis & insperatis*, Lib. VII. Cap. VIII. but in the preceding Chapter, Num. 1. we meet with a Will made by that Father, who believing his Son killed in the War, had appointed other Heirs.

⁵ So PHILO in his Treatise *De Specialibus legi-*

bus, that Adultery is committed with a Woman, who is only betrothed to some Body else, and for this Reason; *αἱ δὲ ὁμολογίαι τῆς γάμου ἰσοδυναμοῦσι*, *because a Contract is as binding as a Marriage.* So in the *Mosaick Law* under the Name of an Ox every tame Animal is meant; and under the Title of a Pit any Hole or Ditch, *Exod. xxi. 28. 35.* CHASSANÆUS, *Catalog. Glor. Mundi*, Part V. Confid. XLIX. GROTIUS.

Criminal Conversation with a Woman promised to another, is considered and punished as Adultery, by the Law of *Moses*; *Deut. xxii. 23, 24.* The Roman Laws have followed the same Notion. The Emperors SEVERUS and ANTONINUS answered that the same is to be done in Case of the Violation of a Woman betrothed, as in Adultery, *because neither any Matrimony whatever, nor the Hope of Matrimony is to be violated.* Digest. Lib. XLVIII. Tit. V. *Ad Leg. Jul. de Adulter. coercend.* Leg. XIII. § 3. See *Collatio Mosaicarum & Romanarum Legum*, Tit. IV. § 6. with Mr. DE PITHOU's Note.

⁶ In this Quotation, from *Declam. CCCL.* our Author reads, *Si inciderit in Latrones; if a Man fall among Thieves*, Mr. BARBEYRAC quotes this Passage according to OBRECHT's Edition, which reads *Latrinas*. He prefers this reading, because *falling among Thieves*, does not express a Manner of taking a Man's Life away different from the Idea conveyed by the Word *Cædes*.

⁷ Our Author misapplies this Passage for Want of understanding it right. But we are not to be surprized that the *Latin* Translator, well known to be none of the most exact, has not expressed the Meaning of it better. The Case is this. The Laws

XXI. And from hence ¹ that eminent Question in *Gellius* may easily be answered, about an Order or Commission ; whether it may be executed, tho' not by the very same Method, yet by some other equally profitable, or perhaps more advantageous than that which was prescribed : which may be done indeed if it be certain, that what was so prescribed was not prescribed under any precise Form, ² but with some more general View that may be obtained as well some other Way ; as is answered by *Scævola*, when he said, that he who has an Order to be Bail and Security for another Person, may give an Order to the Creditor to pay that Person the Money ³. But if that does not sufficiently appear, we had much better observe what *Gellius* alleges there, ⁴ that we quite set aside the Authority of him, who gives us our Commission, if instead of doing what we were ordered, punctually and with due Regularity we intermix our own Prudence, a Prudence that he never desired of us.

XXI. Where also of executing an Order in some other Manner than what was prescribed :

XXII. The Interpretation that restrains the import of the Words promising, is taken either from an Original Defect in the Will of the Speaker, or from some Accident falling out inconsistent with his Design ¹. An Original Defect in the Will is discovered, either from the Absurdity which would otherwise evidently follow, or upon failure of the Reason ² which alone did fully and efficaciously move the Will, or from a Defect of the Matter. The *first* is grounded upon this, that no Man is to be supposed to intend Things that are absurd.

XXII. Or it restrains the Sense, and that either from some Original Defect in the Will, which is discovered by the Absurdity of it.

XXIII. The *second* is grounded on this, that what is contained in the Promise, where such a particular Reason is added or plainly implied, is not considered simply in itself, but as it falls under that Reason.

XXIII. Or from the ceasing of the Motive :

XXIV. The *third* on this, that the Matter in hand is always presumed to be in the Mind and Thoughts of the Speaker, tho' his Words seem to admit a larger Sense.

XXIV. Or from a Defect in the Matter.

Laws of *Athens* allowed a Man to dispose of his Estate by Will, as he pleased, if he left no legitimate Male Issue ; but with this Restriction, that if he left legitimate Daughters, he could give his Estate only to those who should marry them. Therefore says the Orator, a Father can neither adopt a Man nor leave him his Estate, without giving him his Daughter at the same Time ; and consequently if *Pyrrhus*, having, as is pretended, a legitimate Daughter, had adopted *Endius*, without marrying his Daughter to him at the same Time, such Adoption would be null, according to the Laws. So that the Argument is not founded on a Necessity of stretching the Law beyond the Sense of the Terms ; but on what is clearly implied by the very Sense of those Terms. For they suppose the legitimate Daughters to be natural Heiresses, on Default of Male Issue ; except the Father had named a Man for his Heir on Condition he should marry one of his Daughters. Whence it plainly follows, that the Father could adopt no one, without at the same Time giving him one of his Daughters ; since the Adoption of a Son implied a Right of Inheritance, exclusive of all other Persons. In this Passage the Words *ἐπὶ ταύταις* are rendered in *illarum arbitrio*, at their (the Daughters) Disposal. And *ἀνευ τῶν θυγατέρων*, *Inscitis filiabus, non consultis, without the Knowledge and Consent of his Daughters*. This false Sense is followed by our Author. But what immediately follows is sufficient for discovering the Mistake. For the Orator adds, *Εἰ δὲ τὴν θυγατέρα ἐδίδῃς*, but if he has given his Daughter in Marriage, i. e. with his Estate. The late Mr. *PERIZONIUS*, who, as I have observed since I wrote this Note, occasionally quotes the Passages of *Isæus*, in his *Dissertationum Trias*, Dissert. II. p. 129. has given the true Sense of it in a Manner worthy of his Erudition, but without correcting the Translator's Mistake, to whom he elsewhere does Justice in general in that Volume, *Dissert. I. p. 60, &c.*

XXI. (1) See *PUFENDORF*, B. V. Chap. IV. § 5.

² *QUINTILIAN*, *Controv. CLVII. Servants do*

some Things more freely upon a Principle of Honesty and Goodness ; and even the Slaves we buy think it sometimes an Argument of their Fidelity, not to obey us. You have an Instance of this Kind in *excerpt. legat.* in that Part, which treats how Embassies are to be managed ; and in what *John*, one of the *Justinian* Captains, did contrary to *Belisarius's* Orders, *Gothic. II. and IV. GROTIUS.*

The Passage of *PROCOPIUS* here referred to by our Author, is in the *Miscellaneous History*, Chap. XXII. which speaks indeed of the same *John* ; but he exceeds the Orders of *Justinian*, not those of *Belisarius*.

³ *Digest. Lib. XVII. Tit. I. Mandati vel contra, Leg. LXII. § 1.* See, on this Law *ANTHONY FAURE's Rationalia*, Tom. V. p. 133.

⁴ *Lib. I. Cap. XIII.*

XXII. (1) This Distinction has been criticised ; as I have observed on the Chapter of *PUFENDORF*, which answers to this, § 19. Note 2. But I am now of Opinion that the Author may be justified, by shewing his true Meaning, which I think is this. There are some Cases, which there is good Reason to believe the Person who speaks either did, or at least might foresee them ; and yet that he never intended they should be included in the general Terms of the Promise ; tho' he has not expressly excepted them, because he supposed such an Exception clear in itself. This is what he calls an *original Defect of the Will*. There are other Cases, which could not be foreseen, but are such as if they could have come into the Mind of him, who speaks, he would have excepted them. This is the *Accident inconsistent with his Design*.

² We have an Instance of this in a *Roman Law*, which forbids *Patrons*, or Masters to make their freed Men swear, they will not marry or beget Children. But, it is added, *This is to be understood only of such as are capable of having Children ; so that if a Master shall require such an Oath of his freed Man, who is an Eunuch ; he shall not be punished by this Law. Digest. XXXVII. Tit. XIV. Leg. VI. § 2. GROTIUS.*

This Way of Interpretation too is placed by the *Rhetoricians*, under the Head, *περὶ ἐντὶς καὶ διανοίας*, concerning the Letter and the Design, and is intitled, *when the same Meaning is not always expressed*¹.

XXV. An Observation on the Conjectures last mentioned.

XXV. 1. But we must observe in Relation to the Reason or Motive of the Will, that under it may be comprehended some Things not actually in Being, but only in a Moral Possibility of existing, and when this happens, no Restriction is to be allowed: So should it be stipulated, that no Army or Fleet should be brought to such a Place, none ought to be brought thither, tho' there be no Intention thereby to do any Harm, because in that Agreement, not so much any certain Damage, as all Dangers and Inconveniences whatsoever are respected.

2. 'Tis also a very usual Inquiry, whether Promises are to be understood with this tacit Condition, *If Things continue in the same Posture, they are now in*; that is what is not to be granted, unless it plainly appears, that that present Posture of Things was included in that one only Reason we are talking of; and we frequently read in Histories of Embassadors, who understanding that there was so great a Turn in Affairs, as would render the whole Matter and Reason of their Embassy void, have returned Home, without opening their Commission at all.

XXVI. Or when some Accident happens inconsistent with the Speaker's Design; as when the Thing is unlawful:

XXVI. The Masters of the *Art of Speaking*, when an Accident is inconsistent with the Design and Intention, refer this also to the same Head, *περὶ ἐντὶς καὶ διανοίας*; and this Inconsistency is of two Sorts, for the Will is discovered, either by natural Reason, or from some Sign of the Will. *Aristotle*, who has very accurately handled this Part, thinks that, in order to make a Discovery from natural Reason, the Understanding ought to be endued with good Sense, or the Knowledge of what is right and just (a Virtue peculiar to it) and the Will with Equity, which he very wisely defines, *A Correction of that*¹ *wherein the Law, by its being too general, is defective*; which may also be applied to Testaments and Contracts in their respective Way. For since it is impossible to foresee and specify every Accident, there is a Necessity for reserving the Liberty of exempting such Cases, as the Speaker would, were he present, himself exempt; but this must not be done without Abundance of Circumspection; for that would be to make one's self Sovereign Arbitrator of another Man's Act, and therefore is not to be allowed, but when there are sufficient and convincing Tokens for it.

2. One infallible Token that there ought to be such an Exemption is, when to adhere precisely to the Letter would be unlawful, that is, would be repugnant to the Laws of GOD or Nature. For such Things having no Power to oblige, are necessarily to be excepted: *There are some Things* (says *Quintilian the Father*)² *that are naturally exempted, tho' they are no ways comprised in the Sense of the Law*. Thus he who has promised to restore a Sword, that was left him, ought not, if the Person be mad, to restore it, lest by so doing he endanger himself or some other Innocent Persons; nor are we to deliver a Thing to him, who deposited it with us, if the right Owner demand it. *I approve* (says *Tryphoninus*) *of that Justice that gives to every Man his own, but so as not to take from him, who has a better Claim to it*³. The Reason is, because (as we observed elsewhere) such is the Force of Property, that it is a manifest Injustice, not to return a Thing to the right Owner, whenever we know who that is.

XXVII. Or too Burthen-some, all Circumstances considered.

XXVII. 1. Another Token of Restriction shall be this; when to stick close to the Letter, is not absolutely, and of itself unlawful; but when, upon considering the Thing with Candour and Impartiality, it appears too grievous and burthen-some. And this, either in Respect of the Condition of human Nature absolutely considered, or in Regard to the Person and Thing in Question, compared with the very End and Design of the Engagement. Thus a Man who lends a Thing for some certain Time may demand it before that Time, if he happens to be very much in Want of it himself, because by the Nature of such a beneficial Act no

XXIV. (1) See CICERO, *De Inventione*, Lib. II. Cap. XLII. and MARIUS VICTORINUS, in *Rhetoric. Ciceron. II.* p. 221, 222. *Antiq. Rhetor. Edit. Pitthæi*, Paris 1599.

XXVI. (1) SENECA. IV. *Controv.* XXVII. *In the Law, you say, there is nothing excepted. But however many Things which are not expressly excepted,*

are yet evidently implied to be so; the Letter indeed is narrow, but the Meaning extensive; and some Things are so very plain, as to want no Exception at all. GROTIUS.

2 *Declam.* CCCXV.

3 This Law has been already quoted, *Chap. X.* of this Book, § 1. Num. 5. Note 9.

Man can be presumed willing to serve his Friend to his own extreme Prejudice. So he who has promised an Ally the Assistance of his Troops shall be excused, if he be so far engaged in War at Home, as to have Occasion for them himself: And thus too ¹ a Grant of Exemption from Taxes and Tribute must be understood of common yearly Taxes only, and not of those extraordinary Subsidies which the pressing Necessity of Affairs may require, and which the Publick cannot be without.

2. From hence it appears, that Cicero was too loose in saying, *That such Promises are not to be kept as are of no Advantage to the Persons they are made to; nor if they do you more Harm than they do them Kindness* ². For it is not for the Promiser to judge whether a Thing be useful or not to the Person he has promised it, unless it be in a case of Madness, as we have observed before; nor is every Inconvenience to the Person promising sufficient to release him from his Promise; but it must be ³ such a one, as even from the very Nature of the Act, must be believed to be excepted; so he who has engaged to work so many Days for his Neighbour, shall not be obliged to it, if his Father or Son be taken dangerously ill: And this is what Cicero has excellently touched upon, when he says, *If you have given your Word to any one, that you will instantly appear in Court, and there manage his Cause for him, and in the mean while your Son falls dangerously Ill, it would be no Breach of Duty in you not to perform what you promised* ⁴.

3. And it is in this Sense, but we must not stretch it any farther, that we are to take ⁵ what we read in Seneca, *Then shall I break my Word, then shall I be justly charged with Levity, if, when all Things continue in the Posture they were in at the Time of my Promise, I do not perform it. For if there be any Alteration in the Circumstances of the Affair, it gives me a Liberty to determine anew, and discharges me from my former Obligation. I promised to be your Council; but afterwards I find that your Cause tends to the Prejudice of my Father. I promised to take a Journey with you; but they talk that the Roads are pestered with Highwaymen. I was just a coming to serve you, but my Child is fallen Ill, or my Wife's brought to Bed, and so I am detained at Home. All Things ought to be in the very same State and Condition they were in when I promised you, if you would oblige me to keep my Word. All Things, I mean, according to the Nature of the Act in Question, as we just now explained it.*

XXVIII. We have said there may be some other Signs of the Will, from whence it may certainly be collected, that such and such a Case ought to be excepted. Among these Signs there is none more convincing, than when we find that the Words in another Place, tho' they are not directly opposite (for that would be the ἀντινομία or Contradiction we mentioned before) do yet by some unexpected Turn of Things happen to clash and interfere in the present Conjuncture: This the Greek Rhetoricians call τὴν ἐκ περιστάσεως μάχην, ¹ *circumstantial Disagreements*. XXVIII. And from other Signs; as when the Parts of an Act clash and interfere.

XXVII. (1) See ROSENTHALIIUS, *De feudis*, Cap. V. Concl. LXXXVI. Num. 2. HEIG. *Illustrum* XVIII. Num. 16. Part I. COTHMAN, *Conf.* XI. 32. *Clar.* § *Feudum* XXIX. 2. ANDREW KNICH, *De vestitis pactis* XI. Cap. V. Num. 20. HEN. BOCER, *De collectis*. GROTIUS.

2 *De Offic.* Lib. I. Cap. X.

3 See CHARLES MOLINÆUS, *Consuet. Parisiens.* Tit. 1. § 2. gl. 4. Num. 3. FERD. VASQUÆZ, *De Succession.* Creat. L. N. § 18. Num. 80. ANTON. FABER, *Rer. in Sabaud. judicat.* Lib. IV. Tit. XXX. ZASIUS, in L. *Stipulatio hoc modo*, Num. 3. *De Verb. Obligat.* Add. C. *quemadmodum de jurejurando*, and ALCIAT, C. *cum contingat*, intitled as before. GROTIUS.

4 *De Officiis*, Lib. I. Cap. X.

5 *De Benef.* Lib. IV. Cap. XXXV. Here is something else of the same Author's in his thirty ninth Chapter of his fourth Book *De beneficiis*, *I will go sup with him, tho' the Weather be cold, because I have promised it, but not if it snows. I will go to a Wedding tho' my Stomach be a little out of order, because I have promised; but not if I have a Fever upon me. I will be Bail for you, because I*

*have promised you, but not if you bid me be Security for I don't know what, or would bring me in Debt to the Government. There is always, I say, a tacit Exception in all these Cases, I will do such and such a Thing, if I can, if I ought, if Affairs are so and so. Put Matters into the same Posture when you claim my Promise, as they were in when I made it. There is no Fickleness in my falling off, if any Thing new and unexpected has happened. Why are you surprized that I should alter my Resolutions, when the Conditions of my Promise are altered? Make every Thing the same it was before, and I am still the same. We engage to appear in Court on a certain Day: And yet all those who do not appear are not liable to the Penalty. There are some invincible Obstacles that excuse a Non-performance. The English often made use of this Evasion, (see CAMBDEN, *Ann.* 1595.) both in their Disputes with the Dutch and the Hanse Towns. GROTIUS.*

XXVIII. (1) I find in HERMOGENES, καὶ ἐπερίσσει μάχην. Partit. Sect. IV. p. 16. Edit. Genev. 1614. QUINTILIAN calls this, *Colliso casu & eventu*. Instit. Orat. Lib. VII. Cap. VII. as the learned GRONOVIVS observes on this Place.

XXIX.

XIX. *What Rules are in such a Case to be observed.*

XXIX. 1. ¹ Cicero from some antient Authors has, upon the Subject of this Dispute and Difficulty, laid down several Rules to know which Clause ought to prevail, and have the Preference, when the clashing and contrariety is by Accident: As these Rules are by no Means to be slighted, so neither do they seem to me to be ranged and methodized as they ought. We shall dispose them in the following Manner ². 1. *That which is only permitted must give place to that which is commanded*; for he who permits a Thing seems to permit it only in case no other Obstacle intervene than what is then thought of; and therefore as the Author to Herennius says, An Order exceeds a Leave. 2. *What is to be done at a certain and prefixed Time, must be preferred to what may be done at any Time*: Whence it follows, that generally a Contract which forbids is of greater Force than that which commands, because what forbids binds at all Times, but so does not what commands; unless it be either when the Time is exprest, or that the Command includes some tacit Prohibition. 3. *In Covenants which are in the Respects before-mentioned equal; that which is most particular, and comes nearest to the Matter in hand, must take place* ³. For Particulars are commonly of more Efficacy than Generals. 4. *The Prohibition which has a Penalty annexed, is to be preferred before that which has none*; and that which has a greater before that which has a less ⁴. 5. *What has either more honourable, or more advantageous Motives shall carry it*. And in the last Place, *What is last spoken ought to be most regarded* ⁵.

XXIX. (1) *De inventione*, Lib. XI. and MARIUS VICTORINUS there. GROTIUS.

2 QUINTILIAN, *Declam.* CCCLXXIV. *The Law which forbids is always more powerful than that which permits.* DONATUS upon Phormio, *Act* I. *Scen.* II. *He says very well, commands; for that Law which does only permit a Thing has less Force with it, than that which commands.* See CICERO, *Verrin.* XI. and what CONNANUS has, *Lib.* I. *Cap.* IX. GROTIUS.

I have observed in my first Note on § 23. of the Chapter in PUFENDORF which answers to this, that we are here to suppose the Permission general, and the Prohibitions or Orders particular. Mr. CARMICHAEL mentioned in Note I. on § X. of this Chapter, admits of the Restriction, *Whenever the Matter of the Permission or Prohibition is proposed under the same Terms, and so that the Generality or Particularity lies on the Side of the Persons to whom the Thing is permitted or prohibited; or when the whole Matter of the Permission is implied in the Terms of the Law prohibiting, so that the Permission would have no Effect, if it did not derogate from it.* But, it is added, that *If the Permission is only accidentally opposite to the Law prohibiting, we are always to presume that he who permits, does it, as GROTIUS speaks, on "Supposition," that there is nothing, beside the Thing in Question, which hinders making an Advantage of the Permission.* Till then, it is said, the Rule takes Place. But, First, This Presumption may be opposed by another Presumption as well grounded; viz. That he, who gives a general Permission, and at the same Time knows and ought to know that certain Things are prohibited, which may by accident relate to the Matter of the Permission, has by so doing taken away the Prohibitions relating to the Case, in which they may be opposite to the Permission. Secondly, I should be glad to see it made appear by proper Examples, how the Preference of the Law prohibiting to that which permits, follows from the very Nature of the Permission and Prohibitions, independently of Generality or Particularity. The only one I find urged by those who have undertaken to explain the Rule under Consideration is this: *Every Roman Citizen is allowed to have a Concubine.* Another Law says, *No Soldier shall have a Woman with him in the Camp.* It is said, the Law last quoted ought to restrain the first, because it prohibits; whereas the other only

permits. But this is not the true Reason. When the Law allows a Man to have a Concubine, the Permission implies no more than a Liberty of living with a Concubine, as if she was a lawful Wife, without incurring any Penalty: It says nothing relating to the Place where the Commerce may be carried on. So that, when another Law forbids a Soldier having any Woman, and consequently any Concubine, with him in the Camp; this Prohibition is not, properly speaking, in itself an Exception to the Permission of keeping a Concubine. The Permission remains the same, in the Sense of the Law which grants it.

3 See the Commentators, and particularly JAMES GODEFROY, on this Rule of the Law: *Through the whole Law what is particular takes place of what is general; and that is most regarded, which relates to Particulars.* Digest. *Lib.* L. *Tit.* XVI. *De diversis Regulis Juris*, Leg. LXXX.

4 The Reason is, because when we impose a Penalty, we thereby justify a stronger Desire of obliging the Person, on whom we impose it, to do or forbear certain Things, than when we impose none; for in the first Case, in Order to gain our End, we employ a most efficacious Method which we neglect in the other. PUFENDORF answers our Author in this Place without Reason, in the last Paragraph of the Chapter so often quoted in this.

5 This Rule is out of its Place. It relates to Cases where there is an absolute and perpetual Contradiction between two Agreements or two Laws, so that one of them must necessarily remain without Force. The Words of CICERO are, *Deinde, utra Lex posterius lata sit, nam postrema quæque gravissima est.* We are to consider which of the two Laws was made last, for the last is always of most Authority. The Reason of this is given by our Author himself, § 4. Num. 2. But when the Opposition lies only in certain Cases, so that neither of the two Agreements or Laws, though incompatible for a Time, loses any Thing of its Force; the Priority or Posteriority of Time is out of the Question, and of no Service for determining which of the two ought to take Place, because there is then no Change of Will. We are to proceed on other Tokens which express a greater Degree of Will; and on that Foot it may easily happen that the Law or Agreement first dated will take Place:

2. And here too we should repeat what was advanced above, that Agreements sworn to must be understood in their most usual Propriety and Meaning, and that all tacit Restrictions, and such Exceptions as are not absolutely necessary from the Nature of the Thing, must be entirely excluded. And therefore if by Accident two Covenants, one upon Oath, the other not, clash and interfere, ⁶ that upon Oath shall be preferred ⁷.

XXX. 'Tis also a Question, whether in a doubtful Case a Contract ought to be accounted perfect before the Writings are engrossed and delivered. For this *Muræna* alledged against the Agreements made between *Sylla* and *Mithridates* ¹. To me it is plain, that unless it be otherwise agreed on, ² the Writings are to be deemed as the Memorial only of the Contract, and not as any Part of the Substance of it. For if otherwise, it is customary to express it as in the Truce with *Nabis*: *From the Day that these Articles when copied over are delivered to Nabis* ³.

XXXI. But I cannot allow their Opinion, who hold that the Contracts of Kings and States are to be interpreted, as much as possible, by the *Roman Law*, unless it appear, that among some People that Civil Law has, in such Things as concern the Right of Nations, been received even for the Law of Nations, which is not to be presumed without very good Grounds.

XXXII. As to what *Plutarch* in his *Symposiacs* ¹ proposes, *Whether we are to regard his Words who offers a Condition, or his who accepts it, most*; for my Part, I think, that since he, who accepts it, is in this Case the Promiser, his Words, if they be absolute and without Reserve, are what give the Form to the Agreement. But if they are only affirmative with respect to the others Words, then according to the Nature of relative Terms, his, who offers the Condition, shall be looked upon as repeated in the Promise which the Acceptor makes. As for the rest, it is certain, that before the Condition is accepted, he who offered it, is no ways obliged; because there is yet no Right acquired, as is evident from what we said before in Relation to a Promise. And this offering of Conditions is still less than a Promise.

6 ACONTIUS in Ovid.

*The Father promis'd, and the Daughter swore
He unto Men, and she to Heaven appeal'd:
This the Name of perjur'd, that of Liar dreads,
And do you doubt which is the juster Fear?*

GROTIUS.

7 This is grounded on a false Supposition; as has been already observed on PUFENDORF.

XXX. (1) *Appian. Bell. Mithridat.* p. 360. Edit. Amst. (214. H. Steph.) See PUFENDORF, B. III. Chap. VI. § 16. and B. V. Chap. II. § 6.

2 *L. in re, and L. fides gesta.* D. de fide instrumentorum, L. pactum quod bona fide, C. de pactis. So BARTOLUS, JOHANNES FABER and SALICE-

TUS, whose Opinion prevailed in Court against *Baldus* and *Castrensis*, expound, C. de fide Instrumentorum, the Law of Contract. MYNSINGERUS, Decad. X. Conf. XCI. NEOSTAD, De pact. antenuptial. Obierv. XVIII. And therefore what *Ligniacus* produces out of GUICCIARDIN, rer. Italic. Lib. XI. about an Instrument signed by the King, but not yet sealed by him, nor with the Secretary's Hand to it, carries no great Authority with it, nor is the Matter of Fact sufficiently proved. GROTIUS.

3 *LIVY, Lib. XXXIV. Cap. XXXV. Num. 3.* XXXII. (1) The Question is there decided in Favour of the Person who makes the Offer. *Sympos. Lib. IX. Quæst XIII.*

CHAP. XVII.

Of the Damage done by an Injury, and of the Obligation thence arising.

I. WE have already shewn, that a Man may have a Right to a Thing three several Ways, either by Contract, by an Injury done him, or by Law. Of Contracts we have fully treated. Let us now come to that Right, which arises by the Law of Nature from an Injury received. We here call any Fault

I. That an Injury obliges us to repair the Damage.

¹ or Trespafs, whether of Commiffion or Omission, that is contrary to a Man's Duty, either in respect of his common Humanity, or of a certain particular Quality, ² an Injury. ³ From fuch a Fault or Trespafs there arifes an Obligation by the Law of Nature to make Reparation for the Damage, if any be done.

II. *Damage is that which is contrary to a Man's Right strictly fo called.*

II. ¹ The Word *Dammum*, Damage, probably derived from *demo* to take away, is τὸ ἐλαττεῖν, when a Man has lefs than his Right; whether that Right be merely from Nature, or fome super-added human Act, fuch as the Eftablifhment of Property, Contract, or Law. A Man's Life is his own by Nature (not indeed to deftroy, but to preferve it) and fo is his Body, his Limbs, his Reputation, his Honour, and his Actions. As to what belongs to every one in Confequence of the Eftablifhment of Property, or by Vertue of any Agreement, we have fhewn above, both in Regard to the Things which thus become ours, and in Regard to the Right which we thus acquire over the Actions of others. Every one has likewise certain Rights, wherewith he is invefted by fome Law; becaufe the Law has an equal or greater Power over the Persons and Eftates of thofe who are fubject to it, than any private Man has over himfelf, ² and what belongs to him. So an Orphan has a Right to require his Guardian to take ftrict Care of his Affairs, ³ the fame may the State require of a Magiftrate, and not the State only, but any private Member of it, as often as the Law authorifes him, either exprefly, or by plain Confequence ⁴.

III. *A Fitnefs for a Thing is carefully to be diftinguifhed from a Right strictly fo called.*

III. I. But from a mere Aptitude or Fitnefs, which is improperly called a Right, and belongs to attributive Juftice, arifes no true Property, and confequently no Obligation to make Reftitution; becaufe a Man cannot call that his own, which he is only capable of, or fit for. For, as *Aristotle* obferves, *He does not tranfgrefs the Rules of Juftice, who out of Covetoufnefs refufes to relieve a poor Man with his Riches* ¹. And this, fays *Cicero*, in his Oration for *Cn. Plancius*, *is the Privilege of free States, that by their Vote they can give or take from any Man what they please* ². And yet he prefently after fubjoins, that it fometimes happens, that the People do what they will, not what they ought, the Word ought being taken in a larger Senfe ³.

². But we here muft take care that we do not confound Things of a different Kind. For he, to whom the Power of making Magiftrates is committed, is bound

I. (1) The Word *Fault* is here taken in a general Senfe, which comprehends both Difhonefty and Imprudence.

² That is, not only on the Account of a certain Relation, which a Man has to others, or fome particular Employment, but alfo by Vertue of every Engagement he enters into of his own Accord.

³ Called by the *Greeks* ἀμελής δίκη, *An Action of Neglect*. See in *Decretal*. Tit. *De injuria* & *damno dato*, and *D. ad L. Aquilam* & *Vicinas rubricas*. *GROTIUS*.

It is in *Hefychius* that we find Ἀμελής δίκη explained by ζυμὴ δίκη. See the Index to the *Treafury of the Greek Language*, by H. STEPHENS.

II. (1) So *VARRO*, *Lib. V.* *Dammum* from *demitio* an Abatement, when there is lefs made of a Thing than it flood one in. Others rather approve of its Derivation from the *Greek* δαπάνη an Expence, and will have it to be firft *Dapnum*, afterwards *Dammum*, as ὕπνῳ *Sopnus*, *Somnus*. Nor is it any Abfurdity to deduce it from the *Greek* δάμνω, which fignifies βιάζω to offer Violence, or from ζυμὴ δαμία, *damnum*, as *regia*, *regnum*. *GROTIUS*.

The firft of thefe Etymologies is that given by the Lawyers. DAMNUM & DAMNATIO, ab ademptione & quafi diminutione Patrimonii, dicta sunt. *Digest. Lib. XXXIX. Tit. II. De damno infecto*, &c. *Leg. III.*

² See *B. I. Chap. I. § 6.*

³ Thus, by the *Roman Law*, a Guardian is refponfible, not only for Difhonefty, or grofs Negligence, but alfo for what is termed a flight Fault, *levis Culpa*, that is, if he doth not do what a Mafter of a Family of moderate Prudence would have

done. *Cod. Lib. V. Tit. LI. Arbitrium Tutelæ. Leg. VII.*

⁴ And confequently they may require Amends for the Damage done by the Magiftrate by Want of Exaétnefs in the Exercife of his Trust. Our Author here probably had his Eye on the Subfiduary Action allowed by the *Roman Law* to an Orphan againft the Magiftrates of the Town, who either had not affigned him a Guardian, when required fo to do; or had not taken due Care, in the Choice, or required good Security. See the Title *De Magiftratibus conveniendis*, *Digest. Lib. XXVII. Tit. VIII.* and *Code, Lib. V. Tit. LXXXV.* But, commonly fpeaking, private Persons are obliged to bear the Lofs, which happens by an Effect of the Negligence or even bad Conduct of the Magiftrate, without having any Remedy at Law againft the Magiftrate, efpecially one of a very exalted Station. Not that, according to the inviolable Rules of natural Equity, any Magiftrate is in Confcience excufed making all Reparation in his Power for the Damage he has done private Persons, by a considerable Failure in the Execution of his Office, whatever Impunity the Laws may allow him in that Cafe. The Whole of the Matter is, that Magiftrates being Men, we ought to make fome Allowances on that Confideration; and confequently we are fupposed to have before-hand cleared them of what happens by the Effect of a fmall Remiffnefs, or fuch Negligence as human Frailty cannot always avoid; efpecially if, when they were guilty of it, there was no probable Reafon for apprehending very bad Confequences; or at leaft that they were near.

III. (1) *Ethic. Nicom. Lib. V. Cap. IV.*

² *Orat. pro Cn. Plancio, Cap. IV.*

³ *Ibid.*

to the Commonwealth to make choice of such a Person as is fit for the Office; and the Commonwealth has properly a Right to require this of him. Wherefore if the Commonwealth shall by his bad Choice suffer any Damage, he is obliged to make it good. So likewise any Citizen that is not unqualified, although he have no proper Right to a Place or Office, yet the Right of being a Candidate truly belongs to him. And if he be hindered, either by Force or Fraud, from exercising this Right, he may require Satisfaction, not according to the full Value of the Place, but the uncertain Damage he sustained thereby. He has the same Right to sue for Satisfaction to whom a Testator would have left a Legacy, but by Force or Fraud was hindered. For to be qualified to receive a Legacy, is a kind of a Right, and consequently, to deprive the Testator of his Liberty of bequeathing it, is an Injury.

IV. A Man is understood to have less than is due, and consequently to suffer Damage, not only in the Thing itself, but in its genuine Fruits, whether they be gathered or not, if he should otherwise have gathered them, deducting the necessary Expences of improving the Thing and gathering the Fruits, from the Rule that forbids us to enrich ourselves by another Man's Loss.

V. But the Hopes also of the Gain or Increase are to be computed, not as high as if it was already made, but according to the nearness of our Hopes of obtaining it, as for Instance, in the Case of a sown Field which has been ravaged, the Reparation of the Injury must be in Proportion to the greater or less Probability there was of a good Harvest.

VI. Besides the Person that doth the Injury himself, there are others also who may be responsible for it, either by doing what they ought not, or not doing what they ought to have done. By doing what they ought not to have done, *Primarily* or *Secondarily*. *Primarily*, as he who commands it to be done, he who gives the necessary Consent for doing it, he who assists in the Action, he who protects him that committed it, or becomes in any other manner a Party in doing the Injury.

VII. *Secondarily*, He that advises the doing it, or commends and flatters him who does it. For what Difference is there, saith Cicero, Philip. II. between the Man that persuades us to do a Thing, and him that approves of it, when done?

VIII. By not doing what he ought, a Man is likewise bound to make Reparation, *primarily*, or *secondarily*. *Primarily*, when by his Station or Office he ought to hinder the doing it, by giving his Commands to the contrary, or to succour him that has the Wrong done him, and does it not; such a one is called by the Chaldees Paraphrast ܦܪܦܪܐ a Strengtheners of Wickedness.

V. (1) Here the Author had in his Margin quoted a Law, which says, that if on making an Inventory of an Inheritance, it appears that the Deceased stood engaged to perform something under a Condition not performed at the Time of his Death, we are to place among his Debts, not all that he might one Day be obliged to pay, but the Value of the Expectation of the Performance of the Condition, which ought to determine the Quantity of that conditional Debt, which is as yet uncertain. Digest. Lib. XXXV. Tit. II. Ad. Leg. Falcid. Leg. LXXIII. § 2. See on this Law CUJAS, Recitat. in Paul ad Edictum, Tom. V. Opp. p. 826, 827. Edit. Fabrott.

VI. (1) In the Original we find *aut qui alio modo in ipso crimine participat*. I believe, says Mr. BARBEYRAC, that the Author designed to write *alio simili modo*, tho' all the Editions of this Work read as before. For he doth not pretend that these of the inferior Class have no Share in the Crime. The contrary appears from what he says in the tenth Paragraph. And in Reality, without supposing that, by Vertue of what will they become answerable for the Damage? He therefore designed to place in the first Class all such as have, by the prejudicial Action committed by another, an Influence like that of these whom he has mentioned. But he ought to have been more exact. See what I have said on this Subject in my Notes on the Duties of a Man and a Citizen, B. I. Chap. I. § 27. third and fourth Editions.

VII. (1) That is, in such a Manner, that the

Advice, Commendation or Flattery contribute something toward the determining him who commits the prejudicial Action.

2 Totilas in his Oration to the Goths in PROCOPIUS, Gothic. III. ὁ γὰρ ἐπαινεῖσθαι, &c. For he who praises the Person who does it, is himself to be accounted the Author of the Fact. And ULPIAN, Lib. I. C. de servo corrupto. Tho' he would certainly have run away, or stolen something of himself; yet if upon discovering his Intentions to another, that other shall commend his Design, he is bound to make Satisfaction; for we ought not by our Commendations to encourage another to do Mischief. GROTIUS.

See what I have said on this Law in the Chapter of PUFENDORF which answers to this, § 4. Note 2. As for the Passage of PROCOPIUS, the King of the Goths there speaks of a good Action; but the Application may still be just, as the Thought is grounded on the same Principle.

3 AMMIANUS in his twenty seventh Book applies this Saying to Probus the Prefect. And by the Lombard Law, Lib. IV. Tit. IV. even the Adviser is a Party concerned in making up the Matter. See Rom. i. at the end, and the ancient Doctors on that Place. GROTIUS.

VIII. (1) NICETAS CHONIATES. in his Michael Comnenus, ὁ ἐμπνεύσας, &c. He is not only to be accounted an Incendiary, who sets Fire to his Neighbour's House, but he also, who could have extinguished it, and would not. GROTIUS.

IX. *Secondarily*,

IX. And secondarily.

IX. *Secondarily*, He that doth not dissuade when he ought, or conceals the Fact when he ought to have discovered it. In all which Cases the Word *ought*, has Respect to that Right which is properly so called, and is the Object of expletive Justice, whether it arise from the Law, or from a certain Quality in the Person ¹. For if it be due only by the Rules of Charity, the Omission of it is indeed a Fault, but not such an one as obliges one to make Reparation; which, as I have already said, arises only from Right properly so called.

X. What those must contribute towards the Act, who are bound to repair the Damage.

X. It is likewise to be observed, that all these Men we have mentioned, lay themselves under this Obligation, only if they were the true Cause of the Damage done; that is, if they really contributed either to the Whole, or to any Part of it. For if he that did the Injury, would certainly have done it without their Act or Neglect (as it often happens in those of the second Order, and sometimes in those of the first) they are not bound to make Reparation. Which yet is not to be understood, as that, if others be not wanting to persuade or assist, those who have effectually advised and assisted, are not at all answerable, in Case he would not have done the Injury without their Assistance or Counsel. For those others too, if they had actually counselled or assisted, would have been bound to make Reparation.

XI. In what Order they are bound.

XI. But those are principally bound, who by their Command, or by any other Means, have incited another to do an Injury: If there be none such, then he who committed the Fact; and after him the Rest, every one that contributed towards the Fact, is bound to make Reparation for the whole Damage, ¹ if the whole Fact proceeded from him, tho' not from him alone ².

XII. This Obligation to be extended even to the consequent Damage.

XII. He that is bound to make Reparation for the Fact, ¹ lies under the same Obligation ² in Regard to its Consequences. ³ In one of *Seneca's* Controversies this Question is handled in an Instance of a Plane-Tree set on Fire, whereby an House was burnt; where he gives us this as his Opinion upon it, *Altho' you were unwilling to have done Part of the Injury, yet are you bound to make Reparation for the Whole, as much as if you had intended it. For he ought to have been unwilling as to the Whole, that would excuse himself, because he did not design to do ill.* *Ariarathes*, King of *Cappadocia*, having, through Wantonness, stoppt up the Passage where the River *Melas* discharges itself into the *Euphrates*, the Damm broke down, and the Waters rushing with Violence, so swelled the *Euphrates*, that it swept away Part of the *Cappadocian* Lands, and did great Damage to the *Galatians* and *Phrygians*; whereupon, the Case being referred to the *Romans*, he was adjudged to pay 300 Talents Damage ⁴.

XIII. An Instance in a Manslayer.

XIII. Take these Instances that follow as Examples. He that kills a Man unjustly is bound to pay Physicians and Surgeons, if any be made Use of, and to make such Reparation to those whom the deceased Person was obliged in Duty to maintain, such as Parents, Wife, Children, as the Hope of that Maintenance (Regard being had to the Age of the Deceased) amounted to. Thus *Hercules*, having killed *Iphitus*, paid a Fine to his Children, in Order to obtain more easily the Expiation of his Crime. For as *Michael* the *Ephefian* well observes, upon *Aristot. Nicom. 5. ἀλλὰ καὶ ὁ φονεὺς, &c.* The Person that is killed has some Recompence made him, since what is paid to his Wife, his Children, or his Relations, is in some Measure paid to himself. We speak here of an unjust Manslayer, who had no

Our Author observed here, what he had repeated in his Notes on *Rom. i. 32.* that he who doth not hinder another from doing a bad Action, when he ought, is by the *Chaldee* Paraphrast called *רעם*, *Levit. xx. 3.* A Word which signifies confirming others in Evil. And the Rabbins think Persons of that Character mentioned *Levit. xxvi. 21.*

IX. (1) From certain particular Relations, by Vertue of which a Man is obliged to prevent the Evil others may do; and much more so not to engage them to do it. Of this Sort are all such as have any Authority over others, or are concerned in directing them.

XI. (1) *Lex Longobard, Lib. I. Tit. IX. 5:* GROTIVS.

² See this explained on the Chapter of PUFENDORF, on the Subject, § 5.

XII. (1) See AQUINAS, *prim. secund. quest. XX. Art. V.* and *L. si servus servum, & si quis insulam, D. ad L. Aquiliam.* GROTIVS.

² There is a Law which orders, that whoever shall fire a House, and the Fire takes a neighbouring House, is obliged to indemnify, not only the Proprietor of the first House, but also the Owner of the neighbouring House, and the Tenants of both, whose Goods are burnt. *Digest. Lib. IX. Tit. II. Ad Leg. Aquiliam, Leg. XXVII. § 8.*

³ *Excerpt. V. 5.* GROTIVS.

⁴ STRABO, *Geograph. Lib. XII. p. 813. Edit. Amst. (539. Edit. Parisi.)*

Right to commit that Violence which was the Cause of Death. Wherefore, when a Man may lawfully kill another, tho' he be thereby guilty of a Breach of Charity, as he, who being assaulted by his Enemy, would not fly from him, but killed him in his own Defence, yet is he not bound to make Reparation. As for the Rest, the Life of a Freeman cannot be appraised, but that of a Slave, who might have been sold, may.

XIV. He that maims another, is obliged, in like Manner, to pay for his Cure, and to make him Satisfaction for the Loss of his Limb, because he is hereby rendered incapable of getting so much by his Labour as he might otherwise have done. But as I said before of the Life, so here I say of the Limbs, of a Freeman, that they cannot be valued². The same may be said of false Imprisonment.

XIV. In one who maims another.

XV. So an Adulterer and Adulterers are not only bound to free the Husband from the Expence of Keeping the Child, but to make the legitimate Children Reparation for whatsoever Damage they shall sustain, by any Share or Portion that Child shall claim in the Inheritance. He that either by Force or Fraud deflowers a Virgin, is bound to pay her so much as she is damaged in her Hopes of Marriage: Nay, moreover, if he obtained his Desires by promising her Marriage, he is bound to perform that Promise.

XV. In an Adulterer and Fornicator.

XVI. A Thief or Robber is bound to restore what he has taken away, together with its natural Increase, and to repair the Damage the Owner has sustained, as well in what he has ceased to gain, as in what he has positively lost. But if the Thing stolen or robbed be no more in Being, then is he to return the Value of it, not according to the highest, nor the lowest, but a moderate Computation. Among these we may also rank such as defraud their Prince of his lawful Taxes or Customs. In like Manner are those Men bound to make Reparation, who either by an unjust Sentence, by false Accusation, or false Testimony, have done their Neighbour an Injury.

XVI. In a Thief, a Robber, and others.

XVII. As also he that procures a Contract or Promise by Force, Fraud, or unjust Terror, is bound to release the Person who made the Contract or Promise, from any Obligation of Performance¹; for such a Practice is a Breach of a double Right that belongs to every one, not to be imposed upon or deceived, and not to be compelled; the one springing from the Nature of Contracts, the other from his natural Liberty or Freedom of Action. And in this Class we may insert those who will not do what by their Office they are obliged to do, without a Bribe².

XVII. In one who procures a Promise by Fraud or unjust Fear.

XVIII. But he that hath given just Cause, why he ought to be compelled by Force or Terror, must blame himself; for an involuntary Act, arising from a voluntary one, is accounted morally a voluntary one².

XVIII. What if by Fear that is accounted just by the Law of Nature?

XIX. But

XIV. (1) *L. ult. D. de his qui eff. vel. def.* The same was observed among the Hebrews. BABA KAMA, Cap. VIII. § 1. and among the English and Danes; see a Treaty of theirs in the learned PONTANUS's Discourse of the Sea. GROTIUS.

The Treaty here referred to by our Author, contains nothing concerning the Case of Mutilation. I find only a Clause, which says, that if an Englishman kills a Norwegian, or a Norwegian an Englishman, each King engages, that the Heirs of the Deceased shall receive all just Satisfaction, and the Murderer shall pay them a Fine. This is in p. 143. Lib. II. Cap. XXI. of the Book quoted by our Author, which was printed at Hardervic, in 1637, under the Title of ISACII PONTANI, *Discussiones Historicae; quibus præcipere quatenus & quodnam Mare liberum vel non liberum clausumque accipiendum dispicitur, &c.* The Fine, there mentioned, is, perhaps, the *Weregild*, or *Wergeld*, of the antient Saxons; on which see a Dissertation by the late Mr. HERTIUS, *De Hærede occisi vindice*, § 8. p. 305. Tom. III. *Comment. & Opuscul.*

² See the Law quoted in the preceding Note; and what is said on PUFENDORF's Chapter that answers to this, § 8. Note 2.

XVI. (1) See the Chapter of PUFENDORF so often quoted, § 11.

XVII. (1) No Doubt he is bound to do this; but tho' he should refuse to do it, the Promise would not therefore be more valid. The Author here reasons on a false Principle, as we have observed on Chap. XI. of this Book, § 7. where we refer to the Treatise of PUFENDORF, where he is confuted.

² That is, they are obliged to return the Money if he who gave it demands it.

XVIII. (1) That is, if he has not freely consented, as he ought to do, by Vertue of the Right which the Person had to oblige him to it. See PUFENDORF, B. III. Chap. VI. § 11.

² The Author means, that a Constraint which a Man had a Right to employ on another, doth not hinder his Consent, tho' forced, from passing for a free one; because he has given Occasion to the Constraint, by a voluntary Refusal. But his Thought is expressed in such a Manner as may lead the Reader into a Mistake; and I find that Mr. VITRIARIUS, in his Abridgment of our Author, published with the Title of *Institutiones Juris Naturæ & Gentium*, Lib. II. Cap. XVII. § 14. explains

XIX. *What if by Fear accounted just by the Law of Nations?*

XIX. But as it is established by the Consent of Nations, that all Wars declared in Form, and carried on by the Authority of the supreme Powers on both Sides, shall be accounted lawful, as to the outward Effects or Consequences of them, (whereof we shall treat hereafter) so likewise is the Fear whereby one has been induced to do any Thing in such a War, so far to be accounted just, that if any Advantage be obtained, it cannot be required by the adverse Party. And in this Sense may be admitted the Distinction made by *Cicero*,¹ between an Enemy in Form, with whom, says he, we have many Rights in common, that is, by the Consent of Nations, and Pirates, and Robbers. For if these extort any Thing from us by Fear we may require it, unless we bind ourselves by an Oath not to require it; but of an Enemy we cannot. Wherefore, what *Polybius* saith of the *Carthaginians*,² that they had just Cause to enter into the second *Punick War*, because the *Romans* had declared War against them, and extorted from them the Island *Sardinia*, and a great Sum of Money, while they were engaged in Quelling a Sedition of some People they had taken into their Service, has indeed some Shew of Equity according to the Law of Nature, but is contrary to the Law of Nations, as shall be shewn elsewhere.

XX. *How far the Civil Powers are bound for Damages done by their Subjects, where the Question is handled concerning Prizes taken at Sea from Allies, contrary to public Command.*

XX. 1. Kings and Magistrates are bound to make Reparation, if they do not use such Means, as they may and ought,¹ to prevent Robberies and Piracy. For Neglect of which the *Scyrians*² were formerly condemned by the *Amphictyones*. I remember I was asked the Question, concerning a Case that happened³ when our States had granted Commissions to several Privateers, some of whom had made Prizes on our own Friends, and deserting their native Country, roved about upon the Seas, and would not return, tho' recalled, whether the States were bound to make Reparation, either for employing such lawless Men, or not taking Bail or Security of them, that they should not exceed their Commission. To which I answered, that the States were no farther obliged, than to punish or deliver up the Delinquents, if they could be taken, and to make over to the Persons injured, a Right to the Goods of these Pirates: Inasmuch as the States were neither the Cause of this Depredation, nor had any Hand in it, but had expressly prohibited the injuring of our Friends. That they were not in any wise obliged to require Security, since they may, even without express Commissions, give all their Subjects free Liberty to take as many Prizes as they can from their Enemy, as was formerly done: Nor can such a Licence be accounted the Cause of this Injury done to our Friends, since private Men may, without any such Licence, equip Ships and put out to Sea: Nor could it be foreseen that these Men would prove Rogues; nor can we altogether avoid the employing of dishonest Men; for then it would be impossible to raise an Army.

2. Nor are Kings bound to make Reparation, if their Soldiers, either by Sea or Land, shall do their Allies any Damage, contrary to their Command; which is

plains this Passage, as if our Author designed to speak of an express or tacit Renunciation of the Right of requiring that no Injury be done us. Whereas he is only talking of the Validity of Agreements, or Promises, extorted by a just Constraint; as is evident from the Connection of this with the preceding Paragraph. Our Author's Maxim, according to the Turn given it, better agrees with, and is by the Moralists actually applied to what Men do, in a Situation where they have not the free Use of Reason, but so as that they have voluntarily put themselves in that Situation. It is sufficient that we say, that in the Case before us, when a Man is reduced to the Necessity of employing Constraint, for obtaining a Thing which he had a strict Right to demand of us, such forced Consent is to be reckoned voluntary, because it ought to have been so. This Constraint has not the Mark which gives it a Power of making Engagements void; I mean Injustice in him who uses Violence or Menaces. But if he who is constrained voluntarily submitted to the Direction or Authority of the Person whom he obliges to constrain

him, the free Determination which preceded the Refusal, in Consequence of which the Consent was extorted, still farther removes all that is odious, and contrary to Liberty in the Constraint. In short, he who then consented against his Will, has no more Reason to complain and retract, than a bad Paymaster would have, who is sentenced by the Court, or forced by Arms, to satisfy his Creditor, or promise to do it at a certain Time.

XIX. (1) *De Offic. Lib. III. Cap. XXIX.*

2 See that Historian, *Lib. III. Cap. XIII. &c.*

XX. (1) See *Chap. XXI. of this Book, § 2. and B. III. Chap. XVII. § 2. Num. 6.*

2. These were some Merchants of *Thessaly*, who escaping from Prison, where they had been detained after they were stripped, cast the Inhabitants of *Scyros* before the Tribunal of the *Amphictyons*. *PLUTARCH, in Vita Cimonis, Tom. I. p. 483. Edit. Wech.*

3 This, probably, was debated in the Assembly of the States of *Holland* and *West-Friesland*, when our Author was deputed thither, as Pensionary of *Rotterdam*.

proved

proved by the Testimonies of ⁴ *France* and *England*. But if any one be bound to make Reparation for what his Minister or Servant does without his Fault, it is not according to the Law of Nations, which is the Point now in Question, but according to the Civil Law, and even that Rule of the Civil Law is not general; it regards only the Masters of Ships, and some others, for particular Reasons. And thus hath this Case been determined by the Judges of the supreme Court, against certain *Pomeranians*, and that according to Precedents of adjudged Cases of the like Nature two Ages before.

XXI. It is likewise to be observed, that it is by the Civil Law, that a Master is answerable for the Damage ¹ caused by his Slave or his Beast. For the Master that

XXI. That by the Law of Nature no Man is bound to repair Damages done by his Beast or Vessel without his Fault.

⁴ See too *Constitut.* Tom. III. Tit. II. in the Constitution of the Year 1543. *Cap.* XLIV. GROTIUS.

XXI. (1) See the Titles of the *Digest. Si quæ drupes pauperiem fecisse dicatur*, Lib. IX. Tit. I. & *de noxalibus actionibus*, Tit. IV. PUFENDORF doth not agree with our Author in this. In the sixth Paragraph of the Chapter that answers to this, he maintains, that according to the Law of Nature alone, a Master is answerable for the Damage done, even without any Fault of his own, by his Slaves and Beasts. In Regard to Slaves, I was always of PUFENDORF's Opinion; but as to Damage done by a Beast, I was not entirely satisfied with his Reasons, tho' I have not yet testified my Dislike of them; for I still found some Perplexity from which I could not free myself, without allowing the Matter some Consideration when more at Leisure. I had some Years ago an Opportunity of doing this; and I am glad to do Justice to the Gentleman who gave it me. It is Mr. DANIEL PURRY, of *Neufchatel*, who at an Age when it is sufficient Commendation, that a Man has tolerably retained the Lessons of his Masters, let the World see that he could take out of his own Stock. Among his *Observationes Juridicæ*, which he published, and defended, at *Basil*, in 1714, for taking his Degree of Licentiate in Law, we have one (VII. *de noxâ Bestiæ*) in which declaring for the Opinion of GROTIUS, he confutes what is urged in Favour of the contrary Opinion. He, however, confines himself to what regards the Damage done by a Beast, on a Supposition, that the Decision of this Question implies the Decision of that relating to Slaves. As it is said, that the Establishment of Property could not be formed, so as to deprive a Man of a Right to indemnify himself in some Manner, for the Mischief Beasts may do us; he answers, *First*, That all human Establishments being subject to some Inconveniencies, that in Question might follow from the Establishment of the Right of Property, and the Establishment itself remain useful; because the Inconveniency resulting from it is much less considerable than those prevented by it. *Secondly*, That all that can be inferred from the Reason alledged, is, that the Reparation of Damage done by a Beast, ought to be made out of what the Master of the Beast would not have had without it; that is, out of the Overplus of what it cost him, and what it would bring him if sold. As for the other Reason, *That the Reparation of the Damage is a Title infinitely more favourable than the Acquisition of Gain*; it is answered, that if this Maxim has any Meaning not evidently false; it signifies, that in an Equality of Right, or in a disputable Point, the Advantage is to be allowed, rather to the Party which would suffer Damage, than to him who would gain. Now, granting this, nothing but what has been said would follow in the Case before us. If, on one Hand, the Person who has received Damage from a Beast,

may require any Reparation, supposing there is wherewithal to make it; on the other Hand, the Master of the Beast ought not to indemnify him so as to suffer Damage himself: For, both as he is Master, and as he was very far from having any Hand in the Mischief, he has the same Title, and a Title of a longer standing, with him whom the Beast has injured. But, adds he, the Maxim on which the Argument must be built in this Case is false. For when the Right is either fairly disputable, or equal on both Sides, the Rules of Justice evidently require, either that the Thing in dispute be divided, or that the Affair be decided by Lots. This is the Purport of the Observations made by the Author I have quoted. For my Part I am of Opinion, that the present Question, concerning Damage done by a Slave, ought to be decided in a different Manner from that concerning Damage done by a Beast. *First*, Then, in Regard to Damage caused by a Beast, I think it is evident, that, according to the Law of Nature alone, and independently of Civil Laws, he who has received Damage from a Beast belonging to another Man, can require no Satisfaction, when the Owner of the Beast doth not, by his Fault, contribute to the Damage done; that he cannot, I say, demand any Reparation, even out of the Profits arising to the Owner from the Possession of his Beast. A Beast, as it is an Animal void of Reason, can do no Damage, properly so called. When it is said, that in the State of Nature, he who has received any Damage from a Beast, might have taken his Satisfaction on the Beast; this is only a figurative Way of speaking, and not very exact, which must be laid aside when we would give just and philosophical Ideas. I should as soon say, that when a Tree falls on a Man in a Forest, and wounds him, he might have taken his Satisfaction for the Damage by Cutting the Tree, by Burning it, or making some other Use of it. But *Secondly*, The Case is not the same in Regard to a Slave. This Slave is a Man, and as such, capable of doing Damage, properly so called; and consequently, subject to the Law of Nature, which orders Satisfaction for the Damage. The Obligation of repairing a Damage is a general Obligation, from which no Man can be excused in what State soever. The Persons concerned may indeed renounce their Right of demanding Satisfaction; but then the Renunciation must be perfectly clear, and in Case of a Doubt, it is natural to presume, that as no one can, by his own Authority, free himself from the Obligation of repairing the Damage he has done; so no one easily excuses others that Obligation, in Regard to himself. So that the Exception of Cases, where a Damage is done to another, is, and ought to be, tacitly implied in all human Establishments, when it doth not appear that any Abatement is made of that Obligation. Now it cannot be shewn, that the Establishment of Property of Goods implies this Dispensation; and there is the less Reason to presume it, as

Slaves

is not in Fault, is not bound to make Reparation by the Law of Nature; no more than he, whose Ship, without his Fault, falls foul upon his Neighbour's Ship and damages it. Altho' by the Laws of many Nations, as by our own, such Damages are to be equally divided between them both, by Reason of the Difficulty of proving the Fault.

XXII. *That we may do a Man Damage in his Reputation and Honour; and how this is to be repaired.*

XXII. But, as aforesaid, we may suffer Damage, even in our Honour and Reputation, as by Blows, ill Language, Curfes, Calumnies, Scoffs, and such like. And in these, no less than in Thefts and other Crimes, the Wickedness of the Action is to be distinguished from the Effect it produces. This Punishment answers to the former, and the Reparation of Damage to the latter. The Reparation is made by confessing one's Fault, by ¹ declaring the Innocence of the injured Person, by giving Marks of esteem for him, and the like; tho' if the injured Person desire it, Reparation may be made for such an Offence by Money, that being the common Standard, whereby every Thing that is profitable may be measured.

Slaves would be encouraged, and in some Measure privileged, to insult Men, if the Master was not obliged, either to repair the Damage done by them, or deliver them up to the Person injured. A Master when he buys, or otherwise acquires the Property of a Slave, might therefore, and ought, to reckon, that his Right does not extend so far as to deprive those who may be insulted by the Slave, of the Satisfaction they might have taken on his Person, in the State of Nature, and which they have not renounced. It is his Business to consider

whether he is willing to accept of the Advantage arising from the Slave's Service, together with the Burthens belonging to it. I could say much more in Confirmation of what I have here laid down; but what I have said is sufficient, especially in a Note, which is already long enough.

XXII. (1) See the Example of *Vivian*, in CASSIODORUS, IV. 41. who was touched with Remorse for, and repented of an unjust Accusation. GROTIUS.

C H A P. XVIII.

Of the Rights of Embassies.

I. *That certain Obligations arise from the Law of Nations, such as the Rights of Embassies.*

I. **WE** have hitherto treated of those Rights that belong to us by the Law of Nature, adding some Few that arise from the voluntary Law of Nations, as it is an Addition to the Law of Nature. Let us now come to consider, what Obligations that Law of Nations which we call voluntary, doth of itself lay us under. Whereof the chief Head is, *Of the Rights of Embassies*.¹ For in all Authors Mention is made of *The sacred Rights of Embassies*, of ² *the sacred Character* of

I. (1) The Rights of Embassies are in some Manner grounded on the Law of Nature, which authorises all that is necessary for procuring or maintaining Peace and Friendship among Men. See PUFENDORF, B. II. Chap. III. § 23. As to such Rights as are not necessary for that End, if Embassadors can claim them, it is only because the Custom being introduced of allowing Embassadors to enjoy such Rights, whoever receives an Embassy, is, and may be, supposed to receive it on that Foot, unless he expressly declares he will not submit to the established Custom, as he is at full Liberty to dispense with it, when he excuses others on the same Score.

2 POMONIUS, L. si quis. D. de legationibus, *If any one shall strike an Embassador, tho' sent from an Enemy, he is thought to violate thereby the Law of Nations, because Embassadors are accounted sacred. And for this Reason, if, whilst Embassadors of any Nation are resident with us, War be declared against their Principals, they still remain at Liberty. For this is agreeable to the Law of Nations. And*

therefore Quintus Mucius used to say, that he who struck an Embassador, ought to be delivered up to the Enemy that employed him. By the Julian Law against publick Violence, not only those who insult an Embassador, but such as insult any of his Retinue, are declared liable to the Penalty. As ULPIAN replies in *L. lege Julia, D. ad legem Juliam de vi publica*. JOSEPHUS, *Antiq. Hist.* Lib. XV. mightily cries up the sacred Privileges of Embassadors, who, he says, are honoured with the same Name as the Angels and Messengers of GOD. VARRO, *Lib. III. De Lingua Latina, The Persons of Embassadors are sacred.* CICERO, *Verr. III. The Rights of Embassadors are secured both by a divine and human Guard, and the very Name ought to be so sacred and venerable, as to be safe and inviolable, not only amongst Allies, but amidst the Arms of contending Foes.* The Author of *Pelopidas's Life*, *When he thought himself secured by the Rights of Embassy, which every Nation used to regard with the profoundest Reverence.* DIODORUS SICULUS, (in *Excerpt. Peires. N. 248.*) calls this, ἡ ἀδελαν τῶν

of *Embassadors*, of the *Right of Nations* due to them, a *Right* both *divine* and *human*: The *Right of Embassy* is accounted by all *Nations* sacred, it is called The *sacred League of Nations*, and the *human League*; and the *Persons of Embassadors* are stiled *Sacred*.

A Name that Nations always sacred held. Statius.

And *Cicero*, in his *Book of the Answers of Soothsayers*, *I am of Opinion*, says he, that the *Rights of Embassadors* are guarded by all *Laws* both *divine* and *human*. Wherefore, to violate this *Right* Is not only unjust³ but *impious*, as it is acknowledged by all, says *Philip*, in his *Epistle to the Athenians*.

II. 1. But first of all we must take Notice, that whatever be the Privileges of this Sort of *Right of Nations* which we are now to treat of, they belong only to those *Embassadors* who are sent by sovereign Powers to each other: For as to such as are sent by *Provinces*, *Cities*, or any other subordinate Powers, we are to judge of their Privileges, not by the *Law of Nations*, which is common to different Nations, but by the *Civil Law*. An *Embassador*, in *Livy*, calls himself *The publick Messenger of the People of Rome*.¹ And in another Place of the same History, the *Roman Senate* declares,² that *The Right of Embassy* is not granted to a *Citizen*, but to a *Foreigner*. And *Cicero*, to shew that they ought not to send *Emba-*

II. Among whom this takes Place.

πρεσβυτών ἀσφαλείας. *A Privilege of Security*, that the *Sacredness of Embassadors* intitles them to. In *STATIUS*,

An Embassador,
When'er he will, returns in Safety.
Thebaid. Lib. II. (v. 373, 374.)

And again,
Embassador is a Name,
By ev'ry Age in Veneration had.
Ibid. (v. 436.)

St. CHRYSOSTOM, ἡ ἐδὲ τὴ κοινὴ, &c. *Without any Manner of Regard to the common Law of Mankind*, that never suffers an *Embassador* to be insulted. *SERVIUS*, upon *Æneid X. ver. 101*. By the *Right of Nations* screened from every Injury. Not to set down all the Passages to this Purpose, see *LIVY*, of the *Laurentes*. *DION CHRYSOSTOM*, *De lege & consuetudine*. *VELLEIUS PATERCULUS*, *init. Lib. II*. *MENANDER PROTECTOR*. *FELIX's Epistle to Zeno*, in *Append. Cod. Theod.* by *SIRMUNDUS*. *Totilas*, in *PROCOPIUS*, *Goth. III. Πᾶσι μὲν, &c.* To speak in general, it is an established Custom, even with all the *Barbarians in the World*, to reverence the *Character of Embassadors*. The same has *SCAFFNABURGENSIS* related of the barbarous and uncivilized People. *AIMONIUS* attributes these Expressions to *King Clodoveus*, And lastly, by the united Force of *divine and human Laws*, which ordain, that those who are commissioned the *Mediators and Composers of Hostilities*, shall themselves be free from *Hurt and Molestation*. For in *War and Arms* it is an *Embassy* alone that can solicit *Peace*; and the *Person* employed in that friendly Service is no longer an *Enemy*. See also *RADEVICUS*, in *Append.* See *CROMERUS* of the *Polanders*, *Lib. XX*. *LEUNCLAVIUS* of the *Turks*, *Lib. VIII*. *MARIANA* of the *Moors*, *Lib. XII*. *GROTIUS*.

What our Author here quotes from *VARRO* is not in that Writer. The bare Manner of quoting him makes one immediately suspect some Mistake; for what is now extant of the Piece *De Lingua Latina*, begins with the fourth Book. I am satisfied I have discovered the Origin of this false Quotation, and it will hence appear, that the greatest Men sometimes quote on the Credit of others. *DENIS GODFREY*, in a Note on the *Digest. Lib. L. Tit. VII. De Legationibus*, *Leg. XVII.* copying what *CUJAS* has said in his *Observations*, *Lib. XI. Cap.*

V. takes the Words of that famous Lawyer for a Passage from the *Roman Author*. *CUJAS* there observes, that the Priests called *Feciales*, took Cognizance of such Cases as related to the Violation of the Rights of *Embassadors*; and refers to *VARRO*, *Lib. III. De vitâ populi Romani*. After which he adds, *Nor is this to be wondered at; since, as we have said, the Bodies of Embassadors are sacred*. The Transcriber took these for the very Words of the *Latin Author*; and in Order to correct his Original, quotes the third Book of *VARRO's* Work now extant; not knowing that the Passage in View belongs to a Work that is lost; of which *NONNIUS MARCELLUS* has preserved this Fragment, under the Word *Feciales*. They (the *Romans*) ordered, that if any Violation was offered to the *Embassadors* of any Nation, the *Offenders*, tho' of the Nobility, should be delivered up to the State thus injured; and twenty *Feciales* were appointed for taking Cognizance of, and judging in such Matters. p. 529. *Edit. Mercer*. Our Author, who had read *GODFREY's* Note, was the more easily induced to trust him, as he might have remembered to have read the like Words elsewhere. For *ASCONIUS*, a Commentator on *CICERO*, writing on those Words of the Orator, *For the Character of an Embassador ought to be such, that he may be safe; not only among Allies, but even among the Arms of the Enemy*; says, *The Orator added the last Words invidiously, when speaking of Magistrates*. For, continues he, the *Persons of Embassadors* are preserved inviolable by the *Law of Nations*, in making *Treaties*, or regulating the *Terms of Peace and War*. In *Verrem. I. Cap. XXXIII*. *GODFREY*, quoting the Passage of *CICERO*, gives it thus, *Ought not Embassadors to be safe among Enemies?* Our Author cites it exactly in the same Manner below, § 6. which leaves no Room for doubting what gave Occasion to the Mistake under Consideration.

3 Ἐπὶ δὲ ἀσεβείας, *A wicked irreligious Thing*, says *PLUTARCH*, in his *Life of Æmilius*, relating what *Gentius* had done. *JOSEPHUS*, *Antiq. Hist. Lib. XV. τὸ πρὸς τὸ ὀνομα, &c.* This awful Name is able to reconcile one *Enemy* to another. And therefore what can be a greater Act of *Impiety* than to murder *Embassadors*, who are interceding only for what is just and reasonable? *GROTIUS*.

II. (1) *Lib. I. Cap. XXXII. Num. 6.*

2 *Lib. VI. Cap. XVII. Num. 8.*

sadors to *Anthony*, says, ³ *We have not to do with Hannibal a publick Enemy, but with a Citizen.* Now what is meant by a Foreigner, no Lawyer could have shewn us more plainly than *Virgil* has done,

*For every Land not subject to our Yoke,
I foreign call.* ⁴

2. Those, therefore, that are ⁵ joined in Alliance, tho' it be upon very unequal Terms, since they do not cease to be independent, shall have the Right of sending Embassadors: Nay, even those who are partly subject, and partly free, ⁶ for that Part where they are free. ⁷ But Kings that are conquered in a declared open War, lose, together with their other Privileges, the Right of sending Embassadors ⁸. Therefore *Paulus Æmilius* kept the Heralds of *Perseus*, whom he had subdued, Prisoners ⁹.

3. But in Civil Wars, Necessity does sometimes make Way for this Right, tho' irregularly. ¹⁰ As suppose a Nation be divided into two Parties, so equal that it is hard to judge whether Side can be called the Government; or when two Persons, with very equal Titles, contend for the Succession to the Crown. For in such Cases, one Nation may for the Time be accounted two. Thus are ¹¹ those of *Vespasian's* Party accused by *Tacitus*, that in their Civil Sedition they had violated the Rights of Embassadors, in those sent by *Vitellius*, Rights sacred even amongst foreign Nations. Pirates and Robbers, that do not constitute a settled Government, have no Right of Nations belonging to them. *Tiberius*, when *Tacfarinas* sent Embassadors to him, was highly provoked, that a Traitor and a Rogue should pre-

³ *Orat. Philip. V. Cap. X.* See BOECLER'S Note on VELLEIUS PATERCULUS, *Lib. II. Cap. VII.*

⁴ *Æneid. Lib. VII. ver. 369, 370.*

⁵ CROMERUS XXX. GROTIUS.

⁶ As the *Carthaginians*, mentioned *Chap. XV.*

⁷ *Num. 5.* To this Article are referred feudatory Princes, as those of *Germany* are in Regard to the Emperor.

⁸ To this may be added, a remarkable Instance which our Author himself has given in his Letters, *I. Part. Epist. 364. viz.* that of the Chancellor *Oxenstiern*, who, tho' a Subject, after the Death of *Gustavus*, received so great a Power from the States of *Sweden*, that he was authorized to send Embassies as he thought proper, for making War and Peace, &c. As the Case was extraordinary, our Author, in the Letter now quoted, among other Instances, produces that of Embassadors, who being sent from *Flanders* by the Archduke, by Vertue of a Power received from *Madrid*, were received in *France* and *England*, as Embassadors of the King of *Spain*. See what he says further in that Letter, where he tells the Chancellor how he answers the Objections proposed to him on that Occasion, when he was sent to *Paris*, with the Character of Embassador from the Crown of *Sweden*.

⁹ This Question is useless, in Regard to the Conqueror; who will be far from even enquiring whether he ought to receive Embassadors from him whom he has deprived of his Kingdom. But as a Conqueror, who had entered into the War for some Reasons manifestly unjust, doth not by his Victory acquire a true Right over the conquered Kingdom, till the lawful Sovereign renounces all his Pretensions in some Manner or other, the other Powers, as long as they can do it without some great Inconveniency, ought still to acknowledge him for the true King, who really is so; and consequently are obliged to receive his Embassadors, and allow them all their Rights and Privileges. In that Case the Conqueror is to them the same as the Usurper, mentioned by our Author, *Chap. XVI. § 17.* The Difference he makes between

them is grounded only on the Effects which he improperly ascribes to his pretended Law of Nations, as we shall shew in the proper Place.

¹⁰ We have this Fact from LIVY, *Lib. XLIV. Cap. XLV. Num. 1. and Cap. XLVI. Num. 1.* But says GRONOVIVS, the Roman General did not detain the Heralds of *Perseus*, because that Prince being deprived of his Kingdom, had then no Right to send Embassadors; it was because, thinking himself in a Condition of really depriving him of his Kingdom, he would not hearken to any Proposals of Peace; and because those Ambassadors came without Leave, which it was customary to ask. See LIVY, *Lib. XXXII. Cap. XI. and Lib. XXXVII. Cap. XLV.* So that no Injury was done them. *Paulus Æmilius* contented himself with returning *Perseus* no Answer by their Mouth. I find, however, that *Perseus* sending afterwards three Embassadors with Letters, *Paulus Æmilius* sent them back without any Reply, because *Perseus* still took the Title of King, *Lib. XLV. Cap. IV.* Whence it follows, that he must not have considered the Embassadors of that Prince as invested with the Privileges they might have before enjoyed, but looked on their Persons as sacred and inviolable only as far as he pleased.

¹¹ See JOHANNES MARIANA, *Lib. XXII. 8.* about the Embassadors of the City of *Toledo* to the King; and CRANTZIUS, about the People of *Flanders*. *Saxon. XII. 33. GROTIUS.*

¹² And *Magnentius*, in ZOSIMUS, *Lib. II. Malvshij 5.* &c. *Magnentius* was a pretty While considering with himself, whether he should dismiss *Philip* without giving him an Answer, or detain him, contrary to the Privilege of Embassadors. This *Philip* was come from *Constantius*. GROTIUS.

The Thing did not actually happen, but all Things seemed disposed for the Fact. See the Historian, *Hist. Lib. III. Cap. LXXX. Num. 4. Edit. Rycq.* The Passage quoted from ZOSIMUS, is *Lib. II. Cap. XLVII. Num. 3. p. 217. Edit. Cellar.*

sume to treat with him, after the Manner of an Enemy, as *Tacitus* relates.¹² Yet even such Men have sometimes the Privilege of sending Embassadors granted them by a Treaty; as had formerly the Outlaws and Highwaymen in the *Pyrenean Mountains*¹³.

III. 1. But there is a twofold Right, we find, attributed to Embassadors, viz. first¹ to be admitted, and then to have no Violence offered them. Concerning the first there is a Passage in *Livy*, where *Hanno*, the *Carthaginian* Senator, thus inveighs against *Hannibal*.² *Our good General refused to admit into his Camp, Embassadors that came from your Allies, and on their Behalf; he has broke the Law of Nations.* Which yet is not to be taken in so large a Sense as if none were to be denied Admittance.³ For⁴ the Law of Nations does not require that all Embassadors should be admitted, but that none should be rejected without Cause. Now Admittance may be denied, either on Account of the Potentate sending, the Person sent, or the Subject of the Embassy.

2. *Melesippus*, the *Spartan* Ambassador, was commanded, by the Advice of *Pericles*, to depart out of the *Athenian* Territories,⁵ because he came from an armed Enemy. So⁶ the *Roman* Senate denied the *Carthaginian* Embassadors Admittance while their Army was in *Italy*. And so did the *Achaians* to those of *Perseus*⁷, while he was making warlike Preparations against the *Romans*. The like did *Justinian*⁸ to the Embassadors of *Totilas*; and the *Goths* in *Urbis* to those of *Belisarius*.⁹ And *Polybius* tells us, that the Embassadors of the *Cynethians* were driven out, wherever they went, as representing a vile Nation.¹⁰ An Instance of the second Cause we have in *Theodore*, surnamed the Atheist, to whom *Lyfimachus* de-

III. Whether an Embassy is always to be admitted.

¹² *Annal. Lib. III. Cap. LXXIII. Num. 2.*

¹³ *De Bell. Civil. Lib. III. Cap. XIX. Num.*

2. See the Notes of CELLARIUS on the Place.

III. (1) DONATUS, on the Prologue to *Hecyra*, To be admitted to Audience is a Right the Law of Nations has given Embassadors. GROTIUS.

The other Right is mentioned immediately after, and I am surprized that our Author has not taken Notice of it. *It is not allowable to offer Violence to an Ambassador; therefore, for his own Security, he calls himself, not the Speaker of a Prologue, but an Ambassador.*

2 *Lib. XXI. Chap. X. Num. 6.*

3 We are farther to observe, with THOMASIVS, that even when there is an Obligation of admitting Embassadors, it is a bare Duty of Humanity; so that the Refusal alone can never be considered as a real Injustice. See that Author's *Institut. Jurisprudentiæ Divinæ*, Lib. III. Cap. IX. Num. 15, &c. as also his Notes on HUBER, *De Jure Civitatis*, Lib. III. Sect. IV. Cap. II. § 10. where he quotes a Treatise which he much values, but which I have not seen, published under a feigned Name, and entitled JUSTINI PRESBEUTA, *Discursus de Jure Legationis Statuum Imperii*, Eleutheropol. 1700.

4 See CAMDEN in the Year MDLXXI. The fourth Question proposed there. GROTIUS.

5 *Pericles* was of Opinion, that no Herald or Ambassador should be received from the *Lacedæmonians*, while they remained in Arms. THUCYDIDES, Lib. III. Cap. XII. Edit. Oxon. The *Lacedæmonians* had refused to make up the Quarrel in an amicable Manner; as appears from the Conclusion of B. I. and the *Athenians* still continued to offer them that Way, for they told *Melesippus*, that when the *Lacedæmonians* had laid down their Arms, and were returned to their own Country, they might then send them Embassadors, who should be well received. It was evidently their Resolution to come to a War; and *Melesippus* was considered as one sent only in the Character of a Spy; for which Reason he was conducted out of the Coun-

try, by Persons who had Orders to see he spoke to nobody in his Journey. See an Example of the like Sort in APPIAN, *Bell. Mitbr. p. 311. Edit. Amst. (181. Edit. H. Steph.)* and in ARISTIDES, the Rhetorician, *Orat. Panathen. Tom. I. p. 250. Edit. P. Steph.* Our Author means, that in Circumstances like that, there is good Reason for refusing Audience to the Embassadors of a Power, which has taken up Arms. He had no Design of laying it down as a general Rule, that Embassadors from an armed Enemy may always be refused, as ZIEGLER and others ridiculously understand him. He was not apt to fall into such a gross Self-Contradiction.

6 See SERVIUS upon the eighth *Æneid*, concerning this Custom of the *Romans*. GROTIUS.

Our Author here means the Custom of enquiring whence the Embassadors came, and what was their Business, before they received them. The following Passage is what he had in View; at least I know no other that can be meant. ILLE INTRA TECTA VOCARI IMPERAT. *He (King Latinus) acted differently from the Roman Custom. For if News was brought of the Arrival of some unknown Embassadors, first Enquiry was made into their Business, after which the inferior Magistrates went out to them; and lastly, the Senate informed themselves of their Demands without the Walls of the City; and thus, if it appeared proper, they were admitted.* On Verse 168.

7 LIVY, Lib. XLI. Cap. XXIX. Num. 20.

8 PROCOPIUS, *Gothic. Lib. III. Cap. XXXVII.*

9 Idem. Lib. II. Cap. XIX. Where, however, another Reason is alledged.

10 The People through whose Country they passed, would not suffer them to enter their Towns; and some, looking on the Places through which they passed, as defiled, made great Purifications. This is what the Historian says, without mentioning the Reception they met with from the States to which they were sent. Lib. IV. Cap. XX. p. 402. and Chap. XXI. p. 404, 405. Edit. Amst.

nied Audience, when he came upon an Embassy from *Ptolomy*.¹¹ And others have met with the like Treatment, only through personal Hatred. The third Cause we have mentioned, takes Place¹² when either the Design of the Embassy is suspected, as was deservedly that of *Rhabshakeh*, the *Affyrian*, to *Hezekiah*, to stir up the People to Sedition; ¹³ or when it is not suitable to the Dignity of the Potentate to whom it is sent; or when the Circumstances of the Times, and the Situation of Affairs, do not permit it. So the *Romans*¹⁴ forbad the *Ætolians* to send any Embassy without their General's Permission; nor was *Perseus* permitted to send any Embassadors to *Rome*, but only to *Licinius*; ¹⁵ and, in like Manner, when *Jugurtha* sent his Embassadors to *Rome*, they ordered¹⁶ that they should depart out of *Italy* within ten Days, unless they were come to deliver up their King and Kingdom. And thus may those Embassadors in Ordinary, that are continually resident at most Courts, deservedly be rejected as unnecessary, and a new upstart Custom, not known to former Ages¹⁷.

IV. That Defence is lawful against Embassadors by Way of preventing Mischief, but not by Way of Punishment.

IV. 1. Concerning the latter Right of Embassadors, viz. ¹ that no Violence is to be offered them, the Question is more difficult, and variously handled by the great Men of the Age. Let us speak first of the Persons of Embassadors, and then of their Retinue and Goods. As to their Persons, some think that they are only protected from unjust Violence by the Law of Nations, imagining that their Privileges are to be explained by common Right. Others, that Violence ought not to be offered to an Ambassador for every Cause, but only when he violates the Law of Nations, which is extensive enough; for in the Law of Nations that of Nature is included; so that, at this Rate, an Ambassador may be punished for any Crime, except such as are committed against the Civil Law only. There are others of Opinion, that Violence is never to be offered to an Ambassador, unless he be found to act against the Government, or the Dignity of the Potentate to whom he is sent; tho' some think even this to be of dangerous Consequence, that Complaint should rather be made to his Principal, and that it should be left to him to punish his Ambassador according to his Pleasure. Others would have us appeal to Kings and Nations that are entirely disinterested, and to be determined by their Arbitration; which indeed may be done in Point of Prudence, but cannot be claimed as a Right.

2. Nothing of Certainty can be concluded from the Reasons each of these give to confirm their Opinions; for this Right is not grounded upon sure and infallible Principles, as a Right of Nature, but takes its Measures from the Will and Pleasure of Nations.² And they were at Liberty to have provided for the absolute Security and

¹¹ *Lyfimachus* gave him Audience; but bid him Take Care he came not a second Time. To which the Philosopher answered, that He would not, unless *Ptolomy* sent him. This Account we find in *DIOGENES LAERTIUS*, Lib. II. § 182. Edit. *Amst.*

¹² So *Andrew Burgus* *Cæsar's* Ambassador, was denied Admittance into *Spain*, *MARIANA*, Lib. XXIX. There is another Instance of this in *CROMERUS*, Lib. XX. *GROTIUS*.

¹³ In the Retreat of the ten thousand *Greeks*, of which *XENOPHON* has left us the History, the Generals resolved that they would receive no Heralds while they were in an Enemy's Country. They were moved to this Resolution, by their having found, that, under Pretence of Embassies, Spies had been sent among them, who corrupted the Soldiers, and caused several of them to revolt. *De Expedit. Cyri*, Lib. III. Cap. III. § 4. Edit. *Oxon.*

¹⁴ *LIVY*, Lib. XXXVII. Cap. XLIX. Num. 3.

¹⁵ *Idem*. Lib. XLII. Cap. XXXVI. Num. 5, 6. This and the foregoing Instance relate rather to the Manner of receiving an Embassy, than the Reasons for refusing it.

¹⁶ The Emperor *Charles V.* commanded the Embassadors of *France*, *Venice*, and *Florence*, sent to declare War against him, to be conducted to a

Place thirty Miles distant from his Court. *GUICCIARDINI*, Lib. XVIII. *BELLAJUS*, Lib. III. *GROTIUS*.

The Fact mentioned in the Text of our Author, is recorded by *SAL LUST*, *Bell. Jugurth.* Cap. XXX. Edit. *Wass.* The Example produced in the Note is not to the Purpose. The Question there turns on Embassadors, who were actually with *Charles V.* whom he put under an Arrest, till he had Advice, that his Embassadors in *England* and *France* were safe.

¹⁷ See Mr. *THOMASIIUS's* *Jurisprud. Divina*, Lib. III. Cap. IX. § 25, &c.

IV. (1) *MENANDER PROTECTOR*, speaking of the Emperor *Justin the Second*, 'Ο δὲ αὐτὸν τὸν κοινὸν τῶν πρεσβυτέρων θεσμὸν εἶναι ἐν δεσμοῖς, But he, contrary to the common Rights of Ambassadors, put them in Chains. See *ERN. COTHM. Resp.* XXXII. Num. 29, &c. Vol. V. *GROTIUS*.

On the contrary, *Bajanus*, King of the *Avari*, imprisoned the Embassadors of *Justin II.* as the *Greek* Author relates the Matter, *Excerpt. Legat. Just. Justinian. & Tiber.* Cap. IX. where we find the Words quoted by our Author.

² In Reality, if the Consent of Nations was the only sure Foundation of the Rights of Ambassadors, it would be hard to prove the Maxim in Question,

and Protection of Embassadors in all Cases, or only with such and such Reserves and Exceptions : For if, on one Side, it be useful to punish great and capital Offenders ; it is on the other Side advantageous to facilitate Embassies, which cannot be better done than by procuring to Embassadors the greatest Security possible. We are therefore to consider how different Nations have agreed in this Point ; which cannot be proved by Instances only. For Instances enough may be alledged on both Sides. We must therefore have Recourse both to the Opinions of wise Men, and Conjectures of the Will and Pleasure of Nations.

Question, and shew how far it extends. But our Author had not sufficiently consulted the Principles of the Law of Nature, which would have furnished him with clear and certain Reasons. See what Mr. THOMASius says on the Subject ; who, in my Opinion, has treated it better than any one, in his *Jurisprudencia Divina*, Lib. III. Cap. IX. § 36, &c. He first distinguishes between Embassadors, who have done nothing amiss, from those who have behaved themselves ill ; and then such as are sent by one Power to another, with which it is at Peace, from those who come from an Enemy. First then, there is no Difficulty in Regard to Embassadors, who coming to a State with which their Master is at Peace, have injured no Man. The most common and most evident Maxims of the Law of Nature require they should be perfectly secure ; so that, if such an Embassador be insulted or affronted in any Manner whatsoever, his Master has a just Reason for declaring War. The holy King David furnishes us with an Instance of this Kind. 2 SAMUEL Cap. X. As to Embassadors who come from an Enemy, and who have done nothing amiss, there Security depends entirely on the Laws of Humanity, before they are admitted as Embassadors. For an Enemy, as such, has a Right to annoy his Enemy. So that, independently of Agreements or Treaties, by which a Prince or State becomes in some Sort a Friend for a Time, they can be obliged to spare the Embassador of an Enemy only by Vertue of the Sentiments of Humanity, which we ought always to retain, and which oblige us to have a Regard for whatever tends to the Preservation of Peace. When therefore some Act of Hostility is committed on an Embassador sent by an Enemy, before he is admitted as such, no fresh Cause of a War is given ; only that, which the Enemy before had, is thereby confirmed, supposing the War just and lawful. I make this Supposition, because if the War was unjust, that is, if he who sent the Embassador had really injured him to whom he sent him, and thus given him Reason for taking Arms against him ; the Acts of Hostility committed by the latter on the Embassador of the former, do not make the Right change Sides ; unless the Aggressor sent his Embassador to offer his Enemy a reasonable Satisfaction ; for then this ought to be considered as a Case of Necessity, which carries an imperfect Obligation with it. But when an Enemy's Embassador is once admitted, the Power thus admitting him does thereby manifestly engage itself, tho' usually in a tacit Manner, to give and procure him entire Security, while he behaves himself well. So that if this Engagement is broke through, a just Cause of War is given, or at least the Right is transferred to the other Side ; because all Agreements give a perfect Right. Nor are *Heralds*, who are sent to declare War, to be excepted in this Case, provided they do it in an inoffensive Manner. For, according to the Custom of civilized Nations, this Declaration implies a tacit Protestation that we design to use the Way of Arms in a Manner conformable to right Reason, and with an Intent to procure a good Peace. So much for innocent Embassadors. But Secondly, in Regard to such as have rendered themselves culpable in any

Manner, they have committed the Fault either of *their own Head*, or by *their Master's Order*. If the former, they forfeit their Right to Security, when the Crime is evident and heinous. For no Embassador whatever can enjoy more Privilege than his Master would have had in the same Case ; and such a Crime would not be pardoned in the Master. By *heinous Crimes* we are to understand such as tend either to disturb the Government, to take away the Lives of the Subjects of the Prince to whom the Embassador is sent, or to do them some considerable Prejudice in their Honour and Estates ; particularly if the Persons thus injured are dear to the Prince. When the Crime directly affects the State, or him who is at the Head of it ; whether the Embassador has actually used Violence or not, that is, whether he has excited the Subjects to Sedition, has himself conspired against the Government, or favoured the Plot ; or whether he has taken Arms with the Rebels or the Enemy, or engaged his Retinue so to do ; Revenge may be taken on him, even by killing him, not as a Subject, but as an Enemy. For his Master himself would have no Room to expect better Treatment. If he makes his Escape, his Master is obliged to give him up, on Demand. But, if the Crime, how manifest and heinous soever it may be, affects only a private Man, the Embassador ought not, on that Account alone, to be considered as an Enemy to the Prince or State ; but as, if his Master had been guilty of any Crime of the same Nature, Satisfaction ought to be demanded of him, and Arms are not to be taken against him till he had refused it ; the same Reason of Equity requires that the Prince, at whose Court the Embassador commits such a Crime, should send him back to his Master, desiring him either to give up the Offender or punish him. For to detain him in Prison, till his Master shall either recal him in order to punish him, or declare that he abandons him, would be to testify a Diffidence of the Master's Justice, and in some Sort affront him, because the Embassador still represents him. Besides, when a Man has no Right to punish another, he has, commonly speaking, no Right to seize his Person. The Case is different when the Crime is committed by his Master's Order ; for then it would be imprudent to send the Embassador back ; because there would be good Reason to believe that the Prince who commanded the Commission of the Crime will be far from either surrendering or punishing the Offender. The Person of the Embassador therefore may be secured till the Master shall repair the Injury done both by the Embassador and himself. As to those who do not represent the Prince's Person, such as bare *Messengers*, *Trumpets*, &c. they may be killed on the Spot, if they come to abuse a Prince by Order of their Master. Nothing is more absurd than what some maintain, viz. that all the Ills done by Embassadors by Order of their Master ought to be charged on their Master only. Were it so, Embassadors would have more Privilege in the Country of another Prince than their Master himself, should he appear there. And, on the other hand, the Sovereign of the Country would have less Power in his own Dominions, than a Master of a Family has in his own House.

3. We have two most famous Opinions ; the one of *Livy*, the other of *Sallust*. That of *Livy* is upon the Embassadors of *Tarquin*, who had promoted a Conspiracy in *Rome* ; *Altho'*, saith he, *they seemed to have done such Things, as deservedly to denominate them Enemies, yet the Law of Nations prevailed in their Favour*³. Here we see the Law of Nations extended even to those Embassadors that commit Acts of Hostilities⁴. The Saying of *Sallust* may more properly be attributed to the Attendants of Embassadors (of whom below) than to themselves. But the Argument holds good, *a majori ad minus*, i. e. from a Thing less credible to one more so. *Bomilcar*, saith he, *an Assistant in the Embassy sent to Rome, was adjudged a Criminal rather by the Rules of Equity, than of the Law of Nations*⁵. Where Equity is to be understood of the Law of Nature, which suffers every Offender to be punished, that can be convicted, but the Law of Nations makes Exceptions in behalf of Embassadors and Persons of publick Characters. And therefore to proceed against Embassadors as Criminals is to act against the Law of Nations, which prohibits several Things that the Law of Nature allows.

4. There are also probable Conjectures on this Side of the Question. For it is most likely that the Privileges of Embassadors should include in them some greater Right, than what is due to all People in common⁶. But if an Embassador were only to be protected from unjust Violence, this would be nothing extraordinary or peculiar. Besides the Protection of an Embassador from Punishment outweighs the Benefit, that could accrue to the Publick by his Punishment. For the Power, from whom he came⁷ may voluntarily punish him ; and if he refuses to do it, then War may be levied against him, as an Approver of the Crime. Some object, that

³ Lib. II. Cap. IV. Num. 7.

⁴ I think this Passage supposes the contrary. The Historian had said that *the Conspirators being committed to Prison, there was some Debate whether the Embassadors should be treated in the same Manner*. Now, would this have been a Question, if it had been a settled Maxim that an Embassador is screened by his Character, tho' he commits Acts of Hostility ? The very Words quoted by our Author insinuate that the Law of Nations doth not extend so far as to impose an Obligation of sparing an Embassador, who commits Acts of Hostility ; as if the Historian had said, tho' it was evident that the Conduct of the Embassadors was such as authorised their being treated as Enemies, yet the *Romans* were pleased to allow them the Privilege which they would otherwise have enjoyed by the Law of Nations, but of which they had rendered themselves unworthy. So that here is an Exception to the Rule, which declares Embassadors forfeit their Rights the Moment they engage in any Plot, Treason, or such like Conspiracies. I had written this long before I read a Dissertation of the late Mr. COCCÆIUS, *De Legato Sancto, non impuni*, published at *Francfort* on the *Oder* in 1691. where I had the Pleasure to see that celebrated Lawyer explain this Passage and that of *Sallust* almost in the same Manner. *Sett. III. § 2, &c.*

⁵ *Bell. Jugurth.* Cap. XXXIX. *Edit. Waff.* (XXXIV. *Vulg.*) This Passage likewise is misapplied by our Author ; the true Sense of it is given by the Commentators. The Historian means tho', in strict Justice, *Bomilcar* might have been put to Death, according to the Law of Nations, on Account of *Massiva's* Assassination, without being allowed Time to plead his own Cause ; yet in order to use him with Tenderness (*ex æquo bonoque fit reus, &c.*) he was allowed that Favour, which brought him off, as appears by the Sequel of his Story. Thus those Words, *Comes ejus, qui Romam fide publicâ venerat, an Assistant in the Embassy sent to Rome*, are so far from signifying that, because he was in the Retinue of a Person who came with a safe Conduct, nothing could be done to him by the Law of Nations ; that, on the contrary, they insinuate, that,

having committed so heinous a Crime, he had thereby rendered himself the more worthy of speedy Punishment as he came under the Protection of the publick Faith. Consult Mr. COCCÆIUS, as quoted in the foregoing Note. Thus the two Passages, quoted by our Author, rather prove the contrary of what he concludes from them ; tho' his Application of them is approved of by WICQUEFORT, in his *Embassador*, B. I. Chap. XXVII. Tom. I. p. 821, 822. *Edit. Hague 1681.* In Reality, on examining all that the Antients have said concerning the Security of Embassadors, it will appear that this Security relates chiefly, if not solely, to those who do not misbehave themselves, and consists only in this, that the Right of War cannot be employed against them, or any other Method be taken with them, which would otherwise justify falling on the Subjects of the Power, from whom they are sent.

⁶ True. But this is not to be extended beyond what the Design and Custom of Embassies require. Now in Order to this, it is sufficient, that we cannot consider an Embassador as having forfeited his Privileges for all Sorts of Crimes, but only for such as are incontestable and heinous.

⁷ The Question does not here turn on the Advantage that may result from the Punishment, when the Crime is once committed, but on what is necessary to be done for preventing the Commission of it. The Security of Embassadors ought so to be understood, that it implies nothing contrary to the Security of the Powers to whom they are sent, and who neither would nor ought to receive them on other Terms. Now who does not see that Embassadors would be less bold in attempting any Thing against the Sovereign or Members of a foreign State, if they were apprehensive that, in Case of Treason, or any considerable Misdemeanour, the Sovereign of the Country might do himself Justice, than if they have nothing to fear but Correction from their Master, which they may easily avoid, either because they are often secure of his Connivance or tacit Approbation, or because they hope to find Means to retire elsewhere before he can be apprised of their Crimes.

it is better that one should be punished, than a Multitude involved in War. But if the *Potentate* approve of the Fact of his Embassadors, ⁸ his Punishment will not keep off the War. Besides, the Safety of Embassadors is but very slenderly provided for, if they be obliged to give an Account of their Actions to any but their Principals. For since the Reasons of State in those that send, and those that receive the Embassador, are commonly different, nay, often quite contrary, it could scarce ever happen, that something might not be laid to the Embassador's Charge, that would carry the Colour of a Crime ⁹. And tho' some Crimes be so manifest as to admit of no doubt, yet the Danger, there generally is, in punishing Embassadors, is sufficient Reason for a general Law against punishing them at all.

5. Wherefore I am fully persuaded, that tho' it has prevailed as a common Custom every where, that all People that reside in Foreign Countries, should be subject to the Laws of those Countries; yet that an Exception should be made in Favour of Embassadors, who, as they are, by a Sort of Fiction, taken for the very Persons whom they represent, (*he brought along with him, saith Cicero of a certain Embassador, The Majesty of a Senate, and the Authority of a Commonwealth*) ¹⁰ so may they by the same kind of Fiction be imagined to be out of the Territories of the *Potentate*, to whom they are sent ¹¹. Hence it is, that they are not subject to the Laws of the Country, where they reside. Wherefore if any slight Crime be committed by an Embassador, it is either to be connived at, ¹² or he is to be commanded to depart out of the Kingdom, as was done to him, saith *Polybius*, ¹³ who procured the Escape of the Hostages from *Rome*. Hence we may take Notice by the Way, that an Embassador of the *Tarentines*, ¹⁴ who had been guilty of the same Crime, was scourged for it; but this was done at a Time ¹⁵ when the *Tarentines* being conquered by the *Romans* were become their Subjects. But in case the

⁸ It is a Matter of Prudence to consider whether there is Room to believe the Embassador's Master will approve of his Conduct or not. But, in Regard to the Right, the Uncertainty in this Case privileges a Prince to punish a Crime, for which he is not assured of having Satisfaction any other Way, and which might be capable of engaging him in a War, if he was obliged to wait till he knew what the Master of the Embassador would do in the Affair. Our Author doth not however here advise undertaking a War on the Prince, for revenging his not punishing his Minister; as *Cocceius* understands him in the Dissertation above quoted, *Cap. III. § 8*. He only means, in Answer to the Objection before us, that, even supposing the Prince might punish the Embassador (which he denies) a War will not always be avoided by that Means; because the Embassador's Master may approve of his Conduct, even tho' the Offender is punished. Now, in that Case, either he would endeavour to do himself Justice for such Punishment, as an Outrage committed on the Person who represented him; or there would be just Reason for taking his Approbation as an Affront, and consequently for declaring War against him on that Account, if it be otherwise judged convenient to undertake it; which our Author without Doubt supposes. On that Foot then his Answer is not amiss. But it must be allowed that the Objection, and consequently the Answer, are nothing to the Purpose; for the Reason given in the preceding Note.

⁹ This Inconveniency would be to be feared, if a Right was given, to the Power to whom an Embassador is sent, of punishing the least Fault, and without distinguishing the Cases, mentioned *Note 2*. But even supposing the worst, the Inconveniency will be at least counterpoised by the Dangers to which a State would be exposed, if the Ministers of foreign Powers might always flatter themselves with the Hope of not being punished by the Sovereign at whose Court they reside. Here a strict Regard is to be had to what is required by the Se-

curity and Interest both of him who sends, and of him who receives Embassadors. The Design and Effect of Embassies equally demand this Attention.

¹⁰ *Orat. Philipp. VIII. Cap. VIII.*

¹¹ This holds good while the Embassadors have done nothing by which they forfeit the Right of Security and Independence, which the Design of their Employ requires. Mr. *Cocceius* in his Dissertation more than once quoted, *Sect. II.* maintains, however, that all Embassadors are subject to the civil and criminal Jurisdiction of the foreign Power, in whose Country they exercise the Function of their Character. But he reasons either on Prejudices taken from what the *Roman* Law ordains in Regard to another Sort of publick Ministers, sent to their own Sovereign; or on Principles which do not destroy the Foundation of the Right in Question, *viz.* That, as a Prince will be far from purposely subjecting himself to the Jurisdiction of another, neither can it be grounded that he would subject himself to it in the Person of his Embassador, who represents him. See *Pufendorf, B. VIII. Chap. IV. § 21.* and *Chap. XI. § 3.*

¹² *Stephen, King of Poland, did so to the Muscovites, Thuanus, Lib. LXXXIII. Anno MDLXXXI.* And *Elizabeth* to the *Scot* and *Spaniard*. You have both these Instances in *Cambden* at the Year *MDLXXI.* and *LXXXIV.* *Grotius.*

¹³ In all Probability our Author has here copied *Alberic Gentilis*, who relates this Fact in his *Treatise De Legationibus, Lib. II. Cap. XXI.* But I find nothing like it in *Polybius*, not even in the Fragments collected from all Parts with extraordinary Diligence, tho' *Gentilis* on this Occasion says *Ut in selectis habet Polybius.*

¹⁴ He was afterwards thrown down from a Rock together with all the Hostages that were retaken. See *Livy, Lib. XXV. Cap. VII.*

¹⁵ So *Charles V.* commanded the Embassador of the Duke of *Milan*, as his Subject, not to stir from his Court. *Guicciardin, Lib. XVIII. Grotius.*

Crime be great, and tending to endanger the publick Safety, ¹⁶ the Embassador is to be remitted to his Principal, with a Demand, either that he punish him himself, or deliver him up to be punished; as we read of the *Gauls*, ¹⁷ That they demanded the *Fabii* to be delivered up to them.

6. But what I have observed already of human Laws, *viz.* That they are so made as not to oblige in Cases of extreme Necessity, will also hold good in this Maxim of the Law of Nations, which renders the Persons of Embassadors sacred and inviolable ¹⁸. But these Cases of extreme Necessity do not consist in exacting Punishment, which in several other Cases may be exempted by the Law of Nations, as will appear afterwards, when we come to treat of the Effects of an open and declared War; much less in the Place, Time or Manner of inflicting the Punishment, but in preventing some horrid Design, especially against the Publick. Wherefore, to prevent any imminent Danger, ¹⁹ an Embassador may be both arrested and examined. ²⁰ As were *Tarquin's* Embassadors by the *Roman* Consuls, special Care being taken that the Letters and Papers then in their Custody should not be put out of the way or lost ²¹.

7. But if an Embassador make an Assault with Arms, it is lawful to kill him, not indeed by Way of Punishment, but in our own Defence. So the *Gauls* might have killed the *Fabii*, whom *Livy* calls *Violators of Human Right* ²². Wherefore *Demophon* (in *Euripides*) resisted *Eurystheus's* Herald by Force, when he attempted by Violence to carry off the Suppliants; and when the Herald demanded of him,

Dar'st thou an ²³ *Herald strike who's hither sent?*

He answered,

Yes, if that Herald offers Violence.

The Herald's Name was *Copreus*, and ²⁴ because he offered Violence, he was slain by

¹⁶ DION in excerpt. legat. ὅτι νεανίσκοι τινες, &c. When certain young Gentlemen of the Carthaginians were come Embassadors to Rome, and there acted some unbecoming Things; they were remitted to Carthage. The Carthaginians delivered them up. But the Romans inflicted no Punishment on them: They were dismissed. GROTIUS.

¹⁷ The *Gauls* had not those Embassadors in their Power, so that they were not in a Condition to do themselves Justice LIVY, Lib. V. Cap. XXXVI. Num. 8.

¹⁸ It appears, from what has been said in the preceding Notes, that it is not requisite to wait for the last Extremity in this Case.

¹⁹ Mr. COCCÆIUS, in the Dissertation so often quoted, makes his Advantage of this against our Author, as if he had thereby acknowledged that an Embassador is subject to the Jurisdiction of the Power, to whom he is sent. For, says he, to arrest and examine a Man are juridical Acts of a Judge in Regard to one under his Jurisdiction. But the Consequence is far from being just; for the Detention and Interrogatories, which, out of the Case of extreme Necessity here supposed, may be considered as Acts of Jurisdiction, are here only a Means absolutely necessary, for Security against the evil Designs of the Embassador. A just Self-Defence authorises us to do all that, without which we cannot shelter ourselves from Danger. And the Prince, who orders an Embassador guilty of Treason to be arrested, no more exercises an Act of Jurisdiction by so doing, than a private Man, who kills an unjust Aggressor, in Defence of his own Life, exercises the Power of Life and Death.

²⁰ *Pelopidas* was imprisoned by *Alexander Phereus*, because when he was Embassador he excited the *Theffalians* to assert their Liberty. PLUTARCH and the Latin Writer of *Pelopidas's* Life. GROTIUS.

Pelopidas was not Embassador to *Alexander*, but to the *Theffalians*. So that this relates to another Question.

²¹ See SERRANUS in *Henry IV.* GROTIUS.

Our Author probably means to speak of the Letters and Papers belonging to the Secretary of the *Spanish* Embassador, who was put under an Arrest with *Mairargues*, when the treasonable Designs of the Person last mentioned were discovered. But the Life of *Henry IV.* here quoted was not written by Mr. DE SERRES (SERRANUS) as every one knows; since his History comes down no lower than *Charles VII.* It is the Work of his Commentator *Monliard*. Our Author probably had read the *Latin* Translation of that Work, printed at *Francfort* in 1627. in which the Whole passes without Distinction under the Name of JOHN DE SERRES, tho' the History is continued to the Year 1625. The Fact, here mentioned, may be seen p. 844. of that Book.

²² See the Passage quoted Note 17. of this Paragraph.

²³ This Objection is made by the *Chorus* in our Editions; and I know not by Vertue of what Authority it is attributed to the Herald, both here and in his *Excerpta ex Tragæd. & Com. Græc.* p. 317.

²⁴ And in this Sense must we take what *Theodatus* the Goth says to *Justinian's* Embassadors in PROCOPIUS, Gothic. I. σεμνὸν μὲν τὸ χρῆμα, &c. All the World look upon the Character of Ambassadors to be in every respect Sacred and Honourable, which Honour they may justly claim as long as by their good Behaviour they maintain the Dignity of their Employment. But Men generally agree, that it is lawful to kill an Embassador, if he affronts or is injurious to the Prince he is sent to, or if he attempts another Man's Bed. But here, when the Embassadors had proved that it was scarce possible to suspect them of Adultery, since they never stirred abroad with-

by the People of *Athens*, as *Philostratus*²⁵ records in the Life of *Herod*. The same Way does *Cicero* resolve this Question, whether a Son ought to accuse his own Father, who is a Traytor to his Country²⁶. If the Danger be imminent, he ought by Way of Prevention, but if the Danger be past, he ought not by Way of Punishment.

V. 1. But this Law, which we have been speaking of concerning the Protection of Embassadors from Violence, only obliges him, to whom the Embassy is sent, and that only upon Condition he admits it, as if from that Time a Sort of tacit Agreement commenced between them. But one may, and often doth, forbid Embassadors to be sent; or treat them as Enemies, if they come without his Permission. So were the *Ætolians* threatned by the *Romans*; and at another Time they ordered the *Veientine* Embassadors, to depart immediately out of their City, otherwise they would shew them no more Mercy, than *Tolumnius* their King had shewn to the *Roman* Embassadors, whom he commanded to be put to Death. So did the *Samnites* threaten the *Romans*, that if they came into the Council of *Samnium*, they should not depart in Safety³. This Law therefore doth not oblige those, thro' whose Territories Embassadors presume to pass without their Passport. For⁴ if they be going to their Enemies, or coming from their Enemies, or attempting in any other manner Acts of Hostility, they may lawfully be killed. Thus did the *Athenians*

V. That he to whom the Embassador is sent is not bound to observe the Rights of Embassy.

out a Guard, they very prudently subjoin, τὰς λόγους ἢ ὅσους, &c. As for what the Embassador speaks, if it be nothing but what he has received from his Principal, tho' the Message be not altogether so grateful as it ought, he is no ways culpable, but he who employed him must bear the blame; for the Embassador does in this Case only discharge the Commission he was entrusted with. See CAMDEN too in the aforesaid Passage of the Year MDLXXI. GROTIUS.

The Maxim here laid down by the King of the *Goths*, if considered in itself is evidently contrary to our Author's Notions, and agreeable to the Principles we have laid down in the foregoing Notes. It is another Question, whether it was well applied in the Case then in Hand. The contrary appears from the Sequel of the History. As to the second Case, relating to the Excuse made by the Embassadors, the Reason by them alledged is to be understood with some Restriction. If an Embassador has received Orders to make some Proposal or Declaration, which he very well knows must be disagreeable to the Power, to whom he is sent, and which he feels implies, either in itself or in that Power's Way of thinking some Injustice, or even something abusive, provided he deliver his Commission in a civil Manner, he ought to be considered only as an Instrument, and is only to be dismissed, without the least Violence; particularly, if he expresses some Concern at being charged with so odious a Commission. But if he himself insults the Power, to whom he is sent, with Words or otherwise, it would be to no Purpose for him to pretend, he does it by his Master's Orders; that Excuse will only more strongly authorize that Power to call him to an Account for it, because, as he had acted by Order, there would be no Room to hope for any Satisfaction from his Master.

25 That Author says that the Herald attempted to force from the very Altar some *Heraclides* who had fled to *Athens*; and that the same *Athenians*, who put him to Death, made publick Mourning for him. *De Vit. Sophist. Lib. II. in Herod. Cap. V. p. 550, 551. Edit. Olear.*

26 His Words are these: "If a Father plunders Temples, or makes an Attempt on the publick Treasury, shall his Son impeach him to the Magistrates? That indeed would be a Crime; he ought rather to appear in his Father's Defence, if he is accused. But ought not one's Country to be con-

sidered preferably to all other Duties and Obligations? Most certainly; but it is an Advantage to our Country that Children should be dutiful to their Parents. If the Father endeavours to seize on the Government, or betray his Country, shall his Son be silent? He shall entreat his Father to desist; if Intreaties have no Effect on him, he shall represent to him the Enormity of his Crime, and even employ Menaces. At last; if the Ruin of his Country is concerned in the Affair, he shall prefer the Safety of his Country to his Father's Life." *De Offic. Lib. III. Cap. XXIII.*

V. (1) The Passage has been already quoted Note 14. on the third Paragraph.

2 On the contrary, it appears that the *Veians* made that Compliment to the Embassadors from *Rome*; as the learned *GRONOVIVS* has observed. See *LIVY, Lib. IV. Cap. LVIII. Num. 6, 7.* And, to shew that this is a real Mistake of the Author, and not a bare Fault in the Writing, I shall here add that, in the first Editions we read only, *Et olim Veientibus editum, &c.* that published in 1632. reads, *Et olim à Romanis Veientibus editum, &c.* because our Author afterwards added another Example: *Et Romanis à Samnitibus, si quid, &c.* The first Addition would have been unnecessary, if he had not all along thought that the brutish Answer was made by the *Romans*. So that he never perceived his Mistake, as appears from another in the Close of the seventh Paragraph: For telling the same Story of two Things which happened at different Times, he, in the first Edition, ascribed to *Scipio* alone what he relates on the Credit of *LIVY* and *VALERIUS MAXIMUS*. But he afterwards distinguished the Facts and Persons, as they appear in the two Authors quoted. This Remark is of some Use for justifying the Liberty and the Care I have taken to correct such Inaccuracies in several Places, into which our Author has fallen in this and the following Chapter more frequently than in any other of the whole Work.

3 *LIVY, Lib. X. Cap. XII. Num. 2.*

4 The *Sicilians* in Alliance with the *Athenians* seized upon the Embassadors of *Syracuse* which were sent to some other States; *THUCYDIDES, Lib. VII.* So too the *Argives* seized the Embassadors sent by a few factious People from *Athens*, and brought them to *Argos*. *Id. THUCYD. Lib. VIII.* And the *Epirots* intercepted the *Ætolian* Embassadors going

nians serve the Embassadors, ⁵ that were going between the *Persians* and *Spartans*, and so did the *Illyrians* those between the *Iffians* and the *Romans*; and much more may they be imprisoned; as *Xenophon* ⁶ ordered some to be committed; *Alexander* those, who were sent from ⁷ *Thebes* and *Sparta* to *Darius*; the *Romans*, ⁸ those of *Philip* to *Hannibal*; and the *Latins*, those of the *Volsci* ⁹.

2. But suppose Embassadors do meet with bad Treatment, without any such Reason, ¹⁰ yet that Law of Nations, whereof we treat, shall not be esteemed violated thereby, but only the Friendship and Dignity, either of the *Potentate* that sent the Embassador, or of him to whom he goes. Thus writes *Justin*, of *Philip II.* King of *Macedon*. *He sent an Embassador with Letters to make an Alliance with Hannibal, who being apprehended and brought before the Roman Senate, was dismissed in Safety, not out of Regard to the King his Master, but for fear they should make him, who before was doubtful, their professed Enemy* ¹¹.

VI. That even an Enemy to whom the Embassador is sent is bound.

VI. But if the Embassy be admitted, the Law of Nations gives Protection to Embassadors, ¹ even from a declared Enemy, much more from one who intends us Evil, without having yet taken Arms. *Heralds enjoy Peace in the midst of War*, said *Diodorus Siculus* ². The *Spartans*, who had killed the *Heralds* of the *Persians*, are said to have subverted the Rights of all Men ³. If any one strike an Enemy's Embassador, he shall be adjudged guilty of a Breach of the Law of Nations, saith *Pomponius*, because Embassadors are held Sacred ⁴. *Tacitus* calls this Right, whereof we now speak, the Right of Enemies, the sacred Right of Embassy, the Right of Nations ⁵. So likewise *Cicero*, ⁶ Ought not Embassadors to be free from Danger, even in the midst of their Enemies? And *Seneca*, ⁷ He violated Embassies, having no Regard to the Law of Nations. And when the People of *Fidenæ* put the Roman Embassadors to Death, *Livy* calls it Murder, violating the Law of Nations, a Wickedness, an horrid Fact, an impious Piece of Butchery ⁸. And in another Place, when their Embassadors were brought in Danger, *They had not left among them*, says he, so much as the Rights of War ⁹. So *Curtius*, *He sent Heralds to them with Proposals of Peace, whom they slew and threw head-long into the Sea, contrary*

to Rome, and extorted from them a Ransom: One of them only was, at the Request of the *Romans*, set at Liberty without paying any Thing, *POLYB. excerpt. legat. Num. 27.* See the Opinions of *PARRUTA*, *Lib. XI.* and of *BEZAR*, *Lib. XXI.* about the French Embassadors to the Turk, whom the Spaniards took upon the *Pa*, and murdered. And *CRANTZIUS*, *Saxon XII.* about the Embassadors of the States of *Flanders* to the French King, whom *Maximilian* apprehended. *Belisarius's* good Nature and Clemency are mightily applauded for sparing *Gelimer's* Embassadors who had been sent into Spain, and were returned to *Carthage* which was then under the Roman Jurisdiction. *PROCOPIUS, Vandal I. GROTIUS.*

The Second of these Instances is not related with the utmost Exactness. They were the *Parilians*, or Men of a certain Ship of the State, who being employed in transporting those Embassadors, delivered them up to those of *Argos*.

⁵ These Embassadors did not pass through the Territories of the *Athenians*; they were betrayed and put under an Arrest in *Thrace*, and from thence conducted to *Athens*. See *THUCYDIDES, Lib. II. Cap. LXVII.*

⁶ It was not known whither those Embassadors were going. The Historian only says, that they were put under a strong Guard, to be used as Guides. *De Expedit. Cyri. Lib. VI. Cap. III. § 7.*

⁷ They were with *Darius* before the Battle, and were taken in that Battle. *Alexander* released them. See *ARRIAN, De Expedit. Alexandri, Lib. II. Cap. XV.*

⁸ See *APPIAN. Excerpt. legat. Num. 19. GROTIUS.*

⁹ Those Embassadors were sent to the *Latins* themselves, in order to engage them in an Alliance

against the *Romans*, and the *Latins* conducted them to Rome in Chains. This Account is given us by *DIONYSIUS HALICARNASSENSIS*, from whom our Author without doubt took this Instance. *Antiq. Roman. Lib. VI. Cap. XXV. p. 346. Edit. Oxon. (p. 361. Edit. Sylb.)*

¹⁰ It is quite another Thing, if any one shall, out of his own Territories, contrive to surprize the Embassadors of another State; for this would be a direct Breach of the Law of Nations. And this Affair is contained in the *Thebaisians* Speech against *Philip* in *LIVY. GROTIUS.*

¹¹ *Lib. XXXIX. Cap. IV. Num. 1, 2.*

VI. (1) See some Passages just now cited at § 1. And *DONATUS* upon that of the Eunuch, *Convenire & Colloqui*, go and have a little Chat. This is to be understood, as if he had said, *Good Mr. Soldier, by your Favour permit me to do what any Enemy, even in the height of War and Hostilities, is allowed.* *GROTIUS.*

² Our Author probably had in View the Passage where the Historian, speaking of the God *Mercury*, says the Antients attributed to him the Invention of Embassies, and Treaties made between Enemies, as well as the *Caduceus*, by Vertue of which those who go to treat with the Enemy are allowed to return in Safety. *Biblioth. Histor. Lib. V. Cap. LXXXV. p. 235, 236. Edit. H. Steph.*

³ *HERODOTUS, Lib. VII. Cap. CXXXVII.*

⁴ *Digest. Lib. L. Tit. VII. De Legationibus, Leg. XVII.*

⁵ *Annal. Lib. I. Cap. XLII. Num. 3.*

⁶ The Passage is quoted above, in what I have added on Note 2. on the first Paragraph.

⁷ *De Irâ, Lib. III. Cap. II.*

⁸ *Lib. IV. Cap. XVII. Num. 4.*

⁹ *Idem, Lib. XXIV. Cap. XXXIII. Num. 2, 3.*

to the Law of Nations ¹⁰. And with abundance of Reason do these Authors express themselves thus : For even in War many Incidents happen, which cannot be negotiated but by Embassadors, and Peace can scarce ever be made without them ¹¹.

VII. Another Question is commonly started, *viz.* whether an Embassador may be put to Death, or have any Violence in any other manner offered him, by the Law of Retaliation, for what his Principal had done to any Embassador sent to him from that Court. And indeed there are many Instances to be met with in Histories of Revenge taken after this Manner. And no wonder ; for not only just and lawful Actions, but unjust, passionate, outrageous ones are mentioned in Histories. Provision is made by the Law of Nations, not only for the Honour of the Potentate who sends the Embassador, but for the Safety of him who is sent : So that there is a Sort of tacit Covenant also between the Embassador, and the Potentate to whom he goes. He may therefore have an Injury done him, when none is done to his Principal. And so that Action of *Scipio's* did not only argue a Greatness of Soul, but was likewise conformable to the Law of Nations, who when the *Carthaginian* Embassadors were brought before him, and he was asked what should be done to them (soon after the *Roman* Embassadors had been very hardly used at *Carthage*) answered, *Nothing like what the Carthaginians did.* *Livy* adds, that he said, *He would do nothing unworthy of the Roman Maxims* ². In a like Case, but a much more antient one, these Words, says *Valerius Maximus*, were spoken by the *Roman* Consuls, *The Faith of our City, O Hanno, frees thee from that Fear* ³. For at that Time *Cornelius Asina*, contrary to the Right of Embassy, was put in Chains by the *Carthaginians*.

VII. Embassadors not subject to the Law of Retaliation.

VIII. 1. The Attendants likewise and Baggage of Embassadors are in some Measure to be accounted Sacred. Hence amongst the antient *Romans*, when an Herald was sent to make any Treaty, he said to the King : *Dost thou admit me, O King, as the Royal Messenger of the People of Rome, together with my Attendants and Baggage ?* And by the *Julian Law*, ² not only those who did the Embassador himself, but even those that did his Attendants any Injury, were declared guilty of a publick Violence. But ³ these Privileges only belong to them by Way of Accessory ; and consequently no longer, than the Embassador pleases. Therefore if his Attendants commit any great Crime, he may be required to deliver them up to Justice. ⁴ For they are not to be taken from him by Force ; which being once done by the *Achaians* to some *Spartans* who were in the *Roman* Embassador's Retinue, the *Romans* cried out, *They have broke the Law of Nations* ⁵. Whereunto we may also refer the Opinion of *Sallust* concerning *Bomilcar* before quoted. But if the Embassador shall refuse to deliver him up, then are we to proceed in the same Manner as is prescribed against the Embassador himself.

VIII. That the Rights of Embassy are to be extended even to the Attendants of Embassadors, if the Embassadors please.

2. But whether the Embassador himself shall have Jurisdiction over his own Family, ⁶ or may make his House a Sanctuary for all such as fly thither for Refuge,

¹⁰ Lib. IV. Cap. II. Num. 15.

¹¹ This Remark is made by *PHILO* the Jew, *De Legat. ad Caium*, p. 1006. Edit. Paris.

VII. (1) *DIONODORUS SICULUS*, in *Excerpt. Peiresc.* Σκιπίων, ἐκ, ἐφη, δεῖν πρῶτον ὁ τοῖς καρχηδονίοις ἐγκαλεσθαι, *Scipio said they ought not to do that themselves which they condemned the Carthaginians for* : And accordingly the *Romans*, tho' they knew what the *Carthaginians* had done, let them go. See *APPIANUS*. And *Constantius* dismissed *Titian* sent to him from *Magnentius*, tho' *Magnentius* had detained *Philip* sent from *Constantius*. *ZOZIMUS*, Lib. II. See also some Stories in *CROMER*, Lib. XIX. and XXI. and *PARUTA* about the Embassadors of *Venice* stopt in their Journey to *France*, Lib. VII. *GROTIUS*.

² Lib. XXX. Cap. XXV. Num. 10.

³ Lib. VI. Cap. VI. Num. 2.

VIII. (1) *LIVY*, Lib. I. Cap. XXIV. Num. 5. ² *Digest.* Lib. XLVIII. Tit. VI. *Ad Leg. Jul. de vi publicâ.* Leg. VII.

³ See *FRAXINUS CANEUS's* Epistles, p. 75. and 279. *GROTIUS*.

⁴ *SERRANUS* in *Henry IV.* *GROTIUS*.

In the same Place, which I have quoted in *Note 20.* on Paragraph 4. which, however, doth not belong to that Author, but to his Continuator.

⁵ This Instance is both ill related and misapplied. The *Achaians*, not being satisfied with the Proposals made to them by the Embassadors sent from *Rome*, to put an End to the Difference between them and the *Spartans*, arrested all at *Corinth*, whom they suspected to be *Spartans*, and even went to the House of *Orestes*, one of the Embassadors, to take by Force those who had retired thither. The Embassadors complained of this Treatment, as an Attempt by which the *Achaians* made a Rupture with the *Romans*. We have this Account from *PAUSANIAS*, Lib. VII. Cap. XIV. p. 219. Edit. Græc. Wech. 1583. So that this relates to the Right of Refuge, spoken of at the End of this Paragraph.

⁶ In this Case there is commonly a Distinction of Crimes made. See *PARUTA*, Lib. X. where the King of *France* very much resenting something of this Nature, is entirely satisfied. See the same Author, Lib. IX. *GROTIUS*.

depends

depends upon the Concession of the Prince, in whose Dominions he resides. For the Law of Nations does not give him these Privileges ⁷.

IX. And to
their moveable
Goods.

IX. That the Moveables or Furniture of an Embassador, which are all reckoned Dependences of his Person, cannot be seized upon by Way of Pledge, or for discharge of a Debt either by Course of Law, or even, as some pretend, by the King's own Authority and Hand, is the best grounded Opinion. For no Kind of Compulsion or Violence is to be offered either to him or his, that he may enjoy an absolute Security or Protection. And therefore, if he shall contract any Debt, and have no real Estate in the Country (as it commonly happens) to discharge it with, Application is to be made to him in a friendly Manner for the Payment of it, and if he refuse to pay it, Application is in like Manner to be made to his Principal. And if he likewise refuse to pay it, then must we in the last Place have resort to such Remedies, ¹ as are provided against Debtors residing in foreign Countries.

X. Instances
of an Obliga-
tion without
the Right of
Compulsion.

X. 1. Neither is there any Reason to fear (as some may imagine) that if Embassadors have such Privileges, no Body will give them Credit. For Kings, that cannot be compelled, never want Creditors; and *Nicolaus Damascenus* ¹ says, it was a Custom among some Nations, that for Contracts made upon Trust, no Remedy was provided by Law, no more than against Men that prove ungrateful: So that People in those Countries were either obliged to sell nothing, but what they were paid for immediately, or to depend upon the bare Word and Honesty of the Buyer. And ² *Seneca* wishes this Custom would prevail in all Places. *Would to G O D*, saith he, *that we could persuade Men, not to require their Debts, but only of those, who were willing to pay them: I wish that the Buyer could not be bound to the Seller by any Covenant, and that Compacts and Bargains were not kept under Hand and Seal; but that Honesty and Conscience were Security for their Performance.* *Appian* relates of the *Persians*, *That they hated τὸ πωλεῖν, &c.* ³ *The lending and borrowing of Money, accounting it an Inlet to a thousand Frauds and Falshoods.*

2. *Ælian* reports the same Thing of the *Indians*; with whom agrees *Strabo* ⁴ in these Words, *Δίκην δὲ μὴ εἶναι, &c.* *That there are no Courts of Judicature, but for Murders and Injuries, it not being in a Man's Power to hinder these. But as to Contracts and Agreements, it is in the Choice of every one to make them, or refuse them; and therefore if any Man breaks his Word, we are to bear it with Patience. And this ought to make us cautious, whom we give Credit to, but not to fill the City with Law Suits.* It was also enacted by *Charondas*, that no Man should have his Action at Law against him, whose Promise he thought fit to take for what he sold him: Which ⁵ *Plato* likewise approves of. And *Aristotle* ⁶ observes *παρ' ἐνίοις ᾗ, &c.* *That in some Countries there is no Law against Breach of Contracts; for they think, that a Man ought to be content with the Credit of the Person whom he thinks fit to trust.* And in another Place, *ἔνιαρχε τ' εἶναι, &c.* *There are Laws in some Countries against seeking Redress for the Breach of voluntary Contracts, as if he, with whom we have made any Contract, and whose Word we have taken, were only privately to be dealt with.* What is alledged against this Opinion out of the Roman or Civil Law, does not belong to our Embassadors, but only to Deputies of Provinces or Towns ⁸.

XI. How
great this
Right of Em-
bassy is.

XI. Profane Histories ¹ are full of Instances of Wars, undertaken for the ill Usage

⁷ On this Subject see an excellent Dissertation by Mr. THOMASIVS, *De Jure Azyli Legatorum ædibus competente*, which is the Sixteenth of those printed at *Leipsic*.

IX. (1) That is, an Embassador's Goods may be seized, wherever they are found, and the Right of Reprisal may be used, of which our Author treats B. III. Chap. II.

X. (1) That Author speaks of the *Indians*, in STOBÆUS, *Florileg.* Serm. XLIV.

2 *De beneficiis* III. 15. GROTIUS.

3 This HERODOTUS in his *Clio* has called τὸ ὀφείλειν χρέος. GROTIUS.

4 *Lib.* XV. p. 1085. *Edit. Amst.* (709. *Paris.*)

5 *S. De legibus.* GROTIUS.

6 *Ethic. Nicom.* Lib. VIII. Cap. XV.

7 *Ibid.* Lib. IX. Cap. I.

8 What our Author observes here in regard to the *Persians*, on the Testimony of HERODOTUS and APPIAN of *Alexandria*, is nothing to the Pur-

pose. They speak of Persons who run in Debt; but do not in the least insinuate that the *Persians* had no Action at Law to oblige Payment.

XI. (1) The Romans did upon this Account make War upon the *Senones*; APPIAN. *Excerpt. legat.* IV. and X. upon the *Illyrians* and the *Genoese*; POLYBIUS, *Excerpt. legat.* CXXV. and CXXXIV. upon the *Iffians*; DION. *Excerpt. legat.* XII. upon the *Corinthians*; LIVY, *Lib.* III. upon the *Tarentines*; DIONYSIUS HALICARN. *Excerpt. legat.* IV. You have several Examples of the *French* and *Germans* in AMONIUS, *Lib.* III. Cap. LXI. and LXVIII. and in W I T H I N D, *Lib.* II. GROTIUS.

In the Instance here produced from DION CASSIUS, our Author has changed the Persons. The *Iffians* were only the Occasion of the War, which the Romans declared against *Teuta* Queen of *Illyrium*, on her abusing and even putting to Death the Embassadors sent to her from *Rome*, to intercede in

Usage of Embassadors; and ² in the Holy Scriptures we read of a War made by King *David* against the *Ammonites*, upon that Account. Neither can there be a juster Cause, as *Cicero* pleads against *Mithridates* ³.

in Favour of the Island of *Iffos*. The Fact is related at large in *POLYBIUS*, tho' with some Difference of Circumstances. *Hist.* Lib. II. Cap. VIII. &c.

² See *Chryst. ad Stagir.* Lib. III. GROTIUS.

³ See his Oration, *Pro Lege Maniliâ*, Cap. V.

C H A P. XIX.

Of the Right of Burial.

I. 1. FROM the same arbitrary Law of Nations arises the Right of Burying the Bodies of the Dead ¹. *Dion Chrysostom*, among those Customs which he opposes to written Laws, places this of Burial next to the Rights of Embassadors. ² And *Seneca the Father*, ³ among those Laws that are unwritten, which yet are more certain than any that are written, inserts this of Interring the Dead. The Jewish Historians, *Philo* ⁴ and *Josephus*, ⁵ call it *The Right of Nature*. And *Isidore Pelusota*, *One of the Laws of Nature*. As all common Customs, agreeable to natural Reason, are usually termed *Laws of Nature*, ⁶ as we have observed elsewhere, ⁷ *Common Nature*, says *Ælian*, ⁸ *commands us to bury the Dead*. And in another Place, ⁹ *Earth, and a Grave, are a common Claim, and equally due to all*. *Euripides*, ¹⁰ in his *Suppliants*, calls Sepulture *The Law of Mankind*. *Aristides*, ¹¹ *A common Law*. *Lucan*, ¹² *A Ceremony that all Men are intitled to*. *Statius*, ¹³ *The Law of all the Earth, and the universal Agreement of the World*. *Tacitus*, ¹⁴ *The Commerce of human Nature*. *Lyfias the Orator*, ¹⁵ *The common Hope of all*. He that hinders it, is said by *Claudian*, ¹⁶ *To divest himself of Humanity*. And by

I. (1) The Right of Burial is indeed founded on the Law of Nature. See what is said on PUFENDORF, B. II. Chap. III. § 23. Note 9. second Edition.

² *Orat. De Consuetudine*.

³ He places this Duty in the same Rank with those of giving Alms, and raising a Person who has fallen, *Lib. I. Controv. I. p. 85. Edit. Gron. major*.

⁴ The Author, probably, had his Eye on the Passage of this Author, which shall be quoted Note 29. on this Paragraph. I know not any Place where PHILO formally calls the Custom of burying the Dead, a *Law of Nature*.

⁵ I find this, where, speaking of the Siege of *Jerusalem*, he says, that the *Jews*, as if they had agreed to trample on the Laws of their Country, and those of Nature and common Humanity, and the Respect due to the Deity, let the Bodies of the Dead rot above Ground. *Bell. Jud. Lib. V. Cap. II.*

⁶ The Passages, quoted by our Author, for the most Part, shew that it was mentioned as the Law of Nature, properly so called.

⁷ See Chap. XII. of this Book, § 26. and B. III. Chap. VII. § 5. Num. 2.

⁸ *Var. Hist. Lib. XII. Cap. LXIV. p. 755. Edit. Periz.*

⁹ *Idem. Lib. XIII. Cap. XXX.*

¹⁰ It is called so by the Chorus, speaking of the Burial which *Creon* refused those who had been

slain in a Battle between him and *Adrastus*, near *Thebes*. *Supplic. v. 378.*

¹¹ Speaking of the same Story with EURIPIDES, he says, that the *Athenians* espoused the Cause of the *Argians*, looking on the Violation of a Law common to all Mankind, as an Injury to themselves. *Orat. XIII. Tom. I. p. 202. Edit. P. Steph.*

¹² *Pharsal. Lib. VII. v. 799, &c.*

¹³ *Thebaid. Lib. XII. v. 642.* where he immediately after speaks of *Nature*, which ought, in Conjunction with the Gods, to favour an Attempt tending to avenge its Rights. For the Case is the same here as in the Passages quoted Notes 10 and 11, v. 644, &c.

¹⁴ It is where he speaks of the Manner how *Tiberius* treated those who were charged with being in *Sejanus's* Party. After having put them to Death he forbade their being buried. *Annal. Lib. VI. Cap. XIX. Num. 3, 4.*

¹⁵ The Orator says this also, on Occasion of the War between the *Athenians* and *Thebans*, because the latter refused Burial to the Slain of *Adrastus's* Army. *Orat. XXXI. Cap. II.*

¹⁶ The Poet speaks of *Gildon*, who added this Act of Barbarity to what he had been guilty of, in killing the Sons of his Brother *Masceres*. *Bell. Gildon. v. 395, &c.* Concerning the succinct and elegant Phrases here employed, *Exuere hominem, fratrem, &c.* see the learned and judicious Observations of the late Mr. CUPER, *Lib. I. Cap. VIII.* He there quotes the Words, without mentioning

by the Emperor *Leo*, ¹⁷ *To disgrace his Nature.* And by *Isidore of Pelusium*, ¹⁸ ὅσας ὑπερῆεν, *To violate all that is sacred*.

2. And because the Antients derived the Original of those Rights that are common to all civilized Nations, from the Gods, to the End they might be accounted the more sacred; as they did the Rights of Embassy, so we see this Right of Burial every where ascribed to the Gods. In the Tragedy of *Euripides* before quoted, you may find it called, ¹⁹ Νόμον δαίμωνων, *The Law of the Gods.* ²⁰ And in *Sophocles*, *Antigone* makes this Answer to *Creon*, who denied *Polynices* Burial,

*For these Decrees were neither made by Jove,
Nor by th' infernal Gods, from whom Mankind
All other Rights derive. Nor did I think
The Pow'r of mortal Man so great, that Laws
Not written, but acknowledged by the Gods
To be eternal, it could violate.
Why then should I, deterr'd by mortal Rage,
Neglect to see the heavenly Powers obey'd?*

3. *Isocrates* treating of the Grounds of that War which *Theseus* made against *Creon*, speaks thus, *Who is ignorant, who hath not been taught even in the Bacchanalia by the Dramatick Poets, what Misfortunes happened to Adrastus before Thebes, when, attempting to reduce OEDIPUS's Son, but his Son-in-Law, he lost most of his Army, and saw his Captains slain? He with Disgrace surviving, and not being able to obtain a Truce to bury his Dead, came a Suppliant to Athens (which was then governed by Theseus) and begged of him not to let those brave Men lie unburied, nor to suffer the antient Custom to be despised, and the Law of the Country, or rather the universal Law observed by all Mankind, to be violated, not being instituted by an human, but a divine Power: Which when Theseus heard, he forthwith sent his Embassadors to Thebes. The same Author immediately after, ²¹ blames the Thebans for preferring the Decrees of their State, before the Laws of the Gods. ²² He likewise makes Mention of the same Story in other Parts of his Works; and so do *Herodotus*, *Diodorus Siculus*, *Xenophon*, and *Lyfias*. *Aristides* ²³ says, that this War was undertaken to vindicate the Rights of human Nature.*

4. And we find every where, in antient Authors, this good Office of Burying the Dead, highly commended. For *CICERO*, ²⁴ and *LACTANTIUS*,

the Poet's Name, and seems to suppose them spoken of *Creon*. Whence it appears, that he mistook this for a Passage in *STATIUS*. He had in his Memory confounded these Words of *CLAUDIAN* with those of the *Thebais* of *STATIUS*, *Lib. XII. ver. 165, 166.* Or, perhaps, he had lately read the Chapter in *ALBERIC GENTILIS* on this Subject, where that Lawyer having quoted the Passage of *STATIUS*, adds, *And another Latin Poet, speaking of another Creon, says, he divested himself of the Man. De Jure Belli, Lib. II. Cap. XXIV. p. 456, 457.* But, however that may be, I thought I might make this Remark, to shew, occasionally, that my Author is not the only great Man who is liable to Mistake, when he quotes by his Memory.

¹⁷ That Emperor doth not speak precisely of Refusal of Burial, but only of the Inconveniency attending the not allowing the Dead to be buried in Towns, as the Poor cannot be so soon carried out of Town, for Want of having left wherewithal to defray the Expences of a Funeral, and, consequently, must lie several Days above Ground. *Novell. LIII.*

¹⁸ *Epist. CCCCXCI.*

¹⁹ *SOPHOCLES*, in his *Ajax*, and in his *Antigone* he calls it Θεῶν νόμος. *GROTIUS.*

²⁰ *Supplic. v. 563.*

²¹ *PLUTARCH*, in his *Theseus*, will have it, that they obtained the Privilege of Burying from

the *Thebans*, by Contract, and not by Force of Arms. But *PAUSANIAS*, in his *Attici*, says, it was by Force of Arms. *GROTIUS.*

²² Our Author here mistakes *ISOCRATES's* Thought. The Orator, to shew the Deference at that Time paid to the *Athenians*, says, that those who had the Command at *Thebes*, shewed more Regard for their Demands than for the Laws made by the Gods themselves, for the Burial of the Dead. *p. 269.* The Author, reading this Passage hastily, and without observing the Sequel, imagined the Words ἐν τῇ πόλει, referred to the City of *Thebes*, whereas it relates to *Athens*.

²³ He there speaks of a different War, *viz.* that with the *Amazons*, *Tom. I. p. 204.* But as this Instance is produced after the other, and our Author met with ἀνθρώπων, which insinuates, that the Thought of *ARISTIDES* belongs to both, he has referred it immediately to the former.

²⁴ Our Author, in his Margin, had quoted the Oration for *Quintius*; but I am well assured that there is no Passage in all that Oration, where the Word *Humanitas* is applied to the Right of Burial. I believe I have found the Occasion of the Mistake. Our Author, collecting Materials for this Chapter, made Use of Authorities which he found collected by other Writers. It is probable he had before him a long Note of *PETER DANIEL*, on a Passage of *PETRONIUS*, whom he quotes, § 2. where

TIUS, ²⁵ call it an Act of Humanity; *Valerius Maximus*, ²⁶ of Humanity and Civility; *Quintilian*, ²⁷ of Compassion and Religion; *Seneca*, ²⁸ of Humanity and Compassion; *Philo*, ²⁹ of Commiseration of common Nature; *Tacitus*, ³⁰ a Commerce established in human Nature; *Ulpian*, ³¹ an Act of Mercy and Piety; *Modestinus* ³² terms it, the Memory of our mortal State; *Capitolinus*, ³³ an Act of Mercy; *Euripides* ³⁴ and *Lactantius*, ³⁵ of Justice; and *Prudentius*, ³⁶ of Liberality, or Charity. *Optatus Milevitanus* ³⁷ accuses the *Donatists* of Impiety, for denying Burial to the Bodies of Catholicks.

where that Commentator explaining the Words *trahititia humanitas*, produces a great Number of Passages, which mention some Duties of Humanity, not unlike that which regards the Burial of the Dead. He there sets down two from the Oration for *Quintius*, one from *Chap. XVI.* where it is said, that *Good Men abate of their Right, even in Favour of Strangers and Enemies, on a Principle of Honour and Humanity.* I find this quoted by *PETER DE FAURE*, in his *Semestria*, Lib. II. Cap. I. p. 11. almost with the same View. The second is taken from *Chap. XXXI.* where the Orator speaks almost to the same Purpose. Here our Author has confounded in his Memory, these Passages, with those relating to Burial. My Conjecture will be confirmed by another Inadvertency of the like Nature, which I shall observe in *Note 27.* on this Paragraph, and which flows from the same Source. Our Author may have been led into this Mistake by a Reflection we meet with in the Oration immediately following that for *Quintius*. I shall the more willingly set it down here, as it is remarkable; and I am surprized it was forgot in this Chapter, where it would have been natural to insert it. *CICERO*, speaking of Parricides, says, “Our Ancestors did not judge proper to expose the Bodies of those Wretches to wild Beasts, lest such Food might encrease their Ferocity; nor to throw them naked into the River, lest they should defile that Element which serves to purify other Things. They left such Criminals the Use of nothing common to Mankind. For what is so common as Air to the Living, Earth to the Dead, the Sea to those who sail on it, the Shore to those who are thrown on it.” *Orat. pro S. Roscio Amerin.* Cap. XXVI. The Punishment of Parricides was to be fown up in a Leather Sack, and thrown into the Sea.

²⁵ Who has this Expression too, *Lib. VI. Cap. XII.* That last and greatest Act of Piety, to bury Strangers, and the Poor. *GROTIUS*.

²⁶ *Lib. V. Cap. I.* which is entitled *De Humanitate & Clementia*, where several Instances are produced of Persons who have buried their Enemies; some of those are afterwards quoted by our Author.

²⁷ Here we have the other Mistake, which will confirm what I have said in *Note 24.* Our Author had here quoted, in his Margin, *QUINTILIAN*, *Lib. XII. Cap. ult. Institut. Orat.* But that Chapter contains nothing relating to Burial. But he had seen the following Passage, thus quoted, both in *PETER DE FAURE*, *Semestria*, Lib. II. Cap. I. and in the Comment on *PETRONIUS* above-mentioned. “As a Father of Eloquence he formed them; and as an experienced Sailor will instruct the Mariners, concerning Shores and Ports, tell them the Signs of an approaching Storm, and how to work the Ship in a fair or contrary Wind, not only on a Motive of Humanity, but even out of Love for the Employment.” *Lib. XII. Cap. XI.* Among other Passages of the *Declama-*

tions of *QUINTILIAN* the Father, he had also read one, where the Words *Compassion* and *Religion* are used, and that in Relation to Burial. Hence it is easy to conclude, that he has, by Mistake, quoted the *Oratorical Institutions* of the Son, instead of the *Declamations* of the Father or Grandfather.

²⁸ *De Beneficiis*, Lib. V. Cap. XX.

²⁹ It is where he introduces the Patriarch *Jacob* making great Complaint of the false News told him by his Sons, concerning *Joseph's* Death. The afflicted Father bewails nothing so much as his Want of Burial; and addressing himself to his dear Son, he says to him, among other Things. Had it been absolutely necessary for thee to die a violent Death, it would have been less Trouble to me to have heard thou fell by a Man's Hand; for tho' the Murderer had been inhuman enough to leave thy Body unburied, *Perhaps some Traveller seeing thy Corps, and touched with Compassion for human Nature, would have taken Care of, and buried it.* *Lib. de Joseph. p. 530. Edit. Paris.*

³⁰ The Passage is quoted, *Note 14.*

³¹ “It is therefore to be enquired and considered with what View the Charges (of the Funeral) were defrayed. Whether the Person who took Care of it did it as a Duty to the Deceased, or his Heir, or on a Motive of bare Humanity; whether he followed the Dictates of Mercy, or Piety, or Affection. The Design of shewing such Mercy may be also distinguished; for the Person may have been merciful and pious, only that the Corps might not lie unburied, not with a View of doing this Act at his own Expence.” *Et c.* *Digest. Lib. XI. Tit. VII. De religiosis & sumptib. funer. Leg. XIV. § 7.*

³² “The Heir is rather to be commended than condemned, who doth not obey the Testator's Will, by throwing his Body into the Sea; but, being mindful of the Condition of human Nature, buries it.” *Digest. Lib. XXVIII. Tit. VIII. De condition. Institutionum, Leg. XXVII.*

³³ That Historian doth not speak precisely of Burial, but of *Antoninus's* Goodness, who ordered the Bodies of even the lowest Rank of Men to be buried at the publick Expence; whereas that Compliment was usually paid to Persons of Distinction only. *Vit. Anton. Cap. XIII.*

³⁴ *Supplic. v. 379, 526, 530.* See likewise *SOPHOCLES, Ajax, v. 1352.*

³⁵ “In what does Justice consist more, than in doing that for Strangers out of Humanity, which we perform for our own Relations out of Affection; which is much more certain and just, as it is not done for a Man who is sensible of nothing, but to GOD alone, in whose Presence a just Action is a most acceptable Sacrifice.” *Inst. Div. Lib. VI. Cap. XII. Num. 31.*

³⁶ *Opus Benignum, an Act of Kindness.* *Cathermerin. Hymn X. v. 61, &c. Edit. Cellar.*

³⁷ *Lib. VI.*

— Creon must be beat
By Dint of Arms, to Manners and to Man.

Statius. 33

Such Men, saith *Spartianus*, ³⁹ have no Regard to Humanity; *Livy* calls it a Cruelty, ⁴⁰ to which it is scarce credible, that any Man's Anger or Revenge should hurry him; and ⁴¹ *Homer*, ἀνέκτα ἔρφα, *An indecent Thing*. ⁴² *Laëtantius* condemns the Wisdom of those Men, as favouring too much of Impiety, who would make it superfluous to bury the Dead. Upon the same Account *Eteocles* is called *impious*, by *Statius* ⁴³.

II. From
whence this
Custom comes.

II. 1. From whence this Custom of Burying the Dead took its Rise, whether they were first embalmed, as among the *Ægyptians*; or burnt, as among the *Greeks*; or only interred, as they are now, (which *Cicero*, ¹ and after him ² *Pliny*, hold to be the most antient Custom) is not agreed upon. *Moschion* attributes it to the savage Cruelty of the Giants, who used to devour the dead Bodies of Men, the Abolition of which brutal Practice is signified by Burial; for thus he speaks, ³

Henceforth the Law ordain'd
The Dead in Graves should be deposited,
Not lye unburied to the View of Men:
Disjmal Memorial of once barb'rous Feasts.

2. Others are of Opinion, that Men, by Burying the Dead, do, as it were, of their own Accord, pay a Debt which the Law of Nature would otherwise require of them, tho' they were unwilling. For that, Man's Body ⁴ being taken from the Earth, should be restored to the Earth again, was not only declared by GOD to *Adam*, but all the *Greek* and *Latin* Writers do universally acknowledge it. Thus *Cicero*, ⁵ out of *Euripides's* *Hyppipyle*:

38 *Theb. Lib. XII. v. 165, 166.*

39 *Vita Caracallæ, Cap. IV.*

40 He is there speaking of the Treatment given to the Body of *Alexander*, King of *Epirus*, which being cut in two, part of it was sent to *Consentia*, &c. *Lib. VIII. Cap. XXIV. Num. 14, 15.*

41 The same Author, in his 24th *Iliad*, says, that *Jupiter*, and the Gods, were angry with *Achilles*, for not using *Hector's* Body so handsomely as he ought. *GROTIUS.*

42 "Some indeed have thought the Burial of the Dead superfluous, and said, there is no Harm in letting the Body lie neglected and unburied. But the *impious* Wisdom of such Men is repugnant both to the common Sense of Mankind, and the Voice of GOD, which conspire in commanding that Action." *Instit. Divin. Lib. VI. Cap. XII. Num. 27.*

43 *Thebaid. Lib. III. v. 97, 98.*

II. (1) "The Manner of Burying the Dead, used by *Cyrus*, in *XENOPHON*, seems to me the most antient. The Body is returned to the Earth, and being so placed, is lodged in its Mother's Bosom." *De Legibus, Lib. II. Cap. XXII.*

2 *Hist. Natur. VII. 54.* where there is also this Passage, *By Burying is meant any Kind of privately disposing of the Body; but by Interment, when it is laid in the Ground.* *GROTIUS.*

See, concerning the Signification of the Word *Sepulchre*, the fine Observations of the late Mr. *CUPER*, *Lib. I. Cap. VII.*

3 Our Author here only gives us a *Latin* Version of his own, without telling us where he finds this Passage of the antient Poet. It may be seen in *STOBÆUS*, and is Part of a large Fragment, in which *MOSCHION* describes the savage Life of the

first Men, and the Manner how Mankind by Degrees became civilized. The Original stands thus,

Καλῆδε τῆς, θανόντας ὠρεῖ νόμος,
τύμβοις καλύπτειν καπνιμοισθεῖς κόνιν,
νεκρὸς ἀθάπτης μηδ' ἐν ὀφθαλμοῖς ἔσθ',
τῆς πρόθεο θοῆνης μνημόνευμα δύσεβης.
Eclóg. Tit. XI.

4 *JOB x. 9.* And *PHILO* against *FLACCUS*, Ἀνθρώποις ἡ φύσις, &c. *Nature has ordained the Earth as Man's proper Place, not only while he lives, but also when he is dead, that she who receives us at our coming into the World, may receive us too at our going out.* But as there is no laudable Action done by Man, of which GOD has not imprinted some Similitude in some other Sort of Animal, so does it likewise happen in this very Affair. *PLINY* reports of *Pismires*, *Lib. XI. 30.* That they only, besides Men, of any Creature, bury one another. And yet he himself, speaking of the *Dolphins*, says, *Lib. IX. 8.* That they are seen carrying away their Dead, for Fear some Sea Monster should tear it in Pieces. And *VIRGIL*, of the Bees, has this remarkable Observation. *Georg. Lib. IV. ver. 255, 256.*

And Crowds of Dead, that never must return
To their loved Hives in decent Pomp are born:
Their Friends attend the Hearse, the next Relations mourn.
DRYD.

SERVIVS says, *With all the Solemnity of a Funeral.* *GROTIUS.*

5 *Tuscul. Quæst. Lib. III. Cap. XXV.* The Original of this Fragment is preserved by *PLUTARCH*, *Consul. ad Apol. p. 110, 111.*

— *Earth must be*
To Earth restor'd. —

Solomon says, *Then shall the Dust return to the Earth as it was, and the Spirit return unto GOD who gave it.* Euripides being upon this very Subject, in the Person of *Theseus*, speaks thus in his *Suppliants* ⁶,

Permit the Slain to find a peaceful Grave :
All Things to that, which gave them Birth, return.
To Heav'n soars up the pure ætherial Mind,
The mortal Part to parent Earth descends ;
'Tis fit it should be so. For Life to Man,
Not as a Property, but Loan, is given :
And strait the Earth her foster Child resumes.

Lucretius likewise calls the Earth ⁷,

The teeming Womb, and common Grave of all.

Cicero, in his second Book of *Laws*, has quoted this Passage out of *Xenophon*, *The Body is restored to the Earth, and being placed in an hospitable Grave, is, as it were, covered with its Mother's Veil.* *Pliny* likewise tells us, that the Earth receives us at our Birth, nourishes us after we are born, sustains us brought up, and at last, being forsaken of all the World, she, like a tender Mother, takes us into her Bosom, and covers and secures us there. ⁸

3. Some think, that the Hopes of a Resurrection were by our first Parents signified to their Posterity by this Emblem of Burial. ⁹ For *Pliny* testifies, that *Democritus* taught that Men's Bodies ought to be deposited in the Earth, ¹⁰ by Reason of a Promise given them of their being restored to Life again. And Christians also do often attribute this Custom of decently Burying the Dead, to their Hopes of a Resurrection. Thus *Prudentius* ¹¹,

What means that sumptuous Mausoleum there,
And this fine stately Tomb erected here,
Unless those lodg'd within, not dead but Sleeping are ?

4. But what seems the most plain and obvious Reason is, that since Man is the most noble of all living Creatures, it was not fit that his Body should be torn in Pieces, and devoured by Beasts. Wherefore Burial was found out, that this might be avoided as much as possible. By the Compassion of Men, saith *Quintilian*, dead Bodies are preserved ¹² from the Depredations of Birds and Beasts. So *Cicero*,
Being

⁶ *Supplic.* v. 531, &c.

⁷ *Lib.* V. v. 1260.

⁸ *Hist. Natur.* Lib. II. Cap. LXIII.

⁹ It ought to be proved, both that the Custom of Burying is as antient as the first Parents of Mankind, and that Men had then a Notion of a Resurrection. The History of those old Times is too concise to allow us to advance any Thing certain on those Heads.

¹⁰ Our Author, trusting his Memory, has altered *PLINY's* Sense. The Passage is *Lib.* VII. Cap. LV. where, having treated all that was usually said of Hell, and the State of Souls in another Life, as childish Fables, he adds, "Of the same Sort is *Democritus's* idle Assurance, that the Bodies of Men would be preserved and live again; but he himself never returned into the World." So that *PLINY* is not here speaking of Burial, of which he had treated in the preceding Chapter, but only of some Notion of a Resurrection of Bodies, which the Philosopher had framed to himself. On this see Mr. *LE CLERC's* *Philological Index* to *STANLEY's* History of the Oriental Philosophy, at the Word *Resurrection*. Our Author had read, or remem-

bered this Passage, as if it had run thus, *Concerning the Preservation of Bodies, on the Account of a Promise of Resurrection.* But had he consulted the Original, he would soon have seen it was impossible to find that Sense there.

¹¹ *Cathemerin.* Hymn X. ver. 53, &c. Edit. Cellar.

¹² *Declam.* VI. See the Prophecy about *Jeroboam's* Posterity, for the Punishment of his Sins, *1 Kings* xiv. 11. And *TERTULLIAN*, on the Resurrection. *HOMER*, in his third *Odysse*.

Τῶ καὶ οἱ εἰδὲ θανάτῳ, &c.

*When dead, not a few Ashes would they give
Nor one small Turf to screen th'unhappy Corps ;
But all exposed to Dogs, and Fowl, a Prey
They left it.*

He speaks of *Ægythus*, whom as an Adulterer, and the Usurper of the Crown, the *Argives* had thrown out unburied, but whose Remains were afterwards interred by the more compassionate *Orestes*, as you will hear by and by. *Menelaus*, in *SOPHOCLES*,

Being torn by wild Beasts, he wanted even the common Honour of Burial¹³. And Virgil¹⁴,

Lie there inglorious, and without a Tomb,
Far from thy Mother, and thy native Home,
Expos'd to savage Beasts, and Birds of Prey,
Or thrown for Food, to Monsters of the Sea.

Dryden.

And GOD himself threatens some wicked Kings, by his Prophets, that they should be buried with *The Burial of an Ass*, and that the Dogs should lick their Blood. Nor has *Lactantius* Regard to any Thing in Burial but the Dignity of human Nature, when he saith, *We will not suffer the Image of GOD to lie as a Prey to wild Beasts and Fowls of the Air*.¹⁵ And *St. Ambrose*, *Nothing is more excellent than to do this good Office for him, who cannot requite thee; to defend the Body of thy Companion in Nature from the Fowls, and from the Beasts*.¹⁶

5. But suppose there was no Fear of any such Injury, yet to suffer a Man's Body to rot above Ground, and to be trodden under Foot, is an Indignity offered to human Nature. Agreeable to this is that Saying of *Sopater*, in his Controversies, *ὅτι τὸ θάπτειν καλὸν, &c.* That to bury the Dead is a very decent Thing, and instituted by Nature itself, lest the Bodies of Men after Death being naked, should be exposed to Shame and Reproach, whilst they dissolve and corrupt. And they that do this, perform an Office of Humanity acceptable to all, whether it be the Gods, or Demi-Gods, that have thus ordered to respect and honour the Dead. For it is not agreeable to Reason, that the Secrets of human Nature should, after Death, be exposed to publick View. Hence was derived that antient Custom of Burying the Dead, that being laid under Ground, we might not see them rot and moulder away. The like Reason is given by *Gregory Nyssen*, in his Letter to *Letorius*, *We bury the Dead*, saith he,¹⁷ that the Shame of human Nature may not lie exposed to the Face of the Sun.

6. Hence it is, that this good Office of Burial is said to be performed, not so much to the Man, that is, the particular Person buried,¹⁸ as to Humanity, that is,

of *Ajax*,

Ἄλλ' ἀμφὶ χλωρῶν, &c.

But let his Carcase

Rot on these yellow Sands, and feed the Fowl
Which haunt the Beech, or swim the liquid Deep.

But this too *Ulysses*, a Precedent of singular Prudence, does forbid there. And *Sophocles* in his *Antigone*, to her great Praise, says,

Ἥλις τ' ἀνιάδελφον, &c.

Nor would she let her murder'd Brother lye
Unburied, a Prey to voracious Dogs
Or Birds.

APPIAN, *Civil*. I. of some People slain by *Marcius's* Order, *ταφὴν τε εἶδεν*, &c. Nor was any one permitted to give any of the Persons killed, common Burial, but such Men as these were left to the mangling Mercy of Birds and Dogs. *AMMIANUS MARCELLINUS*, at the Beginning of his eighth Book, speaking of *Julian*, And for Fear that the ravenous Fowl should devour the Bodies of the Slain, he commanded them all without Distinction to be put into the Ground. *GROTIUS*.

In the Passage here quoted from *HOMER*, the Poet is not speaking of what actually happened, but of what *Menelaus* would have done, had he been at *Argos*. This is evident from the Sequel of the Discourse. As to the Question itself, it is, perhaps, most natural to say, that the Custom of interring Bodies, which is the most antient, was introduced for avoiding the Nuisance of bad

Smells, exhaling from them, especially in hot Countries, which were first peopled. To this other Notions may afterwards have been added, which differed according to Times and Places. The Reason, mentioned by our Author, has not made an Impression on all Nations; for we see the *Hyrarians* gave human Bodies to be devoured by Dogs, which they kept for that Use. And the *Magi*, a famous Set of Philosophers in the East, did not bury their Dead, till they were torn by Dogs and Birds. See *HERODOTUS*, *Lib. I. Cap. CXL*. *CICERO*, *Tuscul. Quæst. Lib. I. Cap. XLV*. with *DAVIES's* Notes. *SEXTUS EMPIRICUS*, *Pyrrhon. hypotyp. Lib. III. Cap. XXIV. § 227*, with those of *MR. FABRICIUS*. To which may be added, a Piece in the *Hist. Critiq. Tom. XII. Art. X*.

¹³ *De Invent. Lib. I. Cap. LV*.

¹⁴ *Æneid*, *Lib. X. v. 557, &c.*

¹⁵ *Lib. VI. Cap. XII. Num. 30.*

¹⁶ *Lib. De Tobia, Cap. I.*

¹⁷ Upon the same Account *AGATHIAS* says, it is a Custom, *τὰ ἀκαυχνηλὰ τῶν ὀδόνων θηριαλύπειν*, To cover and hide what comes from a Woman in Labour. Thus does it appear, both at our Birth and our Death, how very nothing we are by Nature. To denote which the Jewish Doctors said, that all People, both of the highest and lowest Condition, when born or deceased, must be wrapped up alike. *GROTIUS*.

¹⁸ *SERVIVS*, upon the eleventh *Æneid*. For Sepulture is a Benefit that all Mankind is intitled to. *GROTIUS*.

human Nature in general. Wherefore ¹⁹ *Seneca* and *Quintilian* ²⁰ called Burial, *A Piece of publick Humanity*; and *Petronius*, ²¹ *A Piece of Humanity, derived down to us from our Ancestors*. From all which Instances we may conclude, that Sepulture is not to be denied either to our private or publick Enemies. As to private Enemies, there is a fine Speech in *Sophocles*, about interring *Ajax*, where *Ulysses* thus says to *Menelaus*, ²²

O Menelaus, do not fully all
That you have spoke, by injuring the Dead.

The Reason whereof is given by *Euripides*, in his *Antigone*, thus,

To ev'ry Mortal, Death's the End of Strife;
For what Revenge can you desire more?

So in his *Suppliants*,

If the Argives did you wrong, they're fallen;
And that's Revenge enough for any Foe.

And *Virgil*,

With dead and vanquish'd Foes no War is made. ²³

Which Verse the Author to *Herennius* has quoted, and gives this Reason for it, *For that*, saith he, *which is the last and greatest of Evils has already befallen them* ²⁴. With whom agrees *Statius*.

We've been at War, 'tis true;
But Wrath and Hate by Death are done away. ²⁵

The same Reason is given by *Optatus Milevitanus*, *Tho' your Passion was implacable while your Enemy lived, yet it should end with his Death; for he is now silent with whom you used to contend*. ²⁶

III. 1. And therefore it is agreed upon by all, that Burial is due, even to our publick Enemies. This, saith *Appian*, ¹ *is a common Right in all Wars*. And *Philo* calls it, ² *The Commerce of War*. *Tacitus*, ³ *Our very Enemies do not envy us Graves*. ⁴ *Dion Chrysostome*, *This is a Right religiously observed, even amongst Enemies, tho' their Enmity was irreconcilable before*. *Lucan*, treating upon this Subject, saith, ⁵ *That funeral Rites are to be celebrated, even for Enemies*. And *Sopater*, to the same Purpose, *What War*, saith he, *can be so barbarous as to rob Mankind of its last Honour? What Enmity can extend the Resentment of Injuries so far as to dare to violate this Law?* Whereunto we may add that of *Dion Chry-*

III. *It is due, even to Enemies.*

19 *De Benefic.* Lib. V. Cap. XX.

20 *Declamat.* VI. Cap. III. Edit. Burman.

21 *Satyric.* Cap. CXIV.

22 This is not spoken by *Ulysses*, but by the Chorus. *Ajax*, v. 1110, 1111. *Ulysses's* Speech comes in *Ver.* 1349, &c.

23 *Aeneid*, XI. (104).

24 Neither these Words, nor the Verse quoted from *VIRGIL*, can be found through the whole Book of *Rhetorick*, written by an antient Author, and which has long passed for a Work of *CICERO*. I am confident I can here shew what gave Occasion to the Mistake, which is an indisputable Proof, that our Author sometimes falls into one, by quoting on the Credit of others. *ALBERICUS GENTILIS*, in his Treatise *De Jure Belli*, Lib. II. Cap. XXIV. p. 459, having produced several of the Authorities here employed, adds this Passage, as taken from the third Book of the *Rhetorick* addressed to *Herennius*, *No Man ought to be angry with the Dead*. Thus *Ulysses*, &c. and thus *Aeneas*, &c. For that which is the last, &c. and thus *Apollo* in *Homer* (*Iliad*) Lib. XXIV. against *Achilles*, &c. but there is not one single Verse of *VIRGIL*, in the whole four Books of the *Rhetorick* in Question; and that Lawyer elsewhere makes Use of this Reason for proving, by the By, that the

Work does not belong to *CICERO*, Which Author is not *CICERO*, says he, if he has any Thing from *VIRGIL*, p. 531. It is evident therefore, that our Author had no other Voucher for his Quotation than *ALBERIC GENTILIS*; but I know not whence the Person last mentioned had taken the Words he produces. I have looked for them to no Purpose in *QUINTILIAN*, and the Collection of the antient *Latin Rhetoricians*, published by *PITHON*, at *Paris*, in 1559.

25 *Thebaid.* Lib. XII. v. 573, 574.

26 *Lib.* II. *contra Parm.*

III. (1) *De Bell. Punic.* p. 105. Edit. Amst. (63 *H. Steph.*)

2 That Author says, that "Men of Goodness and Humanity bury such of their Enemy as fall in Battle, even at their own Expence; and that those who extend their Enmity even to the Dead, make an Agreement with the Enemy, for allowing them to pay them the last Duties." In *Flac.* p. 974.

3 *Annal.* Lib. I. Cap. XXII. Num. 3.

4 *Orat. de Lege.* See another Passage of that Orator, quoted § 1. Note 2.

5 The Passage has been quoted in Note 12. on Paragraph 1.

softom, whom we have just now quoted; *By this Law*, saith he, *the Dead are not accounted Enemies, nor does any Man extend his Anger and Revenge to the Bodies of the Slain.*

2. ⁶ Instances of this are every where to be met with. Thus *Hercules* buried his Enemies; *Alexander*, those he had slain at *Iffus*, ⁷ *Hannibal* made a Search for the Romans, ⁸ *C. Flaminius*, *P. Emilius*, ⁹ *T. Gracchus*, ¹⁰ and ¹¹ *Marcellus*, to give them Burial. You would have thought, says *Silius Italicus*, ¹² that it had been some Carthaginian Captain that had been slain. The very same was done by the Romans to *Hanno* ¹³ the Carthaginian; to *Mithridates* by *Pompey*; ¹⁴ by *Demetrius*, to many of his Enemies; ¹⁵ and by *Anthony* to King *Archelaus* ¹⁶. This was Part of the Oath, which the Greeks took, when they made War with the Persians. *I will bury all my Fellow-Soldiers, and if I come off Victorious, the very Barbarians* ¹⁷. And all Histories abound with Instances of ¹⁸ a Suspension of Arms obtained for taking away the Dead. The Athenians in *Pausanias* say, That they buried the Medes themselves; because all dead Bodies, whether of Friends or Foes, have a Right to be interred ¹⁹.

3 Wherefore according to the Exposition of the Rabbi's, the High-Priest, tho' he was forbidden to be present at Funerals upon any other Occasion, yet, ²⁰ if a Man were found dead and unburied, he was commanded to bury him himself ²¹. And Christians have had so great Regard to this Duty, that, rather than fail of performing it, they have thought it lawful to melt down or sell their consecrated Plate, which they never did, but for the Relief of the Poor, or the Redemption of Captives ²².

4. Some Instances indeed may be found of the contrary, but they are only such as are condemned by the general Voice of Mankind.

6 JOSEPHUS in *legibus*; *Θαπείθεωσαν ὃ καὶ οἱ πολεμίαι, Let even your Enemies be buried.* *Agamemnon*, in the seventh *Iliad*, buries the Trojans; *Antigonus*, in *PLUTARCH*, does the same to *Pyrrhus*. See that Author in his Life of *Pyrrhus*. GROTIUS.

HOMER does not say that *Agamemnon* ordered the Slain of the Trojan Army to be buried; but only that a Truce was made that each might bury their own. See *Ver.* 396, &c.

7 DIODOR. SICUL. *Lib.* XVII. *Cap.* XL.

8 *Hannibal* ordered an Enquiry to be made for the Body of *Flaminius*, in order to bury it, but it was not found. *LIVY*, *Lib.* XXII. *Cap.* VII. *Num.* 5.

9 *LIVY* says no more than that, "According to some Authors, the Body of that Roman Consul was sought for and buried." *Ibid.* *Cap.* LII. *Num.* 6.

10 Another uncertain Fact. "There are several Accounts, says *LIVY* of *Gracchus's* Funeral. Some say he was buried by his own Countrymen in the Roman Camp: Others that *Hannibal* raised a funeral Pile for him at the Entrance of the Carthaginian Camp; which is the most common Report." *Lib.* XXV. *Cap.* XVII. *Num.* 4.

11 See *PLUTARCH*, in his Life, *p.* 316. *Tom.* I. *Edit.* *Wech.* *CICERO* likewise observes that "The cruellest of Enemies did not allow his dead Body to be deprived of the Honour of Burial." *De Senect.* *Cap.* XX.

12 *De Bello Punico.* *Lib.* XV. *Ver.* 389, 390.

13 Our Author takes this from *VALERIUS MAXIMUS*, *Lib.* V. *Cap.* I. *Num.* 2.

14 See *APPIAN* of *Alexander*, *p.* 413. *Edit.* *Amst.* (250. *H. Steph.*)

15 As, for Example, after the Victory he obtained at *Salamis*, over *Ptolemy*. *PLUTARCH*, in his Life, *p.* 896.

16 See *PLUTARCH* in his Life, *p.* 917.

17 The Author takes this from *DIODORUS* of *Sicily*; at least I know of no other Historian, who has given us the Form of the Oath in Question. But he has given a wrong Turn to the Clause, which when rightly translated, is nothing to the Purpose.

The Original stands thus: *Ἀλλὰ τὰς ἐν τῇ μάχῃ τελευτήσαντας ἢ συμμάχων πάντας θάψω καὶ κρητήσας τῷ πολέμῳ τῶν βαρβάρων ἐδεμίαν τῶν ἀγωνισαμένων πόλεων ἀνάσσειν ποιήσω.* That is, *I will bury all those of the Allies, who shall fall in Battle; and when I have gained the Victory over the Barbarians, I will not sack any of the Towns taken.* *Biblioth. Histor. Lib.* XI. *Cap.* XXIX. *p.* 258. *Edit.* *H. Steph.* This is a very different Sense, and contains nothing relating to the Burial of the Enemy. Our Author having either read this Passage in haste, or remembered it imperfectly, has curtailed it, and at the same Time altered the pointing, as if it had been, *πάντας θάψω καὶ κρητήσας τῷ πολέμῳ τὰς βαρβάρους.* Here then is a very remarkable Instance of the Necessity of tracing the Sources of Quotations; and comparing the Passages cited with the Originals.

18 See below *B. III. Chap.* XX. § 45. GROTIUS.

See an Example of this in *Note 21.* on § 1. of this Chapter.

19 *Lib.* I. *Cap.* XXXII. *p.* 31. *Edit.* *Wech.*

20 See *LEVITICUS*, xxi. 1, &c.

21 *SERVIVS* observes the same out of the Roman Pontifical Law. GROTIUS.

In his Comment on the Sixth Book of the *Æneid*, where he says, that, "Though the Pontiffs were not allowed even to see a dead Corpse, yet it had been a greater Fault in them to leave it unburied after they had seen it. The bare throwing some handfuls of Earth on the Body would have been a Sort of Burial." On *Ver.* 176. See *GUTHRIE*, *De Jure Manium*, *Lib.* II. *Cap.* VIII. In which Piece, however, this remarkable Passage of *SERVIVS* is not inserted.

22 "No one can complain that Captives are re- deemed: No one can be displeased that the Temple of GOD is built: No one can be angry that Ground is allowed for burying the Remains of the Faithful: No one can grieve that the Dead are at rest by being interred. In these three Cases, the Vessels of the Church, even after they have been consecrated, may be broken, melted down and sold." *AMBROS.* *De Offic.* *Lib.* II. *Cap.* XXVIII.

²³ O save me from this Rage, 'tis all I ask !

Is in *Virgil*.

*Strip'd of the Man, the cruel Wretch deny'd
The Slain a little Dust :*

In *Claudian* ²⁴. Wherewith agrees that of *Diodorus Siculus*, *It is savage Cruelty to wage War with the Dead, who were lately of the same Nature with ourselves* ²⁵.

IV. 1. Some Doubt indeed might have been made concerning notorious Malefactors, if the Divine Law, given to the *Hebrews*, which as it is the Rule of all other Virtues, so it is likewise of Humanity, had not commanded, that those very Men that were hanged upon the Gallows (which was reckoned a Circumstance of the greatest Ignominy, *Num.* xxv. 4. *Deut.* xxi. 23. 2 *Sam.* xxi. 26.) should be buried the same Day. Hence *Josephus* ¹ also observes, that the *Jews* were so careful to bury their Dead, that they took down even the Bodies of those, who were executed by publick Justice, before the setting of the Sun, and interred them; and some other of the *Hebrew* Interpreters add, *That they did this out of Reverence to the Image of GOD, wherein Man was created.* *Homer* in his third *Odysssey* relates, that *Ægypthus*, ² who to the Sin of Adultery had added that even of the King's Murder, was notwithstanding by *Orestes* the slain King's Son buried. And even among the *Romans*, *Ulpian* informs us, ³ the Bodies of executed Malefactors could not be denied to their Relations, if they required them; nay, ⁴ *Paulus* the Lawyer was of Opinion, that they were to be given to any that should ask them. And even *Dioclesian* and *Maximilian* the Emperors declare, in a Rescript, ⁵ *We do not, say they, deny Burial to those Criminals, who have deservedly been put to Death.*

2. In some Histories indeed we meet with Instances of those ⁶ who have been cast out unburied, but this is oftner done in Civil, than in foreign Wars; and tho' we sometimes see the Bodies of notorious Malefactors hung in Chains, to deter others; yet whether this be a laudable Custom or not, is much disputed, not only by Politicians but Divines.

3. On the contrary, we find those commended who have ordered the Bodies of those very Men to be buried, that had denied Burial to others; as *Pausanias* King of the *Spartans*, who, being solicited by those of *Ægina* to retaliate the Barbarity of the *Persians* towards *Leonidas*, rejected their Counsel, as unworthy of himself and the *Grecian* Honour ⁷. *Thesius* thus speaks to *Creon* in *Statius* ⁸.

*Go forth and meet, the worst of Ills, thy Fate,
Yet of a Grave secure.*

The *Pharisees* buried King *Alexander Jannæus*, who had used the Bodies of their dead Countrymen very barbarously. And tho' G O D hath sometimes punished some Persons with the Loss of Burial, yet this he did by his own peculiar Right,

²³ *SERVIVS* interprets this, the Fury of his Enemies, which would even after his Death desire to insult him. *GROTIUS*.

²⁴ See the Passage quoted in Note 16. on Paragraph I.

²⁵ *Lib. V. Cap. XXIX. p. 213. Edit. H. Steph.*

IV. (1) It is where he is speaking of the Cruelty of the *Idumeans* in the Slaughter they made among the *Jews* during the War. *Ball. Jud. Lib. IV. Cap. XV.*

2 *HOMER* says that *Orestes* having killed *Ægypthus*, his Mother's Gallant, made a funeral Entertainment at *Argos*, according to the Custom of those Times, for the Burial of his Mother and her Gallant; that is, he killed them both, tho' the Poet has avoided telling us so of the Mother, in express Terms, as the Scholiast observes *Odyss.* *Lib. III. Ver. 309, 310.* *PAUSANIAS* tells us they were buried without the Town. *Lib. II. Cap. XVI. p. 59. Edit. Wech.*

3 *Digest. Lib. XLVIII. Tit. XXIV. De Cadaveribus punitorum, Leg. I.*

4 *Ibid. Leg. III.*

5 This Custom of the *Romans* is mentioned in *Philob.* against *Flaccus.* *GROTIUS.*

6 This *Josephus* in his Account of the Death of *Alexander* King of the *Jews*, has termed ἀταφία, ἐπὶ ζῶντι καὶ νεκρῶν, to insult the Dead by Non-Interment. Add *QUINTILIAN, Declam. IV. GROTIUS.*

7 We learn this from *HERODOTUS.* See how he makes *Pausanias* answer *Lampro*, one of the considerable Men in the Island of *Ægina*: "Sir, I "admire the Goodness of your Intentions, and the "Concern you express for my Character; but must "observe to You, You deviate from a right Way "of thinking. Having first extolled me and my "Country on the Account of our Actions, You "reduce us very low when you endeavour to persuade me to use the Dead with Severity, and tell "me that if I take that Liberty, which rather becomes *Barbarians* than *Grecians*, and with which "we reproach them, my Reputation will become "more considerable." *Lib. IX. Cap. LXXVII.*

8 *Thebaid. Lib. XII. Ver. 780, 781.*

as his Authority is above all Laws. And whereas *David* kept the Head of *Goliath* to shew it, as a Token of his Victory, this was done to an *Alien*, to a Contemner of the true GOD, and under that Law wherein the Word *Neighbour* was confined to the *Hebrews* alone.

V. Whether
also to those
who kill them-
selves.

V. 1. There is however this one Thing remarkable, that in the *Jewish* Law concerning Burial, an Exception was made of those who laid violent Hands upon themselves, as ¹ *Josephus* informs us. And no Wonder, since no other Punishment can possibly be inflicted upon them who esteem Death itself to be none. Thus were the *Milesian* Virgins deterred from killing themselves, ² and ³ the meaner People of *Rome* formerly, tho' *Pliny* disapproves it ⁴. Thus did *Ptolomy* command the Body of *Cleomenes*, ⁵ who had killed himself, to be hanged up. And ⁶ it is every where customary, says *Aristotle*, to brand those with some Mark of Ignominy, who murder themselves; which *Andronicus Rhodius* explains, of prohibiting them Burial. And this Law, among many others enacted by *Demonassa*, Queen of *Cyprus*, is highly commended by *Dion Chrysostom*. Neither is it to the Purpose to object with *Homer*, *Æschylus*, *Sophocles*, *Moschion* and others, that the Dead are deprived of all Sense, and therefore can neither be affected with Pain nor Shame: For it is sufficient, if what is done to the Dead, strike a Terror into the Living, so as to discourage them from the Crime ⁷.

2. For the *Platonists* do argue excellently well against the *Stoicks*, ⁸ and such as hold it lawful for a Man to kill himself to avoid Slavery or the Pains of an acute Distemper or even out of Hopes of acquiring Glory, by maintaining, that the Soul is to be kept in the safe Custody of the Body, and not to be dismissed, but by the Command of him, who first gave it ⁹. Which Point is fully discussed by *Plotinus*, *Olympiodorus* and *Macrobius* upon *Scipio's* Dream. *Brutus*, following this Opinion, ¹⁰ had formerly condemned the Fact of *Cato*, tho' he afterwards imitated it himself.

V. (1) It appears from *JOSEPHUS* that even such as had laid violent Hands on themselves remained unburied only till Sun-Set. *De Bello Jud.* Lib. III. Cap. XXV. As to *HEGESIPPUS*, quoted by our Author in his Margin, he is not speaking of the *Jews*, but of other Nations, "Some of which," as he observes, expose the Bodies of those who "kill themselves, unburied; others cut off their "right Hand!" The Practice last mentioned was established among the *Athenians*, as appears from our Author's Remark in the sixth Note on this Paragraph, where he quotes the same Passage of *HEGESIPPUS*.

² *Aul. Gell.* Lib. XV. Cap. X. *PLUTARCH*, *De Mulier. Virtut.* Tom. II. p. 249.

³ *SERVIVS* upon the twelfth *Æneid*: *We must know indeed, that it was provided by the Pontifical Laws, that whoever hanged himself, should be cast out unburied. And therefore he very justly styles it, Informis Lethi, an ugly Death, as being the most infamous one in the World. Since there is nothing uglier than this Death, we must believe that the Poet spoke so in Relation to the Majesty of the Queen. But Cassius Hæmina says, that Tarquinius Superbus, after he had forced the People to make Common-Sewers, and many of them had hanged themselves to avoid the Drudgery, ordered their Bodies to be affixed to a Cross. Then was it first reckoned Dishonourable for a Man to lay violent Hands upon himself.* *GROTIUS*.

See *JAMES GUTHIER'S* Treatise *De Jure Manium*, Lib. I. Cap. X. and the *Observationes Juris Romani* by Mr. *DE BYNCKERSHOCK*, Lib. IV. Cap. IV. where that great Lawyer alledges several Reasons for shewing that, according to the *Roman* Law, Self-Murder was punished only when it was attended by Damage to the Publick or to some private Person.

⁴ He doth not disapprove of the Punishment, but only banters those on whom it made an Impression; as if a Man could after Death be sensible of

the ignominious Manner in which his Body was treated. *Hist. Nat.* Lib. XXXVI. Cap. XV.

⁵ See *PLUTARCH*, in the Lives of *Agis* and *Cleomenes*, p. 823. Tom. I. *Edit. Wech.* But as *GRONOVIVS* here observes, this was not done because he had killed himself; but because being incensed at his being detained as a Prisoner, he had raised a Sedition, and entered into a Conspiracy against *Ptolomy Philopater*.

⁶ At *Athens* in *Æschines's* Days, if a Man had murdered himself, his Hand was buried separate from his Body. *Æschin. in Ctesiphon.* Add to this, *Hegesip.* Lib. III. Cap. XVII. *GROTIUS*.

⁷ *QUINTILIAN* speaking of a Law which ordered that the Bodies of Tyrants should remain unburied, observes that that Sort of Punishment was thought necessary, because the Idea of it affects several more strongly than that of Punishments inflicted in their Life-time. *Declam.* CCLXXIV. This is no chimerical Law; the Author of the Treatise on *HOMER'S* Poetry, commonly ascribed to *PLUTARCH*, but by others thought to be the Work of *DIONYSIVS* of *Halicarnassus*, is good Security of its Reality. Quoting the Verses mentioned in Note 12. on Paragraph II. he says: "And "when *Ægysthus* was killed he (the Poet) says he "would not have been buried, had *Menelaus* been "present; for such was the Law concerning Ty- "rants," p. 73. *Edit. Barnes.*

⁸ See my Preface on *PUFENDORF*, § 27. at the End, p. III. of the Second Edition.

⁹ On this Subject see *PUFENDORF*, *B. II. Cap. IV.* § 19.

¹⁰ *PLUTARCH* in his Life. And a great many Philosophers except the *Stoicks*. *SENECA*, *Epist.* LXX. You will meet too with several Men of eminent and professed Wisdom, who deny that one ought ever to offer Violence to his own Life, and who declare it as their Opinion that a Self-Murderer is guilty of an impious and wicked Action. That we ought to wait for that End, which Nature has designed us.

PROCOPIUS,

himself. *It is neither pious nor manly, saith he, to yield to adverse Fortune, and to fly away from those Calamities, which we should magnanimously bear.* And Megasthenes observed, ¹¹ that the Fact of Calanus was by the wisest of the Indians condemned, it being contrary to their Maxims ¹² for any Man through Impatience to kill himself. Neither did the Persians approve of it, as appears by these Words of Darius in Curtius: *I had rather die by another Man's Crime, than my own* ¹³.

3. And therefore, *to die* was by the Hebrews called ἀπολύειν *to be let go*, or, *to be dismissed*, as is plain not only from Luke ii. 29. but from the Septuagint Version of Gen. xv. 2. and Numbers xx. about the End ¹⁴. Which way of Expression is also usual among the Greeks. *He that dies*, saith Themistius (de Anima) *is said by them to be dismissed, and Death they call a Dismissal*. We meet with much such an Expression also in Plutarch (de Consolatione) until GOD himself shall dismiss us.

4. ¹⁵ Yet some of the Hebrews except one Case out of the Law against Self-Murder, as a Kind of commendable Departure, εὐλογος ἐξαγωγή, ¹⁶ when a Man plainly perceives, that his Life is like to be nothing for the future but a Reproach to GOD himself. For since it is concluded, that the Right over our own Lives is not in ourselves, but in GOD; as Josephus very well represented to his own Countrymen; ¹⁷ they are of Opinion, that the Will of GOD, made known to us by sure Tokens, is the only lawful Reason why a Man should hasten his Death. To this Purpose they alledge the Example of Sampson, who found, that the true Religion was made a mock of in his Person; and that of Saul, who fell upon his own Sword, that he might not be insulted by His and GOD's Enemies. For they will have it, that he repented after Samuel's Ghost had foretold him his Death, and altho' he knew he should die in Case he did fight, yet that he would not refuse to fight for his Country and the Law of GOD, having obtained eternal Praise thereby, as David himself declares. And hence it was, that he so highly commends those who had given Saul an honourable Burial. A third Instance we have in Razas a Senator of Jerusalem, as it is recorded in the History of the Maccabees. Instances are likewise to be met with in Ecclesiastical History of those that killed themselves, ¹⁸ lest being put upon the Rack they

Judges xvi.

1 Sam. xxxi.

4.

2 Macc. xiv.

37.

PROCOPIUS, Gothic. IV. βίαιος καὶ ἀσεβής, &c. *It is an unprofitable, rash, and imprudent Thing for a Man to force his Way out of the World; and this Thoughtless Bravery of courting Death is looked upon by all Men of good Sense to have only usurped the Name of Courage.* Nor is it altogether unworthy your Reflection, to consider whether in so doing, you do not act an ungrateful Part against GOD. GROTIUS.

11 STRABO, Geograph. Lib. XI.

12 This was no less the Opinion of the Arabians than of the Indians and Persians, as you may learn from JOB iii. 21. GROTIUS.

13 Lib. V. Cap. XII. Num. II.

14 Our Author, in his Notes on the Gospels, adds that MARCUS ANTONINUS uses the Word ἀπολείπειν to the same Purpose, which signifies to quit a Service or Employment. The Passage is Lib. X. § 22. on which see GATAKER's Comment. But as to the other Expression of the same Emperor, there quoted by our Author: Ἀπίθι ἐν ἱλαῶς καὶ γὰρ ὁ ἀπολύων, ἱλαῶς, I believe his Memory failed him. It is probable he had the following Words in his Mind: Ἀπίθι ἐν ἐκ τῶ ζῆν εὐμενὲς ἢ (as GATAKER rightly reads, instead of ἢ) καὶ ὁ ἐνεργῶν ἀποδύνησκει αἷμα ἱλαῶς τοῖς ἐνισταμένοις. That is, *Depart therefore out of Life cheerfully, like a Man who has succeeded in his Designs, and be not uneasy at what Obstacles you have met with.* Lib. VII. § 47. The learned and accurate English Commentator on MARCUS ANTONINUS quotes no Parallel Passage, for what our Author makes him say, and where the Word ἀπολύειν is used in the Sense here specified. We find only ἀπολυθῆναι τῶ σώματος, *to be dismissed or freed from the Body*, Lib. XI. § 3. on which GATAKER, who quotes the Passage of St. LUKE, and two others, one from HERACLITUS,

the other from CLEMENT of Alexandria, where ἀλύσις and ἀπολύσις are used concerning Death, would not have forgot to express a Passage in his own Author. Nor does he quote it in his Dissertation De Novi Testamenti Stylo, Cap. VII. where he treats of this Way of speaking, and others of a like Nature on several considerable Authorities.

15 That the Hebrews varied in their Judgments upon this Matter, is plain from JOSEPHUS, where he treats of the Death of Phasaël and Herod's Intention to kill himself. And PHILO introduces the Jews speaking thus to PETRONIUS; ἀνακεχεσμέθα τὸ ἴδιον αἷμα, &c. *These Hands shall be imbrued in our own Blood, that will we mingle; then on the Dead let your Commands be laid; Heaven will forgive us, whilst we are divided betwixt Respect to the Emperor, and a Resolution of maintaining our sacred Laws.* And this will be our Case, if despising this paltry Life not worth the keeping, we voluntarily quit it, and walk off with Unconcern. GROTIUS.

16 An Expression used by the Stoics. See DIOGENES LAERTIUS, Lib. VII. § 130. with the Commentators.

17 In his Discourse to those who were shut up with him in a Cave, and were inclined to kill themselves, that they might not fall into the Hands of the Romans. "If any one, says he, throws out of his own Body the Divine Depositum, do you imagine he will escape the Justice of an offended GOD? It is thought just to punish Slaves who run away, even from wicked Masters; and shall we not think ourselves guilty of Impiety if we run away from GOD, the best of Masters?" Bell. Jud. Lib. III. Cap. XXV.

18 See EUSEBIUS, Eccles. Hist. Lib. VIII. Cap. XII. GROTIUS.

should abjure the Christian Faith ; and of Virgins, who, ¹⁹ to preserve their Chastity, have thrown themselves into Rivers ; whom notwithstanding the Church has thought fit to canonize as Martyrs. But yet it is worth while to see ²⁰ what St. *Austin* thinks of these People.

5. I find also, that another Exception to the general Rule of burying the Dead prevailed among the *Greeks*, which the *Locrians* objected against the *Phocians*, viz. that it was a Custom common to all *Greece* to cast out sacrilegious Persons unburied ²¹. The like doth *Dion Prusænsis* report of such as were impious and notoriously wicked ²². And *Plutarch*, that the very same Punishment was established by Law in *Athens* ²³ against Traitors. But to return to my Subject ; antient Writers do generally agree, that it is lawful to go to War with any Prince, that denies Burial to the Dead, as appears by that Story of *Theseus*, which is recorded by *Euripides* and *Isocrates*, in the Places before cited.

§. 1. Num. 3.

VI. What other Rights belong to us by the Law of Nations.

VI. There are also other Rights belonging to us by the arbitrary Law of Nations, as what we have been possessed of a long Time, what comes to us by Contract, tho' made upon very unequal Terms, and to succeed to the Estate of an Intestate Person. For all these, tho' they have their Rise in some Measure from the Law of Nature, yet do they receive an additional Confirmation from human Laws, whether against the Uncertainty of Conjectures, or against some Exceptions, which

Those Persons ought to have considered that GOD was powerful enough to support them in the midst of the most cruel Torments ; and that, even tho' he permitted them to sink under them, he was good enough to have Regard to the Frailty of human Nature, and pardon them a forced Abjuration, on sincere Repentance. So that this Reason did not Privilege them to think themselves exempted from the general Law. They committed a certain Sin, to avoid an uncertain one.

19 CICERO in his Oration *De Provinciis Consularibus*, gives an Account of some Maids of Quality who threw themselves into Wells, and so by a voluntary Death, kept themselves from being ravished. Such another Story does St. JEROME against JOVINIAN relate of the *Milesian* Virgins ; and there is an old Epigram to the same Purpose. ANTHOLOG. Lib. III. Tit. *De juvenibus*, beginning with ὥχουεθ' ὦ Μίληε. And the *Jews* tell you of a Woman in a Ship importuned to Adultery, who when she had asked her Husband, whether Bodies that are drowned in the Sea, would rise again, and he had answered, that they would, threw herself into the Sea. We have many Instances of this Kind among Christian Women. As, the Women of *Antioch* under *Dioclesian*, *Sophronia* under *Maxentius* ; see the Martyrologies, *Zonaras*, and *Sextus Aurelius*. PROCOPIUS, *Perfic.* II. adds other Women of *Antioch* under *Chosroes*. And St. AMBROSE commends the Virgins, who at the Expence of their Lives maintained their Honour. St. JEROME in his Commentaries at the End of the first Chapter of *Jonah* says, *And therefore in Persecutions it is not lawful for me to kill my self, unless when my Chastity is in Danger without it.* GROTIUS.

I know not whom our Author means here by SEXTUS AURELIUS. Neither SEXTUS AURELIUS VICTOR, or the Writer, who passes under his Name say any thing concerning Women, who dispatched themselves for the Preservation of their Chastity. He may perhaps have confounded that Abbreviator of the *Roman* History with another who lived long after him, and is sometimes joined to EUTROPIUS, AURELIUS VICTOR, and other such Abridgments, particularly in DENIS GODFREY's Collection, printed at LYONS in 1592. I

speak of POMPONIUS LÆTUS, who mentions the melancholy Expedient made Use of by *Sophronia* for avoiding the Brutality of the Tyrant *Maxentius*. As for the rest, EUSEBIUS also speaks of that tragical History, tho' he does not mention the Lady's Name, but only mentions her Husband's Dignity. *Hist. Eccles.* Lib. VIII. Cap. XIV. and in his Life of *Constantine*, Lib. I. Cap. XXXIV.

20 To whom we may add St. CHRYSOSTOM, Gal. i. 4. and the third Council of *Orleans* : It is our Judgment that the Offerings for Persons deceased, tho' they were killed in the actual Commission of a Crime, ought to be accepted, unless they are proved to have laid violent Hands upon themselves. And yet this very St. AUSTIN, Lib. I. *De civitat. Dei*, Cap. XVI. says, *But, however, if the Case be so, that they destroyed themselves, purely that they might not suffer any Indecency of this Nature; who of common Humanity could be so barbarous as not to pardon them?* And the *Capitular Francicum*, Lib. VI. 70. *It has been debated and resolved in Relation to him who hangs or murders himself, that if any one, compassionating his unhappy Circumstances, will on that Account give any Alms, he may, if he pleases do so, and sing Psalms for him : But as for them themselves let them be without either Offerings or Masses : For God's Judgments are unsearchable, and his Ways past finding out !* See there too, vii. 443. GROTIUS.

21 DIODOR. SICUL. Lib. XVI. Cap. XXV. p. 523. Edit. H. Steph.

22 *Orat. Rhodiæ*. Concerning sacrilegious Persons and Traitors, see MEURSIUS's *Themis Attica*, Lib. II. Cap. II.

23 But when NICETAS has in his third Book of the Life of *Alexius Isaacius's* Brother, related the Death of *Johannes Comnenus Crassus*, who by Sedition had affected the Crown, he speaks of him in the following Manner ; μετά δὲ τὸ σῶμα, &c. *After his Body was removed thence, it was made the Food of Dogs and Birds ; which was however looked upon by all the World as a Thing a little Brutish and Inhuman.* GROTIUS.

Besides the Crimes mentioned by our Author, there were others for which Men were deprived of Burial. See POTTER's *Archæolog. Græc.* Lib. IV. Cap. I.

natural

natural Reason might perhaps suggest ; as we have already shewn when we treated of the Law of Nature ¹.

VI. (1) But we have also shewn on those Places, the Things there mentioned on the arbitrary Law of Nations.
or at least referred to our Notes on PUFENDORF
for Proofs, that our Author has no Reason to ground

C H A P. XX.

Of Punishments.

I. **W**HEN we undertook, above, to assign the Causes of War, we laid down, that Injuries done might be considered in a twofold Respect, either as they may be repaired or punished. Of the former we have already fully treated. We come now to the latter, that of Punishment ; ¹ which we shall the more accurately discuss, for as much as its Origine and Nature being misunderstood has given Occasion to many Mistakes. Punishment then in its general Acceptation is *the Evil that we suffer for the Evil that we do*. For tho' some Sorts of Labour or Work are often imposed on Persons by Way of Punishment, yet considering the Pains and Trouble that attend such Labour and Work, they may properly enough be ranked amongst the Evils we suffer. As for those Hardships, which some People undergo on account of a contagious Distemper, for being maimed, or for any other Uncleanneſs (many Kinds of which are extant in the Jewish Law) so as, for Instance, to be driven from all Company and Conversation, or to be made incapable of any Office or Employment, they are not properly Punishments, tho' for some Resemblance they have to them, and by an Abuse of the Word, they are so called.

2. Among those Things, which Nature herself tells us to be lawful and just, this is one, That he that doth Evil should suffer Evil, which the Philosophers call the most antient and the *Rhadamanthean Law*, as we have said elsewhere. To the same Purpose is that Saying of *Plutarch*, τῷ Θεῷ ἐπείκει δίκην, &c. ² *Justice is the Attendant of GOD to take Vengeance of those who transgress the divine Law, which all Men naturally have Recourse to against all Men as their Fellow Citizens*. And ³ *Plato*, neither GOD nor Man ever said this, that he, who hath done Wrong to another, doth not deserve to suffer for it. And *Hierax* describes Justice by this as by the noblest Part of it, viz. ⁴ That it is *the Exaction of Punishment on those, who have first offended*. And *Hierocles* calls Punishment the ⁵ *Medicine of Wickedness*. ⁶ And *Lactantius* says, *They are guilty of no small Error, who miscall Punishment, either Human or Divine, by the Name of Bitterness and Malice, imagining that he ought to be esteemed guilty, who only punishes the guilty*.

I. (1) Almost this Whole Chapter should be compared with the third of the eighth Book of PUFENDORF, where the same Matter is treated of, and our Author's Thoughts frequently explained or corrected ; tho' sometimes defended in the Notes.

² *De exilio*, Tom. II. p. 601. *Edit. Wech.*
The first Words of this Passage are taken Word for Word from PLATO, *De Legib.* Lib. IV. p. 716. Tom. II. *Edit. Steph.*

³ St. IRENÆUS's Expositor (in his third Book, Chap. XIV. has set down his Words thus: *And GOD, as a very antient Report goes having the beginning and the Means of all Things at his Disposal, brings them to a just Perfection, visiting them according to their respective Nature, always attended with Justice ready to punish those who presume to deviate from the Law the ALMIGHTY has given*. GROTIUS.

⁴ Agreeable to this is that of *Belisarius* in PRO-COPIUS's *Vandal.* I. περὶ τὸν δὲ ἀντὶ τῆς, &c. Let it

be the first Maxim of Justice to punish Murderers. Add here AGATHIAS, *Lib. V.* where he speaks of *Anatolius*. GROTIUS.

In the Passage of AGATHIAS here specified I find nothing relating to the Subject. I only observe that a little after the Place quoted, the Historian produces a Thought of PLATO on the Advantage of Punishment in Regard to the Criminal.

⁵ It is where he says " We ought to take particular Care not to offend ; but when a Man has been guilty of some Crime, he ought immediately to hasten to Punishment as the Remedy for Vice," p. 124. *Edit. Needham*. As that Commentator on PYTHAGORAS follows PLATO's Notions, he uses the very Terms of the Philosopher, in *Gorg.* Tom. I. p. 478. In Relation to the Thing itself see PUFENDORF in the Chapter that answers to this, § 9. Note 2.

⁶ *De Irâ Dei.* Cap. XVII. Num. 6: *Edit. Cellar.*

3. But that all Punishment, which is properly so called, must necessarily be the Consequence of some Crime or Demerit, is what St. *Austin* has observed, ⁷ *All Punishment, if it be just, must be the Punishment of some Crime*; which is true even of those Punishments that are inflicted by GOD himself, tho' sometimes thro' our Ignorance, *The Offence is concealed where the Punishment is evident*, as the same Author speaks.

II. That Punishment belongs to expletive Justice and how.
^a See B. i. Ch. 1. § 8.

II. 1. But whether Punishment belongs to attributive or ^a expletive Justice, divers Men are of divers Opinions. Some imagine, that because greater Offenders are to be more severely punished, and so on the contrary, and because Punishment proceeds as it were from the Whole or the Community, to a Part or Member of that Community, therefore they would ascribe it to attributive Justice.

^b *Ibid.*

2. But what in the first Place they lay down, that where there is a Geometrical Proportion, it always appertains to attributive Justice, we have shewn ^b in the beginning of this Work not to hold true. Besides, that greater Offenders are more severely punished, and lesser Offenders more lightly, falls out only by Accident, and is not primarily and of itself intended: For that which is simply and in the first Place intended, is ^c an Equality between the Offence and the Punishment; whereof *Horace* thus, ²

*Why doth not Reason poise and mend the Thoughts,
And see our Rage proportion'd to the Faults?*

Creech.

And elsewhere, ³

*Let Rules be fix'd, that may your Rage contain,
And punish Faults with a proportion'd Pain;
And do not flea him, do not run him through,
That only doth deserve a kick or two.*

Creech.¹

And it is to this that the Divine Law, *Deut. xv.* and *Leo's Novell* have a Regard ⁴.

2. Neither is the other Position much truer, that Punishment doth always proceed from the Whole to a Part, as will appear by what we shall say hereafter. Besides we have already ^c shewn, that the true Nature of attributive Justice consists, neither in such an Equality, nor in a Procession from the Whole to a Part, properly speaking, but in considering an Aptitude or Merit, which doth not contain in it a Right strictly so called, but gives Occasion to it ⁵. For altho' he that is punished, ought to deserve Punishment, yet can we not infer from hence, that he must necessarily acquire whatsoever attributive Justice may demand ⁶. Neither do they, who would have Punishment to appertain to expletive, or what is commonly called commutative Justice, explain themselves much better. For they look upon it in such a Light, as if Punishment was due to a Delinquent in the same manner,

^c *Ut supra.*

⁷ *Retract.* Lib. I. Cap. IX. *De Lib. Arbitrio*, Lib. III. Cap. XVIII.

II. (1) *SENECA*, *De Ira* II. 6. He would be unjust to bear one and the same Resentment, when the Crimes are unequal. *TACITUS*, *Annal.* III. Tho' his Crimes are beyond Measure flagrant, yet the Prince's Moderation, and yours and your Ancestors Examples, will qualify the Punishments. There is a Difference between what is only vain, and what is downright wicked; what is only ill said, and what is ill done: There may such a Way be found to punish him, as shall neither give us any Check or Reproach for our Clemency on the one hand nor our Severity on the other. *AMMIANUS*, *Lib. XXVIII.* Praying that their Punishment might not be greater than their Offence. The Scholiast upon *HORACE*, If great Punishments be laid out upon small Crimes, great Crimes must either remain unpunished, or some new Punishments must be invented for them. And *Lex Wisigoth.* Lib. XII. Tit. III. Cap. I. For some Laws, tho' they take Notice of great variety of a Faults, are yet not so distinguishing in their Punishments of them, but several Crimes are obnoxious to one and the same Penalty only. Nor is the Punishment at all proportioned to the *Trespass*, since a greater or a less

Crime ought not to be alike in their Sufferings: And especially when the LORD does in his Law expressly ordain, that the Number and Measure of Stripes shall be according to the Degree and Nature of the Offence. See below in this Chapter, § 28. and 32. and in *B. III. Chap. XI. § 1.* *GROTIUS*.

² *Lib. I. Serm. III. Ver. 78, 79.*

³ *Ibid. Ver. 117, 118.*

⁴ "It is highly requisite that the Laws should ordain Punishments in Proportion to the Offence, and by no Means inflict a Punishment much greater than what the Crime deserves." *NOVELL. CV.*

⁵ A poor Man, for Example, however deserving soever he may be of Alms, has not, strictly speaking, a Right to demand it, unless in Case of extreme Necessity. But when he has received a Piece of Money, it is entirely his own and according to the Laws of *expletive Justice*; so that if any one, or even the Person who gave it him, attempts to take it from him, he is guilty of *Injustice* properly so called.

⁶ For no Man demands Punishment to be inflicted on himself; on the contrary, every one avoids it as much as is in his Power.

that

that a Debt is due upon a Contract.⁷ The vulgar Expression, whereby we say, that *Punishment is due to a Malefactor*, which is very improper, has led them into this Error. For he to whom any Thing is due, hath a Right against him from whom it is due. But when we say that Punishment is due to any one, we mean no more than that it is fit he should be punished.

3. Yet it is true, that commutative Justice is primarily, and of itself conversant about Punishments, so far as he that punishes, if he punish justly, must have a Right to punish, which Right arises from the Crime of the Delinquent. And herein there is another Thing⁸ that comes near to the Nature of Contracts; for as he who sells a Thing, tho' he mention nothing particularly,⁹ is yet presumed to stand obliged to perform the Conditions that naturally belong to such a Sale: So he that commits a Crime, seems voluntarily to submit himself to Punishment, there being no great Crime that is not punishable; so that he who will directly commit it, is by Consequence willing to incur the Punishment; in which Sense some Princes¹⁰ have pronounced Sentence upon a Malefactor thus, *"Thou hast brought this Punishment upon thy own Head"*, and they that take wicked Counsel, are then said to be punished for their Demerit, that is, to lay themselves under an Obligation of being punished by their own Will:¹² And the Woman in *Tacitus*, who lay with another Man's Slave, is said to have consented to her own Slavery; that being the Punishment ordained against such¹³.

4. Michael

⁷ Not so, says the learned GRONOVIVS. On the contrary, they consider the Criminal as a Debtor who is obliged to pay. For which Reason he who punishes, is said *sumere, exigere, petere pœnas*, and the Person punished, *dare, luere, pendere, solvere pœnas*. See our Author's Note on *Acts* vii. 60. and some Passages by him quoted in the following Note. In Reality, this whole Dispute is intirely useless. It is sufficient that we own there is a natural Connection between the Crime and the Punishment, so that no Injustice is committed when a real Criminal is punished. Every one is at full Liberty to call this Act of Justice by what Name he pleases.

⁸ SERVIUS often makes this Remark: Upon the fourth *Æneid*, for Instance, he says, *For those who exceed the Measure of the Offence, do render themselves deserving of Punishment*. And again, *To condemn is to discharge a Man from his Debt*: Hence the Expression of *Damnabis tu quoque votis*. And upon the tenth *Æneid*, *Luant peccata*. *Luant*, that is, absolvant, *Let them pay off their Crimes*. And we say too, *luo pœnam*, but *Peccatum* is much better here. For an Offence is discharged or paid off by its Punishment. For whoever stands obliged by his Crime, is, by his undergoing the Penalty, freed from the former Obligation. On the other Hand, *Luo pœnam* is not to be understood as if the Penalty was paid. But however Custom and Authority have a Liberty to confound these Things, just as it is usual to put what precedes for what follows, or what follows for what precedes. And this is what you frequently meet with in the Language of the Sacred Writings. For, as TERTULLIAN, *De Oratione*, says, *A Debt in the Scriptures is the Figure of a Transgression, because the Person transgressing is thereby indebted to Justice, and Justice demands a Satisfaction of him*. St. CHRYSOSTOM, in his Oration *De terræ motu*, in Tom. V. talking of that rich Man who is opposed to Lazarus, and explaining the Word ἀπέλαες, *received*, a Word used in that Passage of the Gospel, has the following Observation, Ἐχρεώσθη αὐτῷ τιμωρία, ἐχρεώσθη αὐτῷ ὀδύνη. Punishments were owing him, Pains were owing him. And in his second *De pœnitentia*, τὰ ἀμαρτήματα εἰς ὀφειλήματα ἀνατρέφει, Sins are accounted Debts. St. AUSTIN, III. *De libero Arbitrio*,

And therefore, if he does not render what he owes by living well, he shall render it by suffering the Pain which he deserves; because in both these there sounds something of the Word Debt. For it might also be expressed thus, *If he does not by his Actions pay what he owes, he shall by his Sufferings pay for it*. GROTIUS.

⁹ Thus, according to the Roman Law, the Seller, in Case of an Action of Recovery, is obliged to pay double the Sum he has received, if it appears that the Thing sold belonged to another, and the Purchaser is deprived of it by the true Owner; and this, tho' no such express Stipulation was made in the Contract. *Digest. Lib. XXI. Tit. I. De Evictionibus* & *duplæ Stipulation. Leg. II.* See CUJAS on the same Title of the *Code*, Tom. IX. *Opp. Edit. Fabrot. p. 1337, &c.*

¹⁰ SEVERUS and ANTONINUS, in a Rescript to *Asclepiades*, concerning a Fine. *Digest. Lib. XLIX. Tit. XIV. De Jure Fisci, Leg. XXXIV.*

¹¹ PHILO, at the End of his first Book, *De vita Mosi*, ἄνθρωποι γὰρ τοὶ ἀνέδοντες ἀμαρτάνουσιν, ἀνέδοντες δὲ πρὸς τιμωρίας, *For while you make haste to Sin, you are hurrying to Punishment*. GROTIUS.

¹² *Cod. Lib. IX. Tit. VIII. Ad Leg. Jul. Majest. Leg. VIII.*

¹³ *Annal. Lib. XII. Cap. LIII. Num. 1.* The Words of TACITUS, as they stand in the common Editions, are, *Inter quæ refertur ad Patres de pœnâ fœminarum, quæ servis conjungerentur; statuiturque, ut ignaro Domino ad id prolapsa in servitutem sui consensisset, & qui nati essent pro libertis haberentur*. That is, *The Senate was consulted, concerning the Punishment to be inflicted on Women who should lie with Slaves; and it was resolved, that; if this was done without the Knowledge of the Slave's Master, the Woman had consented to her own Slavery, and their Children should be accounted Freedmen*. Our Author has followed this Reading; but the true one is certainly that of RYCVIUS, *Ut ignaro domino ad id prolapsa, in servitute; sine consensisset, pro liberta haberetur*. That is, *If it was done without the Knowledge of the Slave's Master, the Woman should become a Slave; but, if the Master consented to it, she should be considered as a Freed-*

4. Michael Ephesius, upon the fifth of Aristotle's *Nicomachia*, tells us, *τέτοιον τρόπον τινα*, &c. There is herein a Kind of Giving and Receiving, after the Nature of Contracts; for he who has stole either the Goods, or any Thing else, of another Man's, is punished for it. And a little after, *ὡσαύτως αἱ*, &c. Under the Name of Contracts the Antients comprehended, not only such as were made by mutual Agreement, but those Actions also that were forbidden by the Laws.

III. That to punish does not naturally belong to any one Person, but that Punishment may be lawfully required according to the Law of Nature, by any Body who is not guilty of the like Crime.

III. 1. But the Subject of this Right, that is, the Person to whom the Right of Punishing belongs, is not determined by the Law of Nature. For natural Reason informs us, that a Malefactor may be punished, but not who ought to punish him. It suggests indeed so much, that it is the fittest to be done by a Superior, but yet does not shew that to be absolutely necessary, ¹ unless by Superior we mean him who is innocent, and detruce the Guilty below the Rank of Men, and place them ² among the Beasts that are subject to Men, which is the Doctrine of some Divines. *Democritus* ascribes it to Nature, that the better should govern the worse. ³ And *Aristotle* says, That both in Nature and Art, meaner Things are made for the Use of nobler ⁴.

2. The Consequence of which is, that a Man ought not to be punished by one who is equally guilty with himself ⁵; according to that of our Saviour to the Pharisees, *John* viii. 7. Let him amongst you that is without Sin, (viz. such a Kind of Sin) cast the first Stone at her. Which he therefore spoke, because at that Time the Manners of the Jews were extremely corrupted, insomuch as they, who pretended to be the greatest Saints, would wallow in Adulteries, and other such abominable Sins, as appears by *Rom.* ii. 22. Wherefore thou art inexcusable, O Man, whoever thou art that judgest; for in that thou judgest another, thou condemnest thyself, seeing thou that judgest dost the same Things. Therefore what CHRIST had said before, the Apostle saith here. To the same Purpose is that of *Seneca*, ⁶ That Sentence can have no Authority, where he that condemneth another may as justly be condemned himself. And in another Place, A Survey of our own Actions will make us more moderate in passing Judgment upon others, if we consult our own Breasts, and consider ⁷ whether we have not been guilty of the like Crimes. Let every one, saith *St. Ambrose*, ⁸ that is about to judge another, first judge himself, and not condemn the Errors and Oversights of other Men, while he is guilty of far greater himself.

IV. That among Men Punishment is not to be required but for the Sake of some Benefit that may accrue thereby, but that it is otherwise with GOD; and why.

IV. 1. Another Question arises concerning the End proposed in punishing. For what we have hitherto said, amounts only to this, that the guilty Person hath no Injury done him, in Case he be punished. But it doth not follow from hence, that he must necessarily be punished. Nor is it true, for both GOD and Men do pardon many Offenders, many Offences, and are commonly praised for it. For as *Plato* first, ¹ and after him ² *Seneca*, well observed, No wise Man punishes an Offender, because he hath offended, but that he may not offend again. For what is once done cannot be recalled, but what is to come may be prevented. Therefore all Punishments have Regard to the future, and he that punisheth should not be angry, but pro-

Freedwoman. And thus the Passage is nothing to the present Purpose. See the *Receptæ Sententiæ* of JULIUS PAULUS, *Lib.* II. *Tit.* XXI. § 1. with CUIJAS's Comment, and the Notes of Mr. SCHULTING.

III. (1) See what I have said on the Chapter of PUFENDORF which answers to this, § 4. Note 3.

2 TH. 2. 2. Qu. 64. Art. 1. & ibi CAJET. So MOSES MAIMONIDES, upon *Deut.* xxxiii. GROTIUS.

3 In STOBÆUS, *Florileg.* *Tit.* XLVII.

4 *De Repub.* *Lib.* VII. *Cap.* XIV. p. 442. *Tom.* II. *Edit. Paris.*

5 This takes Place in the State of Nature, where all Men being equal, have an equal Right of punishing; and consequently, there is a Sort of Compensation, between two Persons equally guilty. But our Author certainly does not design to extend the Maxim so far as to deprive a Prince, or a Magistrate, of the Right to punish Crimes of which he knows himself guilty. In that Case it is not so much the Prince, or the Magistrate, that punishes

as the Law, or the whole Body of the Society, which has invested those Persons with the Right of correcting and chastising, in their Name, those who shall do any Thing prejudicial to the publick Good.

6 I know not whence these Words are taken. Our Author does not so much as specify the Treatise, from which he quotes them, either here or in his Note on *JOHN* viii. 7. where he has collected other Passages of the same Sort.

7 (*De Ira*, *Lib.* II. *Cap.* XXVIII.) Agreeable to this is a Passage of ST. AMBROSE, in his twentieth Sermon upon the Psalm, *Beati immaculati*, at the Verse *Miserationes tuæ Domine*, a Passage cited *Caus.* III. *Quæst.* VII. So that of CASSIODORE VI. 21. GROTIUS.

8 *Apologia Davidis*, *Lib.* II. *Cap.* I.

IV. (1) *De Legib.* *Lib.* XI. p. 934. *Tom.* II. *Edit. H. Steph.* See also *B.* IX. p. 854. and in his *Protagoras*, *Tom.* I. p. 324.

2 *De Ira*, *Lib.* I. *Cap.* XVI. and *Lib.* II. *Cap.* XXXI.

vident. Diodorus, in his Speech to the *Athenians*, concerning the *Mityleneans*, saith, *That they had done very unjustly, but yet that they were not to be destroyed, unless it should be judged expedient* ³.

2. These Things indeed are true of Punishments amongst Men: Because one Man is so linked in Bonds of Consanguinity to another, ⁴ that he ought never to do him harm, but for the Sake of some Good; but it is otherwise with GOD, to whom *Plato* falsely extends the aforesaid Maxims. ⁵ For his Actions may be grounded on the sole Right of his sovereign Dominion and Jurisdiction over us ⁶, especially when there is any Demerit in us, tho' they propose no End to themselves beyond themselves. And thus do some *Hebrews* explain that of *Solomon*, which is pertinent enough to the present Purpose, ^a *The LORD hath made all Things for himself, even the Wicked for the Day of Wrath*: That is, even then when he punisheth the Wicked, he does it for no other End but only to punish them. And altho' we do admit of the more common Acceptation, ⁷ yet it will return to the same Thing, *viz.* that GOD may be said to have made all Things for himself, that is, by the Right of that transcendent Liberty and Perfection, which is inherent in him, without seeking or regarding any Thing without him; as GOD is called *ἑαυτοῦ*, *A Being of himself*, because not born or created of any. The holy Scriptures, at least, do testify that GOD inflicts Punishment sometimes upon profligate abandoned Sinners, for no other Reason but to punish them. As when he is said ^b *To rejoice at their Calamity, and to mock when their Fear cometh*. Besides too, the last Judgment, after which there is no Place or Hopes of Amendment; nay, and some Punishments which in this Life are imperceptible, that is, do not appear to the Eyes of Men, but are only felt by the Mind of the Sufferer, such as Obduration, do clearly evince the Truth of what we assert against *Plato*.

3. But when one Man punisheth another, equal to him in Nature, he ought to propose some End to himself. And this is what the Schoolmen ^c mean, when they say, that the Design of an Avenger in punishing, ought not to terminate in the Sufferings of the Criminal. But before them *Plato* declared, that those who

³ THUCYDIDES, *Lib. III. Cap. XLIV. Edit. Oxon.*

⁴ CASSIODORE, *De amicitia, If by Accident one Hand hurts the other, that which is hurt does not strike again, nor endeavour to revenge it.* GROTIUS.

⁵ Our Author, in his Margin, quotes the *Gorgias*; and certainly means to speak of a Passage in that Dialogue, where the Philosopher, having set down the several Ends of Punishments, as we shall see hereafter, says, he talks equally of human and divine Punishments; for, adds he, those who reap Advantage from the Chastisement, whether they are punished by the Gods or by Men, are such as commit Faults which are corrigible. *Tom. I. p. 525.*

⁶ Our Author's Meaning is, that some Things would be unjust between Man and Man, were they not done for some Reason, or with some View, distinct from the natural Tendency of the Action itself, which however GOD may do, merely out of his own good Pleasure, without any Violation of his Perfections. Thus, for Example, one Man may not take away the Life of another, purely and simply with the View of taking it away, but either in Defence of his own, when unjustly attacked, or in Order to exercise an Act of just and necessary Punishment. But GOD may, whenever he pleases, deprive whom he will of Life, without any other Reason than his own good Pleasure, and the Right he has over his Creatures. If the Person whom he deprives of Life is innocent, he exercises an Act of his sovereign and absolute Right on him; but if he has deserved Death, it is then an Act of absolute Right, and an Act of Punishment. Con-

sidering this as an Act of Punishment, no other Reason is necessary for engaging GOD to punish. Even tho' the Punishment may have no Tendency either to correct the Criminal, to set an Example, to satisfy the Persons injured, or prevent the Damage that may accrue to others; it is not therefore less lawful. It is enough that the Person punished was guilty; and GOD has a Right to punish him, barely to make him suffer what he deserves. This is all our Author intended to say, who in the first Edition spoke in such a Manner as included but half the Thought which he afterwards expressed entire, *Dei enim Actiones rectæ esse possunt etiam si finem nullum sibi proponant extra ipsas*. I own he might have spoken a little more clearly; but I cannot, without Indignation, see some of his Commentators charge him with extending the sovereign Right of GOD so far, as to pretend he may punish the Innocent, and even condemn them to eternal Torments. Had those Gentlemen been Persons of the least Equity, and had they been pleased to observe what our Author says in the following Chapter, § 14. they would never have taxed him with so odious an Opinion.

⁷ Our Author, in one of his Letters, translates the Passage thus, *GOD has so disposed all Things, that they answer one to the other, and the wicked Man for the Day of Adversity*. Lett. XCI. Part I. That is, that GOD acts in such a Manner, by the Course of Nature, that the wicked Man is punished. In his Notes on the Old Testament, published long after the Date of this Letter, he translates it somewhat differently, *GOD disposeth all Things for what is proper for each; even the wicked Man (is disposed) for the Day of Adversity*.

^a Prov. xiv. 4.

^b Deut. xxviii.

63.

^c Isa. i. 24.

Prov. i. 26.

^c Thom. Samm.

Theol. ii. 2. qu.

108. Sylvest.

verb. vindicta.

punish any Man with Death, or Banishment, or a Fine, *Do not do it purely for the Sake of Punishment, but of some Good*, μή βέλειον ἀπλῶς, ἀλλ' ἐνεκα τῆς ἀγαθῆς ⁸. And ⁹ Seneca, *That Men ought to affect Revenge, not as it is sweet, but as it is profitable*. So likewise Aristotle, *Some Things are simply good, others through Necessity*.

¹⁰ And an Instance of the latter he gives in exacting Punishments.

V. In what
Sense Revenge
is naturally
unlawful.

V. I. What therefore was said by the comick Writer ¹.

Th' Offender's Pain is to th' Offended Ease.

And by Cicero, ² that *Pain is mitigated by Punishment*. And by Plutarch, ³ that *Satisfaction is a Kind of Medicine to a sick and inflamed Mind*: Is agreeable indeed to that Part of our Nature, ⁴ which we have in common with Beasts; for Anger, as well in Men as in Beasts, is ⁵ *A violent Agitation of the Blood about the Heart, raised by a Desire of Revenge*, as Eustathius rightly defines it; which Desire or Appetite is so void of all Reason in itself, that it often mistakes its Object, and is hurried on with Violence, even against those that have done us no Harm; as when we revenge ourselves upon the Whelps of the Creature that hurts us, ⁶ and sometimes against Things altogether without Sense, just as when a Dog bites the Stone that is thrown at it. ⁷ But this Appetite, considered in itself, does not belong to the rational Soul, whose Office it is to govern the Affections, and, consequently, not to the Law of Nature, because that only is the Dictate of a reasonable and sociable Nature, considered as such. But our Reason tells us, that we ought not to make another Man suffer, unless it be for some Good that may accrue thereby. But in the Pain or Sufferings of our Enemy, barely considered in themselves, there can be nothing of Good, but what is false and imaginary; as in superfluous Riches, and many other Things of the like Nature.

2. And in this Sense Revenge is condemned, not only by Christian Teachers, ^a Lib. De Ira, ⁸ but by Philosophers too. Thus Seneca, ^a *Revenge is barbarous and inhuman, and tho' it commonly be accounted lawful, yet it differs nothing from an Injury, but in Order of Time only. He that retaliates his Grievance upon another, only offends with a better Excuse*. Nay, if we will give Credit to Maximus Tyrius, ⁹ he is more guilty that revenges himself, than he that first did the Injury. And Musonius, ¹⁰ *To meditate how we may bite him that has bit us, and injure him that has injured us, is the Part of a Beast, and not of a Man*. Dion in Plutarch, who turned Plato's Philosophy into Maxims for the Conduct of Life, saith, that *Revenge is indeed looked upon to be more just than an Injury in the Eye of the Law, but in the Eye of right Reason they both proceed from the same Disease or Weakness of Mind* ¹¹.

3. It is therefore contrary to Nature, for one Man to be pleased and satisfied with the Pain or Trouble he brings upon another, barely as it is Pain or Trouble. And there-

⁸ In the *Gorgias*, Tom. I. p. 468.

⁹ In his second Book, *De Ira*, Chap. XXXII. and in *B. I. Chap. XII. I will prosecute him, not through Repentment, but because it is what I ought to do*. GROTIUS.

¹⁰ *Politic*. Lib. VII. Cap. XIII. p. 440, 441.

V. (1) PUBLIUS SYRUS, v. 340.

² *Orat. pro A. Cocinâ*.

³ *Vita Arati*, Tom. I. p. 1048. Edit. Wech.

⁴ Hence that of HOMER, *Χόλον δ' ἔμιν ἔλασεν*, *ἦρει*, But him had savage Anger seized. (*Iliad* IV. v. 23. And again,

Ἄγρον ἐν στήθεσσι, &c.

His haughty Breast with brutish Passion rag'd.

(*Iliad* IX. v. 625.)

And again,

Ἄλλ' Ἀχιλλεὺ δάμασεν θυμὸν μέγαν.

But tame, Achilles; that great Spirit of yours.

(*Ibid*, v. 492.)

⁵ Hence in HOMER, *Σβέσαι χόλον, Το extinguish Wrath*:

⁶ SENECA, *De Ira*, Lib. II. Cap. XXI. *How foolish is it to be angry with what has neither deserved, nor feels our Passion*. The *Brasilians*, a wild savage People, revenge themselves upon the Sword, as upon the Man. GROTIUS.

See the Voyages of JOHN DE LERY, p. 163.

⁷ See what SENECA has upon this Subject, *Lib. I. Cap. V. De Ira*. GROTIUS.

⁸ PLATO, *Gorgia*. See what THEODORET says, *Lib. XX. Curation*. GROTIUS.

⁹ *Dissert. II. p. 24, 26. Edit. Davis*.

¹⁰ This Sentence may be seen in STOBÆUS, *Serm. XIX. De Patientia*. Where the Compiler produces a pretty long Passage, from a Treatise of that Philosopher on the Question, *Whether a Philosopher ought to go to Law with any one for Damage received*.

¹¹ PLUTARCH, in *Vit. Dion*. Tom. I. p. 979.

fore the weaker any one's Reason is, the more prone he will be to Revenge. *Juvenal*,¹²

But oh! Revenge than Life is sweeter far!
¹³ Thus think the Crowd, who, eager to engage,
 Take quickly Fire, and kindle into Rage;
 Who ne'er consider, but, without a Pause,
 Make up in Passion what they want in Cause.
 Not so mild Thales, nor Chrysippus thought,
 Nor that good Man who drank the pois'nous Draught
 With Mind serene; and could not wish to see
 His vile Accuser drink as deep as he:
 Exalted Socrates! Divinely brave!
 Injur'd he fell, and dying he forgave,
 Too noble for Revenge; which still we find,
 The Pleasure of a weak and little Mind;
 Degen'rous Passion, and for Man too base,
¹⁴ It seats its Empire in the Female Race.

Creech.

The same Observation is made by *Lactantius*: Foolish and unexperienced Men, saith he, if they have any Injury offered them, are hurried on with a blind and inconsiderate Fury, to revenge themselves upon those that hurt them¹⁵.

4. It is evident therefore, that one Man cannot justly be punished by another, for Punishment's Sake. Let us then enquire what those Benefits of Punishing are that can make it lawful.

VI. 1. To this End the Division of Punishments made by *Plato*, in his *Gorgias*, may be of some Use to us, which the Philosopher *Taurus* has followed, as he is quoted by *Gellius*, Lib. 5. Cap. 14. For that Division is taken from the End of Punishing; and whereas *Plato* had proposed but two Ends, ¹ *Reformation and Example*, *Taurus* adds a third, ² τιμωρίαν, which (as *Clement Alexandrinus* defines it) ³ *Is the Retribution of an Evil done, in Order to make Satisfaction to the Sufferer*. *Aristotle* omitting that Part of the Division, which proposes Example, as one End of punishing, only adds this of Satisfaction to that of Reformation, which he says is instituted *For the Sake of the Person demanding it*. Nor has ⁴ *Plutarch*

VI. The Benefit of Punishment threefold.

¹² Sat. XIII. v. 180, &c.

¹³ SENECA, *De Ira*, Lib. I. Cap. XIII. But Children, old People, and Persons indisposed, are always very fretful; and indeed every Thing that is weak and out of Order, is naturally given to Complaints. GROTIUS.

¹⁴ TERENCE, in his *Hecyra*, How do Children bite and scratch for the smallest Trifles! And why? Marry because their Understandings are weak, and not able to direct them; and your Women truly are even as soon moved as Children. AMMIANUS MARCELLINUS, Lib. XXVI. speaks of Anger thus, The wise define it, the lasting Ulcer of the Mind, and sometimes a perpetual one, that usually arises from a Weakness of Mind, which they conclude with a great Deal of Probability from hence, because the infirm and the declining are more peevish than the sound and strong, Women than Men, ancient People than young ones, and the unfortunate than the happy. GROTIUS.

¹⁵ Lib. VI. Cap. XVIII. Num. 22.

VI. (1) The whole Passage is as follows, "It is thought three Ends ought to be considered in the Punishment of Crimes. The first is what we call Νῆσις, καλᾶσις, or ἀναίσις, when the Punishment is inflicted with a View of chastising and amending, so that he who has chanced to offend, may be more careful and circumspect. The second, which those who are nice in the Distinction of Terms call τιμωρία, is when the Offender is to be punished for the Preservation of the Dignity and Authority of the Person of-

fended, lest an Omission of such Punishment should injure his Honour, and expose him to Contempt. For which Reason it is supposed that Word is here used. The third End of Punishment is what the Greeks term ἐξοδισμός, when such an Act is necessary for the Sake of Example, that others may be deterred by the Fear of a known Punishment, from the Commission of the like Crimes, which it is proper should be publicly forbidden. For which Reason our Ancestors also used the Word *Exempla*, for the greatest and most severe Punishments. — These three Reasons for Punishing are laid down by several Philosophers, and, among others, by our Countryman TAURUS; in his first Commentary on PLATO's *Gorgias*. But PLATO, in express Terms, distinguishes only two," &c. AULUS GELLIUS, *Noct. Attic.* Lib. VI. Cap. XIV.

² St. CHRYSOSTOM too, upon 1 Cor. xi. 32. lays down these three Νῆσις, τιμωρία, καλᾶσις, *Reformation, Satisfaction, Example*. GROTIUS.

³ The Passage from CLEMENT of Alexandria, runs thus, Τιμωρία ἣ ἐστὶν ἀναπόδοσις κακῆς, ὅτι τὸ τῆς τιμωρίας σύμφορον ἀναπαιτούμεν. Our Author, quoting it by Heart, had changed two Words. This is in his *Pedagogue*, Lib. I. Cap. VIII. p. 140. Edit. Oxon. Potter. We have almost the same Definition in his *Stromata*, Lib. VII. Cap. XVI. p. 895.

⁴ *De serâ Numinis vindictâ*, Tom. II. p. 548.

omitted it, when he saith, *Those Punishments which immediately follow Transgressions, do not only restrain the Audaciousness of Offenders, but are the greatest Consolation of the Offended.* And this is what the same ⁵ Aristotle ^a has placed under that Part of Justice which he calls *Commutative*.

2. But, to examine this Point more accurately. I say then, that Punishment may have Regard either to the Good of the Offender, or of him who suffers by the Offence, or of any Persons indiscriminately.

VII. Punishment is for the Benefit of the Offender; and that any one has by the Law of Nature a Right to inflict it; but this with a Distinction.

VII. 1. The Punishment tending to the first of these three Ends, is by the Philosophers called sometimes *Correction*, sometimes *Chastisement*, ¹ and sometimes *Admonition*; by Paulus the Lawyer, ² *The Punishment that is ordained for Amendment*; by Plato, ³ *The Pain that teaches us Prudence*; by Plutarch, *The Medicine of the Mind*, ⁴ whereby she is amended, and made better, after the Manner of Physick, which works by Contraries. For since all human Acts, if they be deliberate, and often repeated, do beget a Proneness in Nature to the same, which at Length turns to an Habit; all Allurements to Vice are to be cut off as soon as possible, which cannot be done more effectually than by allaying the Sweetness of the Sin, ⁵ with the Sharpness of the ensuing Punishment. The Platonists hold, as ⁶ Apuleius testifies, *That Impunity, and Want of Reproof, are more severe and pernicious to an Offender, than any Punishment whatsoever.* And Tacitus, ⁷ that *A corrupt Mind is not to be regulated with gentle Methods, when inflamed by inordinate Appetites.*

^a Thom. Summ. Theol. ii. 2. quæst. 33. art. 3.

2. That it is lawful for any ^a one who is judicious and prudent, and not guilty of the same, or of a like Fault, himself, to inflict that Punishment, which is subservient to this End, is plain from that verbal Correction which every Body is indulged,

To chide a Friend in Fault is an unthankful Office, but what is sometimes useful.

Plaut. ⁸

^b See Augustin in Enchirid. c. 72.

But if the Punishment be by Stripes, or have any Thing of Violence and Compulsion in it, ^b Nature does not distinguish to whom it is lawful, and to whom it is not, nor indeed could it make this Distinction, (unless it be, that our Reason gives this Right peculiarly to Parents over their Children, because they are under a strict Tie of Affection towards them) but what Nature could not do the Laws have done, which have restrained that general Kindred of Mankind (to avoid Disputes and Controversies) to our nearest Relations only, by whom we are most tenderly loved; as appears both from the Code of *Justinian*, ⁹ under the Title, *De Emendatione propinquorum*, and elsewhere; apposite whereunto is that of *Xenophon* to his Soldiers, *ἐὶ μὲν ἐπ' ἀγαθῶν, &c.* ¹⁰ *If I beat any Man for his Good, I deserve Punishment, but no other than what is due to Parents from Children, and Masters from Scholars.* For even Physicians do sometimes lance, scarify, and cauterize their Pa-

⁵ See *Ethic. ad Nicomach.* Lib. V. Cap. VII. VIII.

VII. (1) See the Passage quoted from AULUS GELLIVS, in Note 1. on the foregoing Paragraph.

2 We shall have Occasion to quote this Law in the following Chapter, § 12. Note 1.

3 *De legib.* Lib. XI. p. 933. Tom. II. Edit. H. Steph.

4 See the Treatise *De serâ Numinis vindictâ.* Tom. II. p. 550, 559.

5 SENECA, *De Ira*, Lib. I. Cap. V. *As we put the Staff of a Spear that is crooked into the Fire, and burn it, to make it streight, and cleave it, not to break it, but to open and extend it, so we correct great Vices by the Pain of Body and Mind.* And in Lib. II. Cap. XXVII. *Among these will come in good Magistrates, Parents, and Judges, whose Correction must be submitted to, as the Surgeon's Lancet, and the Physician's low Diet, and other Expedients, which are troublesome for the Present, but are very much for our future Advantage.* GROTIUS.

6 *De Habitud. Doctrin. Platon.* p. 21. Edit. Elmenhorst.

7 *Annal.* Lib. III. Cap. LIV. Num. 2.

8 *Trinum.* Act I. Scen. I. v. 1.

9 The Emperors VALENTINIAN and VALENS use the following Words: "We allow the near Relations who are at Age the Power of correcting Minors, according to the Quality of the Offence; that so wholesome Correction at least may force those to lead a regular Life, on whom the exemplary Conduct of their Family have no Influence. Our Intention is not to extend the Power of punishing a Minor's Fault in infinitum; but let the Authority correct the young Man with the Right of a Father, and restrain him by private Animadversion. But if the Enormity of the Crime exceeds the Limits of domestick Correction, it is our Pleasure that the Offenders be submitted to the Cognizance of the Judges." *Cod. Lib. IX. Tit. XV. De emendatione propinquorum.*

10 *De Cyri Expedit.* Lib. V. Cap. VIII. § 8. Edit. Oxon.

tients, when they cannot cure them by gentler Means. And *Laëtantius*, GOD commands us to keep a strict Hand over our Children, that is, to chastise them as often as they transgress, lest by too much Fondness and Indulgence, they become froward and headstrong, and contract vicious Habits ¹¹.

3. But this Kind of Punishment ought never to be Capital, because Death is not a Good, unless it be so indirectly and by Way of Reduction, as Negatives are reduced to their opposite Positives. For as *CHRIST* said, ^b *That it had been better for some, that is, it had been less evil for them, that they had never been born; so it may be said of incorrigible Tempers, that it is better for them, that is, it is less evil for them to die than to live, when it is certain such Persons would grow still worse, if their Life was prolonged. Seneca means such as these, when he says, That it is sometimes for the Advantage of them that die, to die* ¹². And *Jamblicus*; ¹³ *As it is better for an Impostume to be cauterized, than to let it swell on; so it is for a Man, who is desperately wicked, to die than to live. Such a one Plutarch calls a great Plague to others, but the greatest of all to himself* ¹⁴. And *Galen*, after he had said, that Men may be punished with Death, *First* to prevent the Mischief they would do, ¹⁵ *were they suffered to live, Secondly, that their Punishment may be a Terror to others, adds in the third Place, That it is expedient, even for themselves to die, being so wholly corrupted in Mind and Manners, that it is impossible to reclaim them.*

4. Some there are, who think, that *St. John* speaks of such Men, when he said, ¹⁶ *There is a Sin unto Death.* But because no Arguments can be brought to prove this, but what are fallacious, Charity teaches us not to judge any one rashly to be incorrigible: and therefore a Punishment with this End and View ought very rarely to be made Use of.

VIII. I. ^a The Benefit, that arises from Punishment to him, against whom the Offence was committed, consists in this, that it prevents for the Future the like Offence against him, either by the same Person or by others. *Gellius* out of *Taurus* describes this Kind of Punishment thus, *When the Dignity or Authority of the Person, against whom the Offence is committed, is to be supported and maintained, lest, if it go unpunished, his Authority be despised and his Honour impaired.* Now what is there said concerning the Loss of Authority, will equally hold good of the Loss of Liberty, or of any other Right. We read in *Tacitus*, *He should consult his Safety by a just Punishment* ². Now there are three Ways of securing a Man's self from him who injured him; *first* by putting him to Death; *secondly*, by putting it out of his Power to do him any farther Injury; and *lastly* by the Severity of his Punishment, to deter him from offending any more, which has a mixture of that Reformation in it we were just now treating of. To prevent the injured Persons being injured by others, all Kinds of Punishments are not to be inflicted, but only such as are open and publick, which appertains to that End of Punishment, that is for Example.

2. If therefore our Revenge be directed to these Ends, and confined within the Bounds of Equity, if we regard the bare Law of Nature, that is, abstracted from Divine and Human Laws, and those Circumstances that are not Essential to the

¹¹ *Institut. Divin. Lib. VI. Cap. XIX. Num. 8. Edit. Cellar.*

¹² *De Irâ. Lib. I. Cap. V. See also Chap. XVI.*

¹³ *Protreptic. Cap. II.*

¹⁴ His Words are these. "He (GOD) immediately takes off the incorrigible (Sinner) as a Person hurtful to others, but most hurtful to himself; whereas he allows those a Time for Conversion, who chance to offend rather out of Ignorance of Virtue than a Preference of Vice. *De serâ Numin. Vindictâ.*" P. 551. Tom. II. *Edit. Wech.*

¹⁵ *De serâ Num. Vind. p. 551.*

¹⁶ *St. CHRYSOSTOM* upon 2 *Cor. xiii. 9.* calls those who are guilty of this, *τὰς ἀνίατα νοσήτες*, incurably sick. And *JULIAN* in his second Book of

Constantius: *διτλὼν ὃ ὄντων*, &c. There are two Sorts of Offenders, some are corrigible and give Hopes of Amendment, others who are irrecoverably wicked; for the latter the Laws have thought fit to make Death the Conclusion of their Evils, not so much for their own Benefit as that of others. *GROTIUS.*

VIII. (1) There is some Resemblance of this to be found even among the Beasts. *The Lion avenges himself of his Adulterers.* *PLINY's Natur. Hist. VIII. 16. GROTIUS.*

2 These are the Words of *Poppæa*, whom *Nero* had married, in which she observes to that Emperor, "He ought either to take *Octavia* again willingly rather than by Compulsion, or consult his own Security by a just Severity to that Lady." *Annal. Lib. XIV. Cap. LXI. Num. 7.*

³ Affair, tho' it be private, yet it is not unlawful; whether it be taken by the injured Person himself or some other, since it is natural for one Man to succour another. And in this Sense may be admitted that of *Cicero*, ⁴ where after he had shewn that the Law of Nature does not consist in unsettled Opinions, but in the innate Sentiments of the Mind, among the Instances he gives of its Dictates he places Revenge, which he opposes to Pardon; and, lest any one should doubt what he meant by Revenge, he defines it to be *That, whereby we repel Force and Injuries either defensively or offensively both from ourselves and those who ought to be dear to us, and that whereby we punish Offences.* And *Mithridates*, in an Harangue which *Justin* has transcribed from *Trogus*, speaks thus, ⁵ *Against a Robber all Men ought to draw their Swords, if not for their Safety, yet for their Revenge.* And *Plutarch* in his Life of *Aratus* calls this very Thing ἀμύνης νόμον, the Law of Revenge.

^a Judges xv. 3.

^b — ver. 11.

3. *Sampson*, making his Defence against the *Philistines*, ^a does ⁶ by this natural Right declare his Innocence, if he injured them who had first injured him: And after he had revenged himself of them, he justifies himself with the same Reason, saying, ^b *As they have done to me, so have I done to them.* Thus the *Platæans* ⁷ in *Thucydides*, ὁρθῶς ἐτιμωρησάμεθα, &c. *We have deservedly punished them, for by a Law that universally prevails, we may without any Crime be revenged on an Enemy, who first assaults us.* And *Demosthenes* in his Oration against *Aristocrates* argues, *That the Law common to all Men suffers us to revenge ourselves upon him, who takes away any Thing from us by Force.* And *Jugurtha* in *Sallust*, ⁸ after he had endeavoured to shew that *Atherballay* in wait for his Life, adds, *That the Romans would not do him common Justice and Equity, if they should hinder him to put the Law of Nations in Execution, that is, to take his Revenge.* And *Aristides* ⁹ the Orator proves it from Poets, from Legislators, from Proverbs, from Orators, and all other Authorities, to be lawful to take revenge on those, who have first attempted to do us an Injury. *St. Ambrose* commends the *Maccabees* ¹⁰ for revenging the Death of their innocent Brethren even on the Sabbath-Day; and disputing with the *Jews*, who heavily complained of the Christians for burning one of their Synagogues, he pleads thus: *If I should argue, saith he, according to the Law of Nations, I should recount how many Christian Churches the Jews burned in the Reign of Julian the Emperor, where* ¹¹ *he calls Retaliation the Law of Nations.* Agreeable to which is that of *Civilis* in *Tacitus*, *I have been purely rewarded for my Pains, my Brother's Death, my own Imprisonment, and the most reproachful Language of the Soldiers, who required to have me put to Death, and therefore by the Law of Nations I demand Satisfaction of them* ¹².

4. But because we are apt to be partial in our own Cases or of those that belong to us, and to be hurried on too far by Passion, therefore as soon as many Families came and lived together in the same Place, that Liberty which Nature indulged them in of vindicating every Man his own Quarrel, was then taken away, and Judges appointed to determine all Controversies between Man and Man.

*For when each angry Man avenged his Cause,
Judge to himself, and unrestrain'd by Laws;*

³ When, for Example, says the learned *GRO-NOVIUS*, the Offender is a Father, a Man not in his right Senses, or a Person, whom we ourselves have first injured, and received his Pardon. The first and last Instances are just; but nothing is more misapplied than the Second. For can a Man do an Injury, properly so called, when he is deprived of the Use of Reason?

⁴ *De Invent.* Lib. II. Cap. XXII.

⁵ *Lib.* XXXVIII. Cap. IV. Num. 2.

⁶ *Romulus* in *PLUTARCH* speaking of *Tatius*, murdered by the *Laurentes*, says, φόνον φόνῳ λελάσθαι, *That Blood was expiated by Blood.* And the same *PLUTARCH* of the *Mantineses* ill used by the *Achæans*; ἡ ταῦτα μὲν ἔαγε τὸν τ' ἀμύνης νόμον, *such Treatment was entitled to a Revenge,* *Belisarius*

in *PROCOPIUS*, *Vandal.* I. φύσει γὰρ, &c. *For the injured Party is by Nature in a State of Enmity with those who offer the Violence.* *GROTIUS.*

⁷ *Lib.* III. Cap. LVI. *Edit.* Oxon.

⁸ *Bello Jugurth.* Cap. XXV. *Edit.* Waff.

⁹ *Orat.* *Platon.* II. *pro Quatuorviris.* Tom. III. p. 259. *Edit.* P. Steph.

¹⁰ *De Offic.* Lib. I. Cap. 40. See too his Oration against *Symmachus*. See also *JOSEPHUS*, *Antiq. Hist.* XIII. 1. where he speaks of the Vengeance, that was taken on account of the Death of *John*, the Brother of *Jonathan*. *GROTIUS.*

¹¹ *Epist.* XXIX. So *LIVY* too in his first Book. *When what the Laurentes did was by the Law of Nations.* *GROTIUS.*

¹² *Hist.* Lib. IV. Cap. XXXII. Num. 4.

*The World grew weary of that brutal Strife,
Where Force the Limits gave to each precarious Life.* ¹³ Lucret.

Thus Demosthenes against Conon, ¹⁴ ἀποδείξει ἐν τοῖς νόμοις, &c. It has been ordained by the Wisdom of our Ancestors, saith he, that all these Injuries should be redressed by the Law, ¹⁵ and not by every private Man's Passion and Caprice. So Quintilian, ¹⁶ private Revenge is not only unlawful, but an Enemy to Peace; for there are Laws, Judges and Courts whereunto we may appeal, unless there be any who are ashamed to vindicate themselves by Law. So likewise the Emperors Honorius and Theodosius, ¹⁷ For this Cause are Tribunals erected, and the Security of publick Laws provided, lest any Man should give himself the Liberty to revenge his own Quarrel. And King Theodorick: ¹⁸ Hence sprung the sacred Reverence of Laws, that no Man might revenge himself by his own Hand, nor commit any Outrage upon his Enemy by the sudden Impulse of an impetuous Passion.

5. Yet the antient Liberty, which the Law of Nature at first gave us, remains still in Force where there are no Courts of Justice, as upon the Sea. Hereunto may perhaps be referred that Action of Julius Caesar, ¹⁹ yet a private Man, when he pursued with a Fleet, equipped all on a sudden, those Pyrates by whom he had been taken Prisoner, dispersing some of their Ships and sinking others, and when he found the Proconsul negligent in punishing the Captives, he returned to Sea and crucified them himself. The same will take Place in Desarts, or where Men lived after the Manner of the Nomades; ²⁰ so amongst the Umbrians, ²¹ according to Nicolaus Damascenus, every one is his own Avenger; which is done with Impunity in Moscow at this very Day, when Complaint having been made to the Judge, he does not render Justice in a certain Time. Hence came the Custom of Duelling, or fighting by single Combat, ²² amongst the Germans before the Christian Religion

¹³ Lib. V. Ver. 1147, &c.

¹⁴ P. 730. Edit. Basil 1572.

¹⁵ Thus TYNDAREUS in Euripides's Orestes, argues against Orestes:

Πρὸς τὸν δ' ἄγων τις ἦκε τῆς σοφίας πῶτα;
Εἰ τὰ καὶ παῖς πάντας φάνερα, &c. (V. 491, &c.)

Are we come here to dispute his Wisdom?
If Right and Wrong to all Mankind are known.
What greater Fool than he, who ne'er consider'd
The Justice of the Action once, nor what
The Constitutions of Greece allow'd?
For, when Agamemnon his Life had lost
By my unhappy Daughter's Hands (a black
And barbarous Deed, and what I can't approve)
He ought to've indited her of Murder,
And so her legally have ejected
His Father's House, and then had all the World
Pity'd his Affliction, his Prudence prais'd,
He kept the Laws, and still been pious thought.
But now into the same Misfortune he,
As his Mother was, is plung'd. He justly
Look'd on her as wicked; by killing her
Himself is yet more wicked far become.
Prithee, Menelaus, let me ask thee
This serious Question:
"Should a Wife her Husband stab, his Son stab her,
"Him his Child stab, and so succeeding Blood
"Be made to expiate foregoing Guilt;
"Where would these horrid Ills e'er have an End?

Which last Expressions full of good Sense have afforded, both to Philosophers and Orators, a large Field of Discourse. MAXIMUS TYRIUS, in his Dissertation, Whether an Injury ought to be returned, delivers his Opinion thus: εἰ γὰρ ὁ ἀδικηθεὶς ἀμύνει, &c. If the injured Person may take his Revenge, the Evil will eternally pass from one to the other, and one Injustice succeed another: For if you grant him who has suffered the Injury, the Liberty of persecuting him who

did it, then will it follow, that he who is thus persecuted, has also the Liberty of retaliating. For the Equity is the same on both Sides. Good G.O.D! what hast thou done, what Sort of Justice is this that must necessarily flow from Injustice? And how far will this Evil run, or where will it stop? And ARISTIDES in a Speech of his about Peace: τίς γὰρ ἐλλάνων, &c. Where will you have a Greek left, if on the Account of those who are Dead and gone before, those who come after were always to undergo the same Fate? The same ARISTIDES has something to the like Purpose in his second Leuëtrica. GROTIUS.

¹⁶ Declam. XIII.

¹⁷ Cod. Lib. I. Tit. IX. De Judæis & Gallicis, Leg. XIV.

¹⁸ CASSIODORUS, Lib. IV. Ep. X.

¹⁹ VELLEIUS PATERCULUS, Lib. II. Cap. XLII. PLUTARCH in Cæsar. p. 708. Tom. II. Edit. Wech.

²⁰ See B. I. Cap. I. § 1. Note 1.

²¹ STOB. Tit. De Legib. Does he mean the Umbrians in Italy? That this was a Custom among several of the Africans, is testified by LEO AFER, Lib. II. C. de Tefechis, and C. de Teijenta, and in other Passages. GROTIUS.

See the Note of HENRY DE VALIOS on the Passage of NICHOLAS DAMASCENUS, p. 513. of his Peiresiana.

²² King Theoderick in CASSIODORE III. 23. reproving his Goths, addresses himself to them thus: Break off this old abominable Custom: Pray let your Matters be disputed with Words and not with Swords. And in the 24th. What makes you run to Duelling? What Occasion has a Man for a Tongue, if his Arms are to plead his Cause? Amongst the Trachonitæ in the East, νόμος πάντα τρόπον ἐπεξείλου τὰς τῶν ἀδικούντων φονεῖς. It is an established Rule to pursue by any Method a Revenge upon the Murderers of ones Family or Relations. GROTIUS.

was planted in that Nation, which in some Places is not yet thoroughly rooted out. Wherefore the *Germans*, in *Velleius Paterculus*, were struck with Admiration, when they beheld the Manner of the *Roman Jurisdiction*,²³ finding that they could redress Injuries by Justice, and determine Controversies by Law, which used to be decided by Force of Arms.

^c Numb. xxxv.
19.

The Law^c of *Moses* permitted the Kinsman of him, who was murdered, to kill the Murderer with his own Hand, if he could catch him out of the Places of Refuge; and the *Jewish Commentators* do well remark, that a Kinsman might execute the Law of Retaliation with his own Hand for the Person killed: but for himself, if any Violence was offered him, either by Wounds, Mutilation or otherwise, he was to appeal to the Judge; ²⁴ because it is more difficult to moderate our Revenge when it is excited by our own personal Pain. The like Custom of private Revenge for Murder, prevailed amongst the most antient *Greeks*, as appears from the Words of *Theoclymenus* in *Homer*, *Odyss. XV.* ²⁵ But Instances of this Custom are the most frequent in those Places, where they have no publick Judges to decide their Quarrels. Hence *just Wars*, as *St. Austin* testifies, are usually defined to be those, whereby Injuries are revenged²⁶. And *Plato* approves of carrying on a war-like Contest so long, Till the Offender shall be compelled to make the innocent Person, who has suffered by him, just Satisfaction²⁷.

IX. And for
the Benefit of
all Persons.

IX. 1. The Good of the Publick, or of all Persons indiscriminately, which was the third End of Punishment, demands the same Things as the Interest of the injured Party. For Care is to be taken, that either he who injured one, may not injure another, which is to be prevented by putting him to Death, or by disabling him, or by imprisoning him, or by correcting and reclaiming him, or else¹ that others may not be encouraged, by the Hopes of Impunity, to be alike injurious; and this is best prevented by publick Punishments, which the *Greeks* call *παράδειγμα*, the *Latins*, *Exempla*, Examples: Which are made, ^a That the Punishment of one may strike Terror into many, as the Laws express, or, as *Demosthenes*, ^b That others may consider to be afraid.

^a Cod. l. 9. tit.
17. Ad Leg.
Ful. repet.
leg. 1. Ibid. tit.
20. Ad Leg.
Fabiam de pla-
giar. leg. 7.
^b Orat. in Ne-
eram.

2. And this is a Right that by the Law of Nature every one is invested with. ² Thus *Plutarch*, *Nature*, says he, hath designed the good Man to be a Magistrate, and

I know not whence our Author takes the last Passage quoted in this Note. There is nothing on the Subject in the Fragments of *NICOLAS* of *Damascus*, not even in the Collection of those Fragments made by our Author himself and sent to the celebrated *Mr. De Peiresc*. See Letter CCLXIV. Part I. As to the two Passages of *CASSIODORE*, the *Goths* on the contrary, are there proposed as an Example, as being Strangers to the Custom in Question, ascribed to other Nations. Before the first of them we read, *That you may shew the Justice of the Goths, while other Nations retain this perverse Custom*. And after the latter, *Imitate our Goths, who employ their Swords Abroad, but exercise Moderation at Home*.

²³ Lib. II. Cap. CXVIII. Num. 1. Edit. Burman.

²⁴ *SENECA*, *De Clementia*, Lib. I. Cap. XX.

²⁵ *Theoclymenus* there says, that Having killed a Man in his own Country, he was obliged to fly for it; for as the Deceased had left a great Number of Relations, he was apprehensive of falling by the Hands of some of them, Ver. 272, &c.

²⁶ The Passage has been already quoted Chap. I. of this Book, § 2. Num. 7. where the Author explains it in a more general Sense.

²⁷ He is speaking of Wars between the different States of *Greece*. *De Repub.* Lib. V. p. 471. Tom. II. Edit. H. Steph.

IX. (1) *POLYBIUS* saw some Lyons crucified for their ravenous Desire of devouring Men, that so the Rest thro' Fear of the like Punishment might be deterred from the like Barbarity. *PLINY*, Lib. VIII. Cap. XVI. *GROTIUS*.

² The same Author in his *Pelopid*. δ ὃς παρὰ τῷ, &c. For it was, as indeed it is fit it should be, the Original and most antient Custom and what Nature Designs, that he who is capable of giving Assistance should be the Ruler of him who wants it. And in his *Philopoemenes*: τὰς ἐαυτοῦ πολιτας, &c. Taking upon him the Command of some Troops, who never waited for the Formality of Law and Election, but voluntarily followed him, in Conformity to an universal Maxim of the Law of Nature, that the better Man should Rule. You have some other Passages like these at the End of the Life of *T. Flaminius*. The Author of the Causes of the Corruption of Eloquence talking of Orators, says; Nor were these, tho' mere private Persons, without Power, since both Senate and People were governed by their Advice and Authority. *St. CHRYSOSTOM*, 2 Cor. vii. 13. speaking of *MOSES*: ὁ, πρὸ τῆς χεραγωγίας, &c. Even before he led them he was by his Merit their Leader. It was therefore very foolishly demanded by the Hebrews, who made thee a Ruler and a Judge over us? What dost thou say? Thou seest his Deeds, and dost thou raise a Controversy about a Title? As if a wounded Person seeing an excellent Surgeon come to his Assistance in order to perform a necessary Operation, should impertinently ask him, Who made you a Surgeon, or commissioned you to perform such an Operation? Why, it was my Art and your Distemper, Good Sir! Thus was it *MOSES*'s Knowledge and Capacity that made him what he was. For Government is not only a Piece of Honour, but an Art, nay, and the sublimest Art. The same Writer is upon this very Subject at the End of the

and indeed a perpetual one ; for, by the Law of Nature itself he who acts justly has a Superiority and Preheminence above others ³. So Cicero proves by the Example of *Nasica*, ⁴ that a wise Man is never a private Man : And Horace calls *Lollius*, not a one Year's Consul ; and Euripides in his *Iphigenia at Aulis* says :

—He, whose Mind
Excels in Prudence, is a Magistrate. Ver. 375.

Not that this Right or Privilege is to be extended any farther, than the Laws of the Land permit.

3. Of this natural Right *Democritus* thus speaks ; for I will quote his own Words, because they are remarkable. First, concerning our Right of killing Beasts, this is his Opinion, *καὶ τὸ ζῶον*, &c. Concerning the killing living Creatures, the Case stands thus. If those Creatures either do, or attempt to do, us hurt, whosoever kills them shall be innocent ; nay, he who kills them doth better than he who spares them. ⁶ And presently after he saith, *κλένειν χρὴ*, &c. We have all Manner of Right to kill all those Creatures that without Provocation annoy us. And indeed it is not improbable, that good Men ⁷ before the Flood observed this Maxim, till GOD revealed to the Rest of the World, that he intended the brute Creation for their Food and Sustenance. Again, *Ὅπως περὶ κινάδεων τε καὶ ἐρπετίων*, &c. What we have said of Foxes, and noxious Reptiles, will hold good also of Men, of whom we ought to be no less aware. And then he presently after subjoins, *καὶ ἀλλήν καὶ ληστὴν*, &c. Every one who kills a Robber, or a Thief, is innocent, whether it be with his own Hand, by his Order, or by his Verdict. Upon which Passages *Seneca* seems to have had his Eye, when he saith, ⁸ When I command a Malefactor to be put to Death, I do it with the same Air and Mind, ⁹ that I kill a Serpent or venomous Beast. And elsewhere, As we should not kill Vipers and Snakes, and other noxious Creatures, if we could tame them, like other Animals, and secure ourselves and others against their Teeth and Stings ; neither would we hurt and destroy Men, because they have offended, but only that they should not offend again.

the third Chapter to the *Ephesians* : *ἡ ἀδίκια, ἡ σὴ ὥμωτη*. Φήσιν, αὐτὴ μὲ καλίστησεν ἀρχὸν καὶ δικαστήν, your Injustice, your Barbarity, says he, made me your Ruler and your Judge. GROTIUS.

3 The Passage is not exactly quoted. It runs thus : The Law always bestows the first Dignity in the State on the Man who practises Justice, and knows what is advantageous to Society. *Præcept. gerend. Reipub.* Tom. II. p. 817. Where by the Word Law may be understood the general Law or Rule of Policy or Government. Besides, this Passage, and those produced by our Author in the following Notes, are so far from being to his Purpose, that they may insinuate something contrary to his Notions. Their Tendency is to prove that every Man has a natural Right of inflicting Punishment for the Advantage of others in general ; because every Man has a Right to command such as are less knowing and wise than himself. Now this Doctrine does not agree with either what our Author maintains, Chap. XXII. of this Book, § 12. or with the Principle he has laid down above, that the Right of inflicting Punishment is not the natural Consequence of the Right of Superiority.

⁴ *Tuscul. Disput.* Lib. IV. Cap. XXIII.

⁵ Lib. IV. Od. IX.

⁶ *Apud* STOBÆUM, *Serm.* XLIV. See PLUTARCH, *De solertiâ Animalium*, Tom. II. p. 964. Edit. Wech.

⁷ And some were afterwards observant of this primitive Custom, as DICÆARCHUS, and others whom St. JEROME cites as Evidences against JUVENIAN. GROTIUS.

⁸ *De Irâ*, Lib. I. Cap. XVI.

⁹ *Καθάπερ ἔν ἔχεις*, &c. As therefore we immediately kill Vipers and Scorpions, and other poisonous Creatures, before they either bite or wound us, or make any Attempt upon us, as soon as ever we spy them out, by a necessary Precaution, that we may not suffer by the Malignity that is in them ; in like Manner is it fit that Men should be punished, who tho' they are tame and sociable by Nature, do yet degenerate into the savage Cruelty of Brutes, and think it both Pleasure and Profit to do all the Mischief they can. *Philo de Special. Lib. XI.* And *Claudius Neapolitanus* in PORPHYRY, Lib. I. *De non Esu Animalium*, *ἐκ ἑστὶ ὅς ὁσεί*, &c. There is no one but will kill a Serpent if he can, lest himself, or some other Person, should unawares be bitten by him. See, if you are at Leisure, what follows there. And again, not a great Way further, *ἔτι καὶ σκορπίον*, &c. We kill a Serpent or a Scorpion, tho' they do not assault us, that another Body may not be hurt by them ; and this is a Piece of Revenge which we take in Justice to all Mankind. And PORPHYRY himself, Lib. XI. *ὥστε* ὅς, &c. For as, tho' there be some Sort of Society between us and ill People, People who by their own Disposition and innate Wickedness, as if they were driven on by some impetuous Wind, are for injuring any one who comes in their Way, we yet think it convenient that all of them should be punished and taken off ; so is it also proper to kill any irrational Creature, which is naturally injurious, and bent to hurt whatever goes near it. And this is what PYTHAGORAS means, in OVID's *Metam.* XV.

What'er attempts our Life, without a Crime
May itself to Death be doom'd. GROTIUS.

4. But since an Examination into the Nature and Circumstances of a Fact, doth often require great Diligence, and the proportioning of Punishment to it, much Prudence and Equity, lest while every one would presume too much upon his own Wisdom, and others not giving Way to him, Quarrels should arise, it has been agreed upon in all well regulated Societies, to chuse out some, whom they judged to be the best and most prudent, or were likely to prove so, and make them Magistrates. So the same *Democritus*, *The Laws had not restrained us from living as we pleased, if one Man had not injured another. For Envy is the Mother of Sedition.*¹⁰

5. But yet, as in Revenge or Punishment inflicted for the Satisfaction of the offended Party, (whereof we have just now treated) so likewise, even in this Punishment, which is for Example, there remain some Footsteps of the antient Right in those Places, and amongst those Persons, who are not subject to any established Courts of Judicature; and even among those too who are so subject, in some particular Cases. Thus by the Law of *Moses*,¹¹ any private Man might upon the Spot, and with his own Hands, kill a *Jew* who had forsaken GOD and his Law, or who attempted to seduce his Brother to Idolatry. The *Hebrews* call this¹² the *Judgment of Zeal*, which was first put in Execution by *Phineas*,¹³ and afterwards passed into a Custom. Thus *Mattathias*^c slew a certain *Jew*, who was polluting himself with the Superstitions of the *Græcian* Idolatry. Thus three hundred other *Jews* are said to have been killed by their own Countrymen, in that Book which is commonly called the third of the *Maccabees*. Nor was St. *Stephen* stoned^d upon any other Pretence, nor the Conspiracy^e raised against St. *Paul*. There are many more Instances of this Kind to be met with¹⁴ in *Philo* and *Josephus*.

^c 1 Macc. ii. 24.

^d Acts vii.
^e — xxii. : 3.

6. Moreover, in many Nations the plenary Right of Punishing, even with Death, remained in Masters over their Servants, and Parents over their Children, after the publick Laws were established. Thus in *Sparta* it was lawful for the *Ephori* to kill a Citizen, without any legal Prosecution.¹⁵ From what has been said

we

¹⁰ Apud STOBÆUM, Serm. XXXVIII.

¹¹ Deut. xiii. 9. Add to this a Passage of JOSEPHUS, XII. 8. MOSES MAIMONIDES, Ad XIII. Artic. and Director, Lib. III. Cap. XLI. GROTIUS.

This Law is ill explained by our Author. It supposes a legal Condemnation, and requires only that every Man should appear as an Accuser on such Occasions. See PUFENDORF in the Chapter which answers to this § 13. and Mr. LE CLERC's Commentary on the *Pentateuch*.

¹² See 1 Maccab. xi. 24. 26. GROTIUS.

¹³ Numb. xxv. The Government of the *Israelites* was not formed at that Time. See Mr. LE CLERC on Ver. 7. of the Chapter here quoted. And a Dissertation of Mr. BUDDEUS, *De jure Zelotarum in gente Hebræâ*, § 34. &c.

¹⁴ Whose Opinion of this Matter is this, in his Book *De Sacrificantibus*, Κολαστέον ὡς δῆμιον, &c. *We ought to use him as a publick and common Enemy, without any Regard to his being related to us, and immediately to acquaint all, who have a Respect for Religion, with his Persuasions, that with the utmost Expedition they may run to the Punishment of the wicked Wretch, fully convinced that it is an Act of Piety to kill such a Fellow as this.* And there is another Passage to this Purpose no less remarkable, about the End of his Treatise *De Monarchia*. GROTIUS.

¹⁵ This Fact, as GRONOVIVS observes, is taken from ISOCRATES's *Panath. Orat.* But says the Critic, the Orator speaks of the *Helotæ*, who were not Citizens, but little better than Slaves; he refers us to NICHOLAS CRAGIUS, *De Repub. Laced.* Lib. II. Cap. IV. That learned *Dane* (p. 132. Edit. *Ludg. Batav.* 1670.) only says that the *Ephori* exercised

their Power chiefly on the *Helotæ*; however he leaves the Words of ISOCRATES in their general Extent, and without the least Restriction. He only intimates that the Orator may have stretched a little too far. p. 130. On considering the Passage in itself, I think that the whole Context of the Oration shews that ISOCRATES by no Means confines himself to the *Helotæ*, or publick Slaves. He is speaking of the Populace, or common People, in Opposition to the most considerable Persons among the *Lacedemonians*, πλῆθος δῆμου. He is speaking of free Men, but such as had been deprived of the Advantages which they ought to have enjoyed in that Quality: Ἀπάντων δ' ἀποσεργασίας αὐτῆς, ὧν προσῆκε μέλειεν, &c. He is speaking of Persons, whose Minds were become as servile, as if they had been real Slaves: τὸν δὲ δῆμον περιούϊας ποιήσασθαι, καὶ ἀδελωσαμένους αὐτῶν τὰς ψυχὰς, ἐδὲν ἦσαν, ἢ τὰς ἱκελιῶν, &c. They were not therefore really Slaves. In the Passage last quoted, they are termed πελοῖται, *Persons, who live near*, that is, in the Neighbourhood of *Lacedemon*. But XENOPHON distinguishes these πελοῖται from the *Helotæ*, Hist. Græc. Lib. III. Cap. III. § 6. Edit. Oxon. In short the Orator is speaking of Persons, who were usually obliged to serve in the Army, as appears from what he says a little before the Passage in Question. Now it is well known that the *Lacedemonians* employed the *Helotæ* in that Manner, only in the greatest Extremities, as after the Battle of *Leuctra*, or that of *Plataæ*. Our Commentator's Criticism therefore doth not seem well grounded. But he might have observed that the *Ephori*, being Magistrates, and invested with a very extensive Power, when they put a Man to Death without the

Formality

we may plainly see, what the Law of Nature was concerning Punishments, and how long it continued.

X. 1. Let us now enquire whether this Liberty of punishing or revenging Injuries be not restrained by the Gospel. It is no Wonder indeed, as we said ^a elsewhere, that many Things which are permitted by the Law of Nature, and the Civil Law, should be forbidden by the divine Law, that being the most perfect of all Laws, and proposing a Reward above human Nature; and to obtain such a Reward, it is no Wonder if Virtues that exceed the bare Dictates of Nature are required. ¹ That those Corrections which leave no Infamy nor lasting Damage behind them, and in some Ages and Circumstances, are necessary, especially if they be inflicted by such Persons as human Laws permit so to do, as by Parents, Tutors, Masters, and Teachers, are no Ways repugnant to the Precepts of the Gospel, may be plainly enough gathered from the Nature of the Thing. For these Medicines of the Mind are altogether as innocent, as the disagreeable Potions given to a sick Person.

X. ^a What the Gospel has enjoined in this Case.

^a See B. i. Ch. 2. § 6. B. ii. Ch. 1. § 10.

2. But the same is not to be said of Revenge. For as it tends only to satisfy the Resentment of the injured Person, it is so far from being agreeable to the Gospel, that it is not allowed of even by the Law of Nature, as we have shewn above. But the Law of *Moses* did not only forbid the *Jews* to entertain any Hatred against their Neighbour, that is, their Countrymen, *Lev. xix. 17.* but also to shew them some Sort of Kindness, even when they were Enemies, *Exod. xxiii. 4, 5.* Wherefore the Name of *Neighbour* being extended to all Mankind by the Gospel, it is plain that it is required of us, not only not to hate our Enemies, but even to do good to them, which is expressly commanded, *Matt. v. 44.* yet it was permitted to the *Jews* to seek Revenge for some great Injuries, not indeed by their own Hands, but by appealing to the Judge. But the Gospel takes away this Indulgence too, as is evident by the Opposition which our blessed Saviour puts between the Law and the Gospel. *Ye have heard, saith he, that it hath been said, an Eye for an Eye, &c. But I say unto you, Matt. v. 38, 39.* For tho' what follows is properly concerning repelling of Injuries, and even this Liberty does in some Measure at least restrain, yet is it to be understood as much more strictly prohibiting Revenge; because it quite abrogates the old Indulgence, ² as only suitable to the Time of a more imperfect Dispensation; *Not that a just Revenge is evil, but that Patience is much better;* as *Clement's* Constitutions have it, *B. vii. Chap. xxiii.*

3. Whereof ³ *Tertullian* thus speaks, *CHRIST plainly teaches us a new Kind of Patience, forbidding even that Retaliation which GOD before allowed of, when he required An Eye for an Eye, and a Tooth for a Tooth, commanding us to turn to him that shall smite us on the right Cheek, the other also; and to let him that shall take away our Coat, have our Cloak too; without Doubt CHRIST added these Things as Supplements, agreeable to the Precepts of the Creator. And therefore we*

Formality of a Trial, they might be supposed to act by publick Authority, on a Supposition that this Power was either expressly or tacitly included in the Right conferred on them by the Commonwealth. So that the Example is unreasonably alledged, for shewing that since the Establishment of Civil Courts of Judicature, private Persons have in certain Places, retained some Remains of the Right of punishing, which each Man enjoyed in the State of Nature.

X. (1) *It is a Sin not to restrain the Vices of our Servants and Children,* *LACTANTIUS, De ira Dei, Cap. XVIII.* where there are several more Things upon the same Subject. *GROTIUS.*

2 An Eye for an Eye, which, if we may so say, is the Justice of the Unjust. *St. AUSTIN* in his Exposition of *Psaln cviii.* quoted, *C. sed differentia XXIII. Quest. III.* *GROTIUS.*

We are to distinguish, however, between the Letter of the Law, and the Spirit or Intention of the Legislator, as has been elsewhere observed.

3 Against *Marcion IV.* And in his Book *De Patientia, CHRIST* superinducing Grace upon the

Law, to enlarge and compleat it, gave his own Patience to its Assistance, because that alone was wanting to make up the Doctrine of Righteousness. And *St. CHRYSOSTOM*, upon *Ephes. iv. 13.* *Ἀπὸ τῆτο ὀφθαλμὸν, &c.* For this Reason it is said, An Eye for an Eye, and a Tooth for a Tooth, to tie up the other's Hands, and not to stir up thine against him; not only to secure thy Eyes from Harm, but to preserve his too. But what I wanted to know is this, Why, since Revenge is allowed, are those blamed who have Recourse to it? And presently after, *συγγιγνώσκει ὁ Θεός, &c.* GOD pardons those whom the sudden Sense of an Injury and Violence offered, may perhaps hurry on to require a present Satisfaction; and therefore he says, An Eye for an Eye. But elsewhere, The Ways of the Revengeful lead to Death. Now if where it is permitted to pull one Eye out for another, the Punishment of the Revengeful be such, how much greater shall it be to those who are expressly commanded to expose themselves to new Injuries? *GROTIUS.*

are to look back, and consider whether the Doctrine of bearing Injuries be delivered in the Old Testament. GOD there, by his Prophet Zachariah, ⁴ commands, that no Man should remember the Injury of his Brother, or even of his Neighbour. For again he saith, Let no Man think of the Evil his Neighbour has done him. And certainly, he who commands us to forget Injuries, doth much more strictly command us to bear them patiently. And when he says, Vengeance is mine, I will repay it, what doth he but teach us, that we should wait with Patience, till GOD (whose Prerogative it is to revenge) will be pleased to take our Cause into his Hand? As far therefore as it is inconsistent, that he should require a Tooth for a Tooth, and an Eye for an Eye, by Way of Return for an Injury, who does not only prohibit any such Return, but even any Revenge at all, even the very Remembrance of an Injury; so far is it made plain to us, what he designed by an Eye for an Eye, and a Tooth for a Tooth, viz. not to allow the first Injury to be punished by the second of the same Kind, by Way of Retaliation, which he had prohibited by prohibiting Revenge, but to restrain the first Injury, which he had also prohibited by ordaining the Punishment of Retaliation, that every one perceiving the Liberty of a second Injury indulged, might forbear to do the first. For he well knew, that Men would more easily be restrained from Violence, by permitting the Law of Retaliation to be put immediately in Execution, than by threatening a distant Punishment. But both these Methods were necessary, to answer the different Dispositions and Faith of Men, that he who believed in GOD, might be deterred by the Dread of divine Vengeance; and he who believed not, by the Law of Retaliation.

4. The Intent of this Law, which was hard to be understood, CHRIST, the Lord of the Sabbath, of the Law, and of all his Father's secret Counsels, hath revealed and confirmed to us, commanding us even to turn the other Cheek, that he might the more effectually eradicate Revenge, which even the Law of Retaliation had designed to hinder, and which, at least, the Prophets had manifestly condemned, both by forbidding us to remember Injuries, and by commanding us to rely upon GOD for their Punishment. And therefore, if JESUS CHRIST hath added any Thing, to which the Precepts of GOD are not only not contrary, but even favourable; it cannot be said, that he hath overturned the Doctrine of the Creator. And, after all, if we examine this Doctrine of so exact and perfect a Patience thoroughly, it would not be reasonable, if it did not proceed from GOD, who has promised to be our Avenger, and to perform the Office of a Judge. For if he who lays so great a Burden of Patience upon me, as not only not to return a Blow, but to turn my Cheek to the Smiter; and not only not to return reproachful Language, but to bless those that curse me; and not only not to refuse my Coat, but to give my Cloak also: If he, I say, will not defend me, in vain doth he command me Patience, not giving me the Reward of the Command, the Fruit of Patience, I mean Revenge, which he ought to have permitted me to take, if he doth not do it himself; or if he permits not me to do it, he ought to do it himself; because, to punish Injuries is a necessary Part of good Discipline. For by the Fear of Punishment, all Acts of Violence are restrained. But if every one was left to his Liberty, Violence would rage to such a Degree, under the Protection of Impunity, that People would have both their Eyes, and all their Teeth, beat out.

5. Tertullian, we find, is of Opinion, that not only Christians are forbidden to require Retaliation, but also that the Jews themselves were not permitted to do it, as a Thing in itself innocent, but only to prevent a greater Evil; which certainly holds true of that Exaction of Punishment, which proceeds from a Grudge or Hatred, as appears from what we have already said. For that this was condemned by the wisest of the Jews, who did not only regard the Letter, but the Intention of the Law, is plain from *Philo*, in which Author the Jews of Alexandria, upon the Calamity of *Flaccus*, their bitter Enemy, express themselves thus, ἐκ ἐφρόδου-
μεθα, ὃ δέσποτα, τιμωρίας ἐχθρῆς, διδιδασμένον πρὸς τῶν ἱερῶν νόμων ἀνθρώπων, *We*

⁴ This Passage of ZACHARIAH, on which TERTULLIAN grounds his Argument, is Chap. VII. Ver. 10. Let none of you imagine evil against his Brother in your Heart. I know no other Place where this is repeated, and spoken of our Neighbour, as that Father asserts. But the true Sense of the

Passage is widely different from that here given. The Prophet means, as our Author himself observes in his Notes on the Old Testament, that we ought to be in such a Disposition as not to entertain even a Thought of injuring any Man. He is not here speaking of Revenge in particular.

take no Pleasure, O LORD, in the Punishment of our Enemy, being taught by thy holy Laws, a Compassion and Fellow-feeling for all Mankind. And to this Purpose is that general Command of CHRIST, To forgive all who have offended us, Matt. vi. 14, 15. that is, neither to do nor wish them Evil, through a Resentment of the Evil they have done us. For whosoever doth so, as Claudian expresses it,

— Ferus est Legumque videtur
Vindictam præstare sibi.

De Mallii Consulatu, Ver. 224, 225.

Is barb'rous, and seems himself assuming
A Vengeance that to the Laws belongs.

For which Reason Lactantius, B. vi. Chap. xviii. quoting that Saying of Cicero, It is the first Part of Justice not to do any Man any Harm, unless we be provoked by an Injury, ⁶ makes this Reflection upon it, O what a plain and true Sentence is here spoiled by the Addition of two Words! And St. Ambrose saith of the same Sentence of Cicero, That it wanteth the Authority of the Gospel to confirm it. ⁷

6. But what shall we say of Revenge, not as it regards what is past, but what is to come? Surely CHRIST would have us to forgive even this; first, if he who has offended shew any Tokens of Repentance, ⁸ Luke xvii. 3. Eph. iv. 32. Col. iii.

13. In which Places a more plenary Remission is understood, that is, such an one as restores the Offender into his former State of Friendship; from whence it follows, that no Punishment ought to be required of him. Besides, tho' no Signs of such Repentance do appear, if the Damage we sustain be not very great, CHRIST, by the Precept of parting with our Coat, teaches us, that we ought patiently to bear it. And even Plato, ⁹ hath said, that We must not return Evil for Evil, tho' we should suffer some considerable Grievance. The Sense of which Words are to be met with likewise in Maximus Tyrius. ¹⁰ And Musonius professes of himself, that for any small Affront (such as a Box on the Ear, mentioned by our Saviour) he would neither bring an Action at Law against any Man, nor encourage any other to do it, because such little Injuries are much better forgiven. ¹¹

7. But, if to wink at the Faults and Offences of others be attended with any great Hazard, we ought then to be contented with that Security of their Behaviour, which may do them the least Damage. For the Law of Retaliation itself was not in Force, even amongst the Jews, as Josephus, ¹² and other Jewish Writers, observe; but the injured Person, besides his Loss of Time, and the necessary Expences of his Cure, of which Expences we have a distinct Law, Exod. xxi. 19. ¹³ (for this imports no more than simple Restitution, having nothing penal in it) was wont, in Lieu of Retaliation, to receive a Fine, ¹⁴ which was practised too at Rome, as Favorinus ¹⁵, in Gellius, informs us. Thus Joseph, the Foster-Father of JESUS, believing Mary guilty of Adultery, ¹⁶ had a Mind to get rid of her by Divorce, rather than expose her, and make

⁵ See ORIGEN against CELSUS. GROTIUS.

⁶ De Offic. Lib. I. Cap. VII.

⁷ Offic. Lib. I. Cap. XXVIII.

⁸ See MOSES MAIMONIDES, quoted by the learned CONSTANTINE in his Book De damno dato, Cap. VIII. § 7. GROTIUS.

⁹ In his Dialogue intituled Crito. "We maintain, says he, that it is a bad and shameful Thing to injure any Man, tho' we may be Sufferers by the Forbearance, or might find our Account in the Action; as also to return Evil for Evil. K. P. "We say—it is not lawful to return an Injury, as the Generality imagine; because it is by no Means allowable to do an Injury."

¹⁰ Probably at the End of his second Dissertation; where however the Thought doth not seem exactly the same.

¹¹ He is speaking of those who adhere to the Maxims of Philosophy. The Declaration here mentioned is in a pretty long Passage preserved

by STOBÆUS, and taken from a Treatise written professedly on this Question.

¹² JOSEPHUS doth not say what our Author ascribes to him. He only observes that the Law allowed the injured Person the Choice of Retaliation, or a Fine with Damages. Antiq. Jud. Lib. IV. Cap. VIII. So that, on the contrary, he supposes the Law of Retaliation sometimes put in Execution. It is very evident, however, that the true Sense of the Law was only that the Loss of an Eye, &c. was to be punished, according to the Enormity of the Fact. See my Observations on that Subject, in Note 15. on B. I. Chap. II.

¹³ Lex Wisigoth VI. 13. GROTIUS.

¹⁴ See CONSTANTINE on the Baba Kama, Cap. VIII. § I. GROTIUS.

¹⁵ This is not the Remark of FAVORINUS, but of SEXTUS CÆCILIUS, Noët. Attic. Lib. XX. Cap. I. p. 868. Edit. Jac. Gronov.

¹⁶ St. AUSTIN, Lib. II. De adulterinis Conjugiis.

make her a publick Example : And this he is said to have done, because he was a just Man ; that is, an honest and good-natured Man ; upon which Place St. Ambrose has this Remark, *That the just Man is free not only from the Cruelty of Revenge, but even ¹⁷ from the Severity of a Prosecution.* As also Lactantius had before said, *A just Man must not even accuse a Person of a capital Crime.* ¹⁸ And Justin, ¹⁹ talking of those who accused the Christians, saith, *We would not have them punished who calumniate us : Their own Wickedness, and their Ignorance of what is good, is sufficient Correction for them.* Apol. 2.

8. It remains that we say something of those Punishments that are inflicted, not for any private Advantage but for a publick Good ; partly by putting to Death, or disabling the Criminal from doing any more Mischief, partly by deterring others by the Severity of the Example ; that those Punishments were not abrogated by CHRIST, we have proved by an irrefragable Argument elsewhere^b ; since, when he delivered those Precepts, he gave this Testimony of himself, *That he did not destroy a Tittle of the Law.* But the Law of Moses, which in these Cases certainly continued in Force as long as the Jewish State continued, strictly commanded their Magistrates to punish Homicides, and other great Crimes with Death, *Exod. xxi. 14. Num. xxxvi. 31. Deut. xix. 13.* And if the Precepts of CHRIST were consistent with the Law of Moses, ²⁰ as that Law required capital Punishments, ²¹ well may they be consistent with human Laws, which do in this Respect imitate the divine.

^b B. i. Ch. 2. § 7, 8.

XI. The Argument drawn from the Mercy of GOD declared in the Gospel, answered.

XI. 1. Yet some there are, who, to maintain the contrary Opinion, alledge the great Mercy of GOD under the New Testament, which is to be imitated by all Men, and even by Magistrates themselves, as GOD's Vicegerents ; which we grant to be true in some Measure, but yet that it is not to be extended so far as they would have it. For the great Mercy of GOD declared in the Gospel has Regard chiefly to Sins committed against the Law given to Adam, ¹ or against the Law of Moses, before the Promulgation of the Gospel, *Acts xvii. 30. Rom. ii. 15. Acts xiii. 38. Heb. ix. 15.* For those which are committed afterwards, especially if they be persisted in with Obstinacy, are threatned ² with Judgments much more severe, than those of the Law of Moses, *Heb. ii. 2, 3. x. 29. Matt. v. 21, 22, 28.* Neither are they threatned with Judgments of the other Life only, but GOD often punishes such Crimes even in this, *1 Cor. xi. 30.* Nor is Pardon for such Sins obtained, ³ unless the Party does, as it were, punish himself, *1 Cor. xi. 31.* by great Sorrow and Compunction, *2 Cor. ii. 7.*

güs. But if a Christian (which is certainly very true) may not kill his adulterous Wife, but only dismiss her. GROTIUS.

17 (In Psalm. cxviii. Serm. VII. Cap. V. See HINC MARUS, *De divortio ad Interrog. V. in fine. C. laicos. II. Quæst. IV.* and PANORMITANUS there. GAIL, *De pace publica*, VIII. 3. Add C. *accusasti de accusationibus*, as it is in BROCARD. GROTIUS.

18 He says that " Since Murther is prohibited, a just Man is not allowed to give Evidence against any one in capital Cases ; because there is no Difference between killing a Man with the Sword and with Words," *Lib. VI. Cap. XX. Num. 16.* A Maxim, which taken thus generally, is certainly false.

19 He has this Expression too ; *Dial* with TRYPHO, *μὴ δὲ μισθὸν ἀμείβεσθαι*, &c. *Nor in the least willing to retaliate any one a Mischief as our new Legislator has enjoined us.* Add to this what is below, § 15. GROTIUS.

20 JOSEPHUS mightily cries up the Pharisees Moderation in punishing. And from hence are there so many Exceptions in their Laws relating to publick Punishments ; and that Maxim of theirs, that where there is a Necessity to inflict Death, it ought to be done in the tenderest Manner. This is in the THALMUD, *Tit. Ketuboth.* GROTIUS.

The Passage of JOSEPHUS, which our Author had in View, is where the Jewish Historian relates

how Jonathan, a Sadducee made the Pharisees odious to Hyrcanus, by engaging him to ask them what Punishment was due to Eleazer for injurious Words uttered against the High-Priest. The Pharisees only condemned him to be whipt and put into Prison ; being of Opinion that " Bare Affronts did not deserve Death, and being moreover naturally inclined to Moderation in Punishments." *Jud. Antiq. Lib. XIII. Cap. XVIII.*

21 St. AUSTIN, *Quæst. Evang. Lib. I. Quæst. X.* GROTIUS.

XI. (1) In the Original we read *Legem primævam*. In the first Edition it was *contra Naturæ Legem*. This Alteration insinuates that GOD himself revealed the chief Rules of the Law of Nature to our first Parents, who transmitted them to their Descendents. The Author has in other Places made such Corrections, in Consequence of his Opinion, that Tradition has contributed most to the Knowledge of the Principles of the Religion, and Laws of Nature.

2 St. CHRYSOSTOM says the same as well in his Oration, *Ad patrem fidelem*, as in his XI. *De jejuniis.* GROTIUS.

3 A Sinner ought, before he gets his Pardon, to lament and bewail himself. TERTULLIAN, *De pœnitentia.* St. AMBROSE, upon Psalm xxxvii. St. CHRYSOSTOM, upon *1 Cor. Hom. XXVIII.* and upon *Matt. Hom. XLII.* Add *2 Cor. vii. 9,* 10. GROTIUS.

2. And

2. And they farther urge, that Magistrates, in Imitation of GOD, ought, at least, to pardon the penitent. But, besides that it is scarce possible for Men to discern which are true Penitents, and that if outward Shews, and Professions of Repentance were sufficient, no Man but would come off with Impunity, GOD himself doth not always remit all Kinds of Punishment, even to the true Penitent, as appears by the Example of *David*. As therefore GOD might remit the Punishment of the Law, that is, a violent or an otherwise untimely Death, and yet inflict grievous Punishments upon the Delinquents; ⁴ so now, in like Manner, he may remit the Punishment of eternal Death, and yet, either punish the Sinner with an untimely Death himself, or be willing that he should be so punished by a Magistrate.

XII. 1. But others again condemn this Proceeding too; because, together with Life, all Opportunity for Repentance is cut off. But they themselves know very well, that good Magistrates always take special Care, that no Malefactor be hurried away to Punishment; before he has had a sufficient Time allowed him to confess his Sins in, seriously to detest and abhor them, and to make his Peace with GOD; and that GOD doth sometimes accept of ¹ such a Repentance, tho' good Works being prevented by the Death of the Malefactor do not follow it, is plain from the Example of the Thief crucified with CHRIST. And if it be said, that longer Life might conduce much to a more serious and perfect Repentance; it may be answered, that Instances of those sometimes happen, to whom this ² Saying of *Seneca* may be justly applied, *There is but one good Thing more, that we can offer you, which is Death*: And that other Expression of the same Author, *Let them cease to be wicked by the only Method they are capable of doing it*. Which is what *Eusebius*, the Philosopher, had said before, *πειδὴν ἔχουσιν, &c.* Since they cannot be reformed by any other Means, let them, being thus freed from those Chains, bid Adieu to their Villanies ³.

XII. And that from the Cutting off of the Opportunity of Repentance.

2. Let these therefore, together with what we have said in the ^a Beginning of this Work, serve for Answers to those, who would either prohibit all Punishments in Christian Countries, or at least such as are capital, without Exception; contrary to which is the Doctrine of the Apostle, who, in the Office of a King, ^b includes the Power of the Sword, for the Execution of divine Vengeance; and he saith in another Place, ^c that we are to pray that Kings may become Christians; and that as they are Kings, they may be a Guard to the Innocent: Which, in this general Corruption and Depravity of Mankind, even since the Times of the Gospel, cannot be done; unless, by the Death of some, the Audaciousness of others be restrained, seeing all the publick Punishments that are every where inflicted upon the Guilty, are scarce sufficient to protect the Innocent.

^a B. i. Ch. 2. § 7.

^b Rom. xiii. 4.

^c 1 Tim. ii. 1, &c.

3. Nor will it be impertinent to propose to the Imitation of Christian Governors, in some Respects, ⁴ the Example of *Sabakon* the *Ægyptian* King, a Man eminent for his Piety, by whom capital Punishments were changed into certain servile Works, with a very happy Success, as ^d *Diodorus* testifies: And *Strabo* says too, that there are some People bordering upon Mount *Caucasus*, who put no Man to

^d Lib. i. c. 65.

4 St. JEROME, upon the first Chapter of *NAHUM*, which Passage is inserted *Caus. XXIII. Quæst. V.* AGATHIAS, *Lib. V.* out of *PLATO*. GROTIUS.

XII. (1) St. JEROME, *Ad Damasum*, cited in *C. Importuna de pœnitentia*, Dist. I. GROTIUS.

2 Who has this Expression too in his Treatise *De beneficiis* VII. 20. *Death to such Sort of People is the only Remedy, and it is best for him to go quite out of the Way, who is never likely to come to himself.* And again, *At the same Time I should do a Kindness to all Mankind, and to him, since to Persons of that Temper, Death alone is a Cure.* GROTIUS.

3 *Apud STOBÆUM*, Serm. XLVI. From the whole Passage it appears, that he makes Use of this Reason, to shew that Legislators, when they ordered Sentence of Death, had no Design of, injuring the Criminal who should suffer; but, on the

contrary, of thus procuring them the last Remedy against their Wickedness.

4 Yes, and of the *Romans* too, in most Cases; for none of them, after the *Porcian* Law was made, could ever be whipped, or put to Death, unless he were a Traitor, or condemned by the People themselves. GROTIUS.

Concerning the *Porcian* Law see *LIVY*, *Lib. X. Cap. IX.* But this Prohibition of Whipping or Executing a *Roman* Citizen, did not proceed from a Spirit of Clemency and Humanity: It was a Privilege, then considered as inseparable from Liberty, of which the *Romans* were extremely jealous; but in Process of Time, it gave Occasion to a Licentiousness, which they were obliged to curb by eluding the Law. See *SIGONIUS*, *De antiquo jure Civium Roman.* Lib. I. Cap. VI. and the *Probabilia Juris*, by Mr. NOODT, *Lib. III. Cap. XII.*

Death, tho' the greatest Malefactor. ⁵ Nor is that of *Quintilian* to be slighted, *No Man can doubt, saith he,* ⁶ *but that if Malefactors could be reclaimed, and brought to behave themselves better, as it is granted they sometimes might, it would be more for the Advantage of the State, that they should live than die.* It is observed by *Balsamon*, that the *Roman* Laws which condemned Men to Death, were most of them changed ⁷ by the succeeding Christian Emperors, ⁸ into other Punishments, in Order both to impose on the Guilty a severer Method of Repentance, and also by the Length and Tedioufness of their Punishment, to make it the more exemplary.

XIII. Imperfect Divisions of Punishment rejected.

XIII. 1. By ¹ the Enumeration we have made of the Ends of Punishment, it appears, that *Taurus* the Philosopher has over-looked some of them, out of whom *Gellius* thus, *When either there appear in the Malefactor great Hopes of Reformation, without Punishment, or, on the contrary, no Hopes at all of his Amendment, even tho' he should be punished; or no great Reason to fear, that the Dignity of the Person, against whom the Offence is committed, should be slighted or contemned; or if the Offence be of such a Nature, as that it is not necessary to deter others from it by the Example, then is it scarce worth the While to put ourselves to the Trouble of punishing.* ² For he seems thence to infer, that Punishments are needless, if any one of these Ends be wanting: Whereas, on the contrary, all these Ends must be wanting, that there be no Need of punishing. Besides, he omits that End when an incorrigible Offender is taken away, that he may not commit more or greater Crimes; and what he said of the Loss of Dignity, is to be extended even to other Damages, which we have just Occasion to fear.

2. Much better is *Seneca's* Division of Punishments, *In revenging Injuries, says he, the Law hath Regard to these three Things, which a Prince should likewise have Regard to.* ³ *Either to reform the Person himself whom he punishes; or, by making an Example of him to reform others; or, to take away incorrigible Offenders, that the Rest of the World may live in greater Safety.* For here, if we understand by *The Rest of the World*, not only those who have been injured already, but those also who may be injured hereafter, we have a perfect Division, unless after the Word *take away*, or *disable* should have been inserted. For Imprisonment, or any other Punishment that disables the Malefactor from doing more Mischief, comes in under this Head. Less perfect is that Division of *Seneca* in another Place, ⁴ *All Punishment, saith he, is to be inflicted upon these two Accounts; either, to reclaim the flagitious, or to take them away.* And that of *Quintilian* is yet more imperfect than this, where he saith, *In all Punishments the Crime is not so much regarded, as the Example.* ⁵

⁵ *Geogr. Lib. XI. p. 790. Edit. Amst. (520. Paris.)* where he says, "They banished such as had been guilty of the greatest Crimes, together with their Children. Whereas, on the contrary, the *Derbicians* put Men to Death for small Crimes."

⁶ *Institut. Orat. Lib. XII. Cap. I. p. 1055. Edit. Burman.*

⁷ See what is below in this Book, *Chap. XXIV. § 11.* See *Isaac Angelus's* Oath, in *NICETAS, Lib. I.* The same Author says, that not one was executed in *Johannes Comnenus's* Reign. See *MALCHUS* about *ZENO*, and *St. AUGUSTIN's* 158th and 159th Epistle to *Marcellinus Comes*, cited *C. Circumcelliones*, *Caus. XXIII. Quæst. V.* and in the following Chapters; and *St. CHRYSOSTOM* against the *Jews*, where he speaks of *Cain's* Punishment. *GROTIUS.*

⁸ Chiefly into Work. *St. AUGUSTIN, Epist. CLX. Let them have the Use of their Limbs, and let them be employed in some profitable Service.* See also *NECTARIUS's* Letter to *St. AUGUSTIN*, it is the 201st. *GROTIUS.*

XIII. (1) We have here followed the Order of the Original. *Mr. BARBEYRAC* places this Paragraph immediately after the ninth: For which Transposition he gives the following Reasons, "In

"the Place where we find it, it interrupts the Discussion of the Questions, which relate to the inflicting of Punishments, in Regard to what a Christian's Duty allows; and I cannot but suspect that our Author, designing to add this Paragraph, after he had written the others, was not very careful where to place it, and did not afterwards perceive the Mistake; as was sometimes the Case, in Regard to the Additions he made to his printed Work. However this be, on a careful Enquiry into the Context of the Discourse, it will appear, that this Paragraph, which comes in naturally where I have inserted it, makes a disagreeable Interruption in the Place from whence I have removed it."

² *Lib. VI. Cap. XIV.*

³ *De Clement. Lib. I. Cap. XXII.* These two Designs of Punishment are also laid down by *PHILO*, in *Legatione*, *ὅτι καὶ ἡ κόλασις, &c.* *Because Punishment does often correct and amend even the Offenders; but if it does not do that, it will certainly have an Influence on the Standers by.* For other's Smartings make many People better, out of a Fear and Apprehension of suffering so themselves. *GROTIUS.*

⁴ *De Ira, Lib. I. Cap. ult.*

⁵ *Declam. CCLXXIV.*

XIV. From what has already been said, we may gather how dangerous it is for any private Christian ¹ to punish any Man, tho' never so wicked, especially with Death, either for his own or the publick Good, ² although it be sometimes permitted by the Law of Nations, as we have shewn already. Hence is that Custom of those Nations much to be commended, where the supreme Power grants Commissions to People going to Sea, to attack Pirates wherever they meet them; that they may make use of any Opportunity that serves, not as it were of their own Head, but by the express Order of the Publick.

XIV. *That it is not safe for private Christians to punish, even when the Law of Nations permits them.*

XV. Not unlike to this is another Custom, which prevails in many Places, ¹ where not any one who has a Mind to it is allowed to be a Prosecutor, but only some particular Men, who are appointed by publick Authority; that so no Man may contribute towards the Effusion of his Neighbour's Blood, but only he who is obliged to it by his Office. Agreeable to this is that Canon of the Council of *Eliberis*, *If any Believer be an Informer, and another by his Information be either proscribed or put to Death, we have thought fit to forbid him the Sacrament, even to the last.*

XV. *Or to be forward in a Prosecution.*

XVI. And from what hath been already said, it may also be gathered how rash and indecent a Thing it is for a Man who is really a Christian ¹ to thrust himself into publick Offices, whose Business it is to sentence People to Death, and to think and profess, that the Right of Life and Death over his fellow Citizens, may safely be committed to him, as the most excellent of all others, and a Kind of God amongst Men. For certainly the Danger that CHRIST admonishes ² us of, in judging others, (because, as we judge others we must expect to be judged ourselves in like Cases, by GOD) is altogether as true in this Affair.

XVI. *Or to affect the Office of a Judge in capital Crimes.*

^a Matt. vi. 1.

XVII. 1. Another important Question may be asked, *Whether human Laws, which permit one Man to kill another, give him a Right so to do before GOD, or only Impunity amongst Men.* Covarruvias ^a and Fortunius ^b are for the latter, whose Opinion is so much disliked by Vasquez, ^c that he calls it an abominable one. It is not to be doubted, as we have said elsewhere ^d, but that the Law can do both in some Cases. But whether it does do so much or not, is to be gathered partly from the Words of the Law, and partly from the Nature of the Thing. For if it makes Allowances for the Transport of Passion, it only exempts from human Punishment, but does not take away the Guilt; as in the Case of an Husband ¹ who kills his adulterous Wife, or her Gallant.

XVII. *Whether human Laws, which permit one Man to kill another, grant him a Right so to do, or only Impunity for doing it; explained by a Distinction.*

^a De Matrim. par. 2. c. 7. § 7. num. 20, &c.

^b De ultim. fine

Leg. illat. 11.

^c Contr. Illustr.

l. 4. c. 8.

^d B. ii. Ch. 1.

§ 14.

2. But if it have Regard to the Danger that may ensue, by deferring the Punishment, then it is supposed to transfer a publick Authority to a private Person, so as that he now ceases to be a private Person. Of this Kind is that Law in the Code of *Justinian*, under this Title, *Quando liceat unicuique sine Judice, &c.* ² When it may be lawful for any one, without appealing to the Judge, to kill upon the Spot, those Soldiers who shall be found plundering the Country. And the Reason of the Law is there added, *viz. That it is better to prevent Evil in Time, than to punish it afterwards. We permit you therefore to do yourselves Justice, and what, it is too late to punish by a Course of Law, we suppress by this Edict; hereby com-*

XIV. (1) See some Passages above, B. I. Chap. III. § 3. GROTIUS.

2 In this very Chapter, Sect. VIII. GROTIUS.

XV. (1) St. CHRYSOSTOM, *De Pœnitentia* VIII. Καλὸν μὲν εἶναι, &c. *It is therefore a good Thing, as I told you, by a kind Composition of Matters, to prevent a Suit of Law, and thus to direct your Friend, to the very End that a Court intends. But if the Process be already entered, let it take its Course, only be sure never to begin one.* GROTIUS.

XVI. (1) See SENECA, *De Otio Sapientis*, canvassing this Question, *Whether a wise Man ought to take upon himself a publick Concern.* GROTIUS.

XVII. (1) See St. AUSTIN, *De Civitate Dei*, cited C. *quicumque*, Caus. XXIII. Quæst. VIII. And C. *inter* with the following C. *Caus.* XXXIII. Quæst. II. GROTIUS.

The first Part of the Passage attributed to St. AUGUSTIN in the Canon, doth not belong to that Father but to St. JEROM, in *Ezech.* Cap. IX. The other Words may belong to some other Ecclesiastical Writer: At least I do not find them in the Treatise *De Civit. Dei*; tho' the same Thought is indeed expressed in a different Manner, *Lib. I. Cap. XXI.* "Those only excepted, whom a just Law in general, or GOD, the Fountain of Justice, in particular, orders to be killed, whoever lays violent Hands on himself, or on any other, is guilty of Murder."

2 That is, and likewise Soldiers themselves; for the Law regards those also who are not such. The same Law supposes the Fact committed in the Night, and in the Fields. *Cod. Lib. III. Tit. XXVII. Quando liceat, &c. Leg. I.* See Cujas and FABROT, on that Title.

manding, That no Man shall spare a Soldier, whom he is obliged Sword in Hand to defend himself against, as against a Thief and a Robber. And to the same Purpose is the subsequent Law, of punishing Deserters, which runs thus: ³ Be it known unto all Men, That against publick Robbers, and Soldiers who fly from their Colours, Power is hereby given to every Man to execute publick Revenge for the common Safety. And thus is that of Tertullian to be understood ⁴ Against Traitors and publick Enemies, every Man is a Soldier.

3. And herein the Right of killing Exiles, when found within the Dominions they are banished from, differs from the Laws just mentioned, inasmuch as that a particular Sentence must have been already passed upon the one; whereas in the other Case a general Edict, ⁶ together with the Evidence of the Fact, has the Force of an anticipated Sentence.

XVIII. That internal Acts are not punishable by Men.

² B. 2. Chap.
⁴. § 3. Num.
2. and Chap.
⁶. § 1. num. 1.

XVIII. Now let us see whether all Kinds of vicious Acts ought to be punished by human Laws. And certainly they ought not. For first the internal Acts of the Mind, tho' they be afterwards made known to others by Confession or any other Accident, cannot be punished by Men, because, as we have said elsewhere, ^a it is not agreeable to human Nature, that any Right or Obligation should rise amongst Men from Acts merely internal. And in this Sense are the Roman Laws to be understood, when they say, *Cogitationis Pœnam neminem mereri*, ¹ No Body deserves to suffer for his Thoughts. But yet these internal Acts, ² as far as they influence the external ones, are brought into the Account, not simply of themselves, but by Reason of the external Acts, which from the Intention become more or less worthy of Punishment.

XIX. Nor external Acts that are unavoidable by human Nature.

XIX. 1. Secondly, Those Acts that are unavoidable by human Nature, are not to be punished by human Laws. For tho' nothing be imputed to us as a Sin, but what hath the Concurrence of the Will, and is done freely; yet to abstain altogether, and at all Times from all Kinds of Sin is above the Strength and Condition of human Nature; whence it is, that all Sorts and Sects of Men have accounted it Natural for a Man to sin. As amongst Philosophers, ¹ Sopater, ² Hierocles, ³ Seneca;

³ Ibid. Leg. II.

⁴ (Apolog. II.) AGATHIAS, Lib. IV. Οὐδὲν σεμνὸν, &c. A Resolution of wishing and doing well to the Publick, is not peculiar to Generals, or other great People; but every one who will, may, and ought to be concerned at the Calamities of the State, and do all he can to put Things in a better Posture. See above in this Chapter, Sect. IX.

GROTIUS.

⁵ Here the learned GRONOVIVS quotes a Law, produced by QUINTILIAN, which allows of killing an Exile, if found in the Country. *Declam. CCCV.* But, tho' we have the same Words in his CCLXVIII. *Declamation*, this may have been a spurious Law, as well as several other, invented by the antient Declaimers, for furnishing them with Matter. Be that as it will, our Author is here speaking of Persons put under the Ban of the Empire; whom he calls BANNITI. For, according to the Constitutions of the Empire, any one may with Impunity use such Exiles as he pleases, both in regard to Estate and Life. See JAMES MENOCHIVS, *De arbitrar. Judic.* Lib. I. Quæst. XC. ANT. MATTHÆUS, *De Criminib.* Tit. V. Cap. II. BOECLER, *Conductor Carolin.* Tom. II. *Dissert.* p. 74, 75. and the *Jus publicum* of Mr. COCCEIVS, *Cap. XXXII.* § 12, &c.

⁶ QUINTILIAN, in his CCLXth *Declamation*, There are some Crimes against the State so notorious, that the bare Sight of them is enough to declare them capital. GROTIUS.

XVIII. (1) The Words are *Cogitationis pœnam nemo patitur*; No Man suffers Punishment for his Thoughts. Digest. Lib. XLVIII. Tit. XIX. De Pœnis. Leg. XVIII. Add to this, that, according to Mr. BYNKERSHOEK, *Observat. Jur. Rom.* Lib. III. Cap. X. the Roman Lawyers, speak there

not of a bare Thought, of a loose Design, which terminates in no exterior Act, by which a Man is disposed to seek Means for executing his Design; but of a Design, the Execution of which has not been followed by the Effect. For such a Design, tho' accompanied by actual Attempts, was not punished by the Roman Law, unless in Case of some certain enormous Crimes, specified by the Laws, and excepted from the general Rule, in Favour of the Publick. See the Particulars and Proofs at large in the Treatise above quoted. On that Foot we are to consider the following Words of MAXIMUS of Tyre, either as not conformable to the Roman Law, or as unexact. "The Law, says he, punishes as Adulterers, Robbers, or Traitors, not only those who have actually committed the Facts, but such as designed to commit them, tho' they did not find Means for putting the Design in Execution." *Dissert. II.* p. 20. Edit. Cantab. Davis.

² So SAYRUS, Lib. III. THESAURI, Cap. VI. GROTIUS.

XIX. (1) Σύμφυλον εἶναι ἀνθρώποις τὸ ἐμαρτάνειν. These Words are in STOBÆUS, *Serm. XLVI. De Magistratu*, &c. Let us add the following from XENOPHON, a much more antient Philosopher. "I see no Man entirely exempt from Faults." *Hist. Græc.* Lib. VI. Cap. III. § 6. Edit. Oxon.

² Where he says, "There is an Evil born with us, and at the same Time acquired; viz. the Motion of free Will, in a Manner contrary to Nature." p. 192. Edit. Needham.

³ And in his first Book, *De Ira*, Cap. XIV. There is no Man living who can intirely justify himself. In his ninth Chapter he had said, Among many other Inconveniences of Mortality, the Darknes

of

neca; amongst the Jews, ⁴ Philo; amongst Historians, ⁵ Thucydides; and amongst Christians, ⁶ very many have left us their Testimony upon Record. If, saith Seneca, ⁷ every Man, who is of a depraved corrupt Nature were to be punished, no Man would go unpunished. To the same Purpose is that of Sopater: ⁸ He, who is rigid enough to punish Men as severely, as if it was possible for them to live altogether without Faults, must certainly exceed the Bounds of Correction. Which ⁹ Diodorus Siculus calls a Wrong done to the common Frailty and Weakness of Men; and in another Place, he says, It is to forget the Weakness, that is common to all Mankind. For as the same Sopater saith, Our lesser, and as it were daily Slips of Infirmary are rather to be connived at than punished.

2. And indeed it may well be doubted, ¹⁰ whether these can truly and properly be called Sins, since, tho' every particular Fault may seem to be done freely, we lie under a Kind of Necessity in general to sin. Every Law, ¹¹ saith Plutarch in the Life of Solon, ought to be made against Things that are possible to be observed, if it intend to punish a few with Advantage, and not a Multitude to no Purpose. There are likewise some Sins, that are not absolutely unavoidable to human Nature, ¹² but to this or that particular Person, or in this or that particular Case ¹³ by Reason of such or such a Temperament of the Body strongly inclining the Mind, or by some inveterate Custom, which yet are commonly punished, not so much for themselves, as ¹⁴ for the preceding Fault that occasioned them, because either the Remedies were neglected, or the Depravity voluntarily contracted.

of our Understanding is one, and not only the Necessity of erring, but the doating upon our Errors. Afterwards, Chap. XXVII. Who can declare himself free from the Breach of every Law? And in B. III. Chap. XX. We are all of us bad. In his Treatise De Clementia, I. 6. We are all faulty: Some more, some less: Some on purpose, others by Accident, or drawn away by another's Wickedness: Some of us have been a little too weak in standing to our good Resolutions, and have lost our Integrity with Regret and Reluctance. Nor do we only for the present do amiss, but we shall always do so to the last Moment of our Lives. And if there be any one who has so well cleared his Conscience that nothing can any longer either disturb or deceive him, it is even by frequent Miscarriages that he arrives at this State of Innocence. PROCOPIUS, Gothic. III. in a Speech of Belisarius, Τὸ μὲν ἐν, &c. Not to sin at all is neither consistent with human Make, nor will the Nature of Things allow it. Add to this the Emperor Basil, Cap. L. GROTIUS.

I am very much mistaken, if instead of the Emperor Basil, our Author does not in the last Quotation mean MANUEL PALEOLOGUS, of whom, beside some Orations, we have some Precepts for the Education of a Prince, Προβλήματα βασιλικῆς ἐκπαίδευσης. In the first Chapter that Emperor says, "He who knows how to distinguish rightly the Ends, and what relates to them, particularly that most perfect End to which all Things move naturally, and which puts all Things in Motion; and is willing to do what he knows is best; will not sin in Deed, Word, or Thought, or any other Motion of the Soul." But then he advances this only as a Supposition; "It being impossible, as he observes, for a Man to attain such a Degree of Knowledge without the Divine Assistance." p. 76. Edit. Basil. 1578. This Work, which was published and translated by LEUNCLAVIUS, cannot be very common, since Mr. FABRICIUS makes no Mention of it in his Bibliotheca Græca. The Reason of our Author's Mistake is, that BASIL, the Macedonian, has written Precepts of Morality, addressed to his Son, Κεφάλαια καὶ ἐντολὰς, in sixty-six Chapters; whereas those of MANUEL employ a hundred,

4 In his third Book, De Mose. To which may be added, ABENESDRAS upon JOB v. 7. and Rabbi ISRAEL, Cap. VIII. GROTIUS.

5 The Passage is in the third Book, where the Historian adds, "There is no Law that can prevent Man's committing Faults, either in a public lick or private Capacity." Cap. XLV. Edit. Oxon.

6 Among others, LACTANTIUS, who says, "If GOD should punish every Man according to his Deserts, all Mankind would be destroyed; for no one is free from Sin. There are many Inducements to Sins, our Age, Wine, Poverty, Opportunities, and a Prospect of Reward." De Ira Dei, Cap. XX. Num. 4. Edit. Cellar.

7 De Ira, Lib. II. Cap. XXXI.

8 Apud STOBÆUM, Sermon. XLVI.

9 And in his Fragments he says, Μὴ συγκοφανῶν ἀνθρωπίνης φύσεως ἀδυνατείαν, We must not disparage the Infirmary of human Nature. GROTIUS.

These Passages, especially that quoted in the Note, are not much to our Author's Purpose, except it be on Account of the Expression, which may be applied to the Subject. This will appear to any one that examines the Context in the Original.

10 This Thought has been justly censured by PUFENDORF, B. I. Chap. V. § 8.

11 In vita Solonis. p. 90. Tom. I. Edit. Wech.

12 These Sins are not absolutely unavoidable. In Regard to Things, to which we are inclined by the Force of Constitution or Custom, the Use of our Liberty is indeed more difficult, but not entirely impossible. See PUFENDORF, B. I. Chap. IV. § 5, &c. to which several Reflections might be added.

13 SENECA, De Ira, Lib. II. Cap. XVIII. It is the Mixture of the Elements that causes a Variety of Manners, and therefore some Peoples Tempers incline them more to this or that, according as one Element does predominate. In another Place he calls this, the Result of the Condition of our Birth, and the Complexion of our Bodies. Epist. XI. GROTIUS.

14 See C. Inebriaverunt. Caus. XV. Quæst. I. GROTIUS.

XX. I. Thirdly,

XX. Nor those Acts that are neither directly nor indirectly hurtful to human Society; the Reason of which is assigned.

XX. 1. *Thirdly*, those Sins are not to be punished, which neither directly nor indirectly concern human Society, nor any Body else. Because no Reason can be assigned, why the Punishment of such Sins should not be left to GOD, who is most wise to understand, most righteous to weigh, and most mighty to revenge them. Wherefore all human Punishments, as to such Sins, are plainly unprofitable, and of Consequence improper. But those Punishments are to be excepted, that tend to the Reformation of the Party transgressing, tho' perhaps no other may have any Interest in it. Nor are Actions to be punished, that are done in Opposition to Virtues, which by their very Nature are averse from all Compulsion, such as Mercy, Liberality and Gratitude.

2. *Seneca* discusses this Question, Whether the Vice of Ingratitude ought to go, unpunished; and why it ought he alledges many Reasons, particularly this, which will likewise hold in other Vices of the like Nature: *Since*, says he, *it is highly Praiseworthy to be grateful, it would cease to be so, if we were bound to be grateful*; that is, Gratitude would lose that which is most commendable in it, and which puts it in the Rank of excellent Virtues, as appears from the subsequent Words: *For, if Ingratitude were punishable, no Man would more commend a grateful Man, than he does him, who restores what was given him in Trust, or than he does him, who pays his just Debts without being forced to it by Law.* And soon after: *It would not be so glorious to be grateful, unless we might be ungrateful with Impunity.* And to these Kinds of Vices may be referred that of *Seneca* the Father in his Controversies, *I do not desire that the Criminal should be commended, but only acquitted.*

XXI. The Opinion of those who hold that it is never lawful to pardon, rejected.

XXI. It remains now that we enquire, whether we may not sometimes forgive or pardon Offences. ¹ For the Stoicks deny it, as appears by a Fragment in *Stobæus*, entitled, *De Magistratu*, in *Cicero's* Oration for *Muræna*, and at the End of *Seneca's* Books *De Clementia*, but their Argument is very weak. *Pardon*, say they, *is the Remission of a Punishment that is due, but a wise Man will always do what he ought to do.* Here the Fallacy lies in the Word *due*. For if by *due* be meant, that he, who has offended, deserves to be punished, that is, may be punished without Injustice, it will not follow from hence, that he, who forbears to punish him, does what he ought not to do. But if it be meant, that Punishment is in such a Manner due from a wise Man, that he is indispensibly obliged to exact it, we say, that that doth not always happen, and therefore in this Sense Punishment is not always due, but permitted only. And that may be true, as well before the penal Law as afterwards.

XXII. It is shown here that Punishment is allowable before the Establishment of any penal Law.

XXII. 1. Yet it is not to be doubted, but that before the penal Law be made, an Offence may be punished, because he, who has offended, naturally brings himself into such a Condition, as that he may justly be punished: ¹ But it does not follow from hence, that Punishment must needs be exacted; because this depends upon the Connection of the Ends, for which Punishment was instituted, with the Punishment itself. Wherefore if those Ends be not in a Moral Sense necessary, or if quite contrary Ends do occur no less Profitable or Necessary, or the Ends proposed by Punishment can be obtained another Way, then it plainly appears, that there is nothing, which can strictly oblige us to exact Punishment. An Instance of the *first*

XX. (1) The same *SENECA*, *De Beneficiis* I. Cap. I. *Ingratitude is a shameful Thing, only when we are at Liberty to return, or not return, a Kindness.* *SENECA* the Father, *Controv.* V. 34. You tell me, that he ought not to do it; it is a Thing of immense Estimation, therefore there is no Punishment. *St. AUGUSTIN*, *Lib. II. Cap. LXXXIII. contra Petilian.* Thus then because there are Laws against you, you are not compelled by them to do Good, but you are forbidden to do any Hurt. *GROTIUS.*

The Passage here quoted from *St. AUGUSTIN*, where he is speaking of the Laws against the *Donatists*, has a Sense different from that in which our Author must have taken it, in Order to apply it in this Place.

² This is in *B. V. Controv.* XXIII. You have such another Expression in the fourth Book. *Controv.* XXV. There is a great Deal of Difference

between Reproof and Punishment. Excerpt. *Contr.* VI. 8. For as *PLUTARCH*, in his *Cimon* says, some Things are *ἑλλείματα μᾶλλον ἀρετῆς τίνος ἢ κακίας πονηρένυμαλα*, *Rather the Defects of some Virtue than the Effects of Vice.* *GROTIUS.*

XXI. (1) *DIDORUS SICULUS*, in his Fragments, argues very well against them that *συγγνώμη τιμωρίας ἀρετωλέρα*, *Pardon is better than Punishment.* And *St. CYPRIAN* shall speak for Christians, in his fifty-second Epistle. *The Philosophers and Stoicks are of another Opinion, who say that all Sins are alike, and that a wise Man must not easily be bent. But Christians and Philosophers do widely disagree.* *GROTIUS.*

XXII. (1) *JULIAN DE EUSEBIA*, *ἐδὲ ἥ εἰ σφόδρα*, &c. *For tho' there are some who deserve ill Treatment and Correction, there is no Necessity that they should be quite destroyed.* *GROTIUS.*

Cafe is, when an Offence is committed so privately, as that it comes to the Knowledge of but very few, so that a publick Discovery of it by Punishment, may not only be unnecessary, but even hurtful; according to what *Cicero* said in the Case of one *Zeuxis*; ^a *Being put into the Hands of Justice, he ought not perhaps to be dismissed, but there was no Necessity that he should have been put there at all.* Of the second in him, who commits an Offence, which is overbalanced, either by his own or his Ancestors Merits. For then as *Seneca* well observes, ² *The supervening Service covers and conceals the Injury.* Of the third in him, who mends upon a bare Reproof only, or makes the offended Person Satisfaction by asking his Pardon; so that for those Ends there is no need of Punishment.

2. And this is that Part of Clemency, which exempts from Punishment, with Regard to which the wise *Hebrew* hath declared, ^b *That it becometh the Just to be merciful.* For since all Punishment, especially if it be severe, has something in itself that is repugnant, not indeed to Justice, but Charity, surely our common Reason will easily suffer us to abstain from it, unless a Motive of Charity more strong and more just irresistibly hinder us. Very apposite to which is that of *Sopater*, where he says, that ³ *That Justice, which is conversant about Contracts, admits of no Favour, but that, which is conversant about Offences, puts on sometimes the mild and gentle Countenance of the Graces.* The Sense of the former Part of which *Cicero* has expressed in these Words: *Via Juris ejusmodi est quibusdam in Rebus, ut nihil sit Loci Gratiæ.* ⁴ *The Manner of doing Justice is in some Cases of such a Nature, as to leave no Room for Favour:* And of the latter Part *Dion Prusæensis* thus: *χρηστὴ ἡγεμονία, συγγνώμη.* ⁵ *It is worthy of a good Prince to pardon.* And in *Favorinus*: *That which Men call Clemency, saith he, is nothing but a seasonable Mitigation of the Rigour of the Law.*

XXIII. Now one of these three Things may happen, either that some Punishment is to be indispensibly exacted, ¹ as in Crimes of the most pernicious Example; or that it is not to be exacted at all, as when the publick Good requires that it should be omitted; or that we may do either the one or the other, as we think convenient. To which Intent is that of *Seneca*, ² *That Clemency is free.* The wise Man, say the *Stoicks*, ³ *s pares, but does not pardon.* As if we might not with the *Vulgar*, the Masters of Language, call that, to pardon, which they call, to spare. But in this as well as other Points, as *Cicero*, *Galen*, and others have observed, a great Part of the Disputations of the *Stoicks* ⁴ is spent in nothing, but Words, which a Philosopher more especially ought to avoid. For as the Author to *Herennius* truly remarked, ⁵ *It is ridiculous and a Fault to raise a Controversy about the Alteration of Names:* Which *Aristotle* had expressed thus: ⁶ *We must take Care to shun quibbling about a Term.*

XXIV. 1. There seems to be greater Difficulty after the penal Law is made, ¹ because the Law-Maker is in some Measure bound by his own Laws; but this only

² The Passage is in his Treatise *De Benefic.* Lib. VI. Cap. VI. But the Author has followed the Generality of Editions in his Time, which read *Sic beneficium superveniens injuriam adparere non patitur*; whereas in the Manuscripts we read *injuria*, as the Sense necessarily requires, according to the Remark of *JUSTUS LIPSIUS*, cotemporary with *GROTIUS*. So that the Philosopher's Meaning is, that an Injury done by one from whom we had before received some Favour, effaces the whole Merit of the Favour. Which has no Manner of Relation to the Question in Hand. See my Observations on *PUFENDORF*, B. VIII. Chap. III. § 16. Note 4. Besides, even allowing our Author's Reading the true one, the Passage would be nothing to his Purpose, for *SENECA* would then be speaking of a Service done after the Injury is received; whereas *GROTIUS* speaks of the Services that the Offender has already done before the Commission of the Crime, and even of his Ancestor's Services.

³ *Apud STOBÆUM*, Serm. XLVI. Tit. *De Magistrali.*

⁴ *Epist. ad Quintum Fratrem*, Lib. I. Epist. II. ⁵ *Oratio ad Alexandrinos.*

XXIII. (1) *JOSEPHUS*, Παρρησία νότον, &c. Parricide is a common Injury both against Nature and human Life, and whoever does not punish it, does himself sin against Nature. *GROTIUS*.

² *De Clementia*, Lib. II. Cap. VII.

³ *Ibid.*

⁴ Out of Use, as the Scholiast upon *HORACE* says. *St. AUGUSTIN contra Academicos*, It is absurd to keep a Stir and Wrangling about Words, when there remains no Dispute at all about Things. *GROTIUS*.

⁵ Lib. II. Cap. XXVIII.

⁶ *Topic.* Lib. I. Cap. XVII.

XXIV. (1) Two Questions may be here started, which our Author himself proposes in his *Sparsio forum ad Jus Justinianum*. Tit. *De pænis*, p. 213. Edit. *Amst.* First, Whether it be better to allow the Judge the Determination of Penalties for each Crime, or to regulate the Kind and Degrees of Punishment by express Laws? Our Author, without giving us his own Opinion, only observes that the former was at first practised among the

only holds, as we said before, ² as far as the Law-Maker is looked upon as a Member of the Community, not as he is the Representative, and carries with him the Power and Authority of the State. For as such he may intirely abolish the penal Laws; for the Nature of an human Law is such, that it depends upon the Will of the Legislator, not only in its Institution, but also in its Duration. But the Law-Maker ought not to take away the Law, without a reasonable Cause for it, which if he does, he transgresses the ^a Rules of political Justice.

^a See B. I. C.
1. § 8.

2. But as he can take away the Whole Law, so he may suspend the Obligation of any Part of it, as to this or that Person, or this or that particular Fact, the same Law in all other Respects remaining in Force, after the Example of GOD himself; who, as *Lactantius* observes, ³ when he gave Men Laws, did not deprive himself of the Power of pardoning such as should transgress those Laws. ⁴ A Prince, saith *St. Austin*, may revoke a Sentence, and absolve and pardon the Person condemned to die: And gives this Reason for it, that he is not subject to Laws; who has Power to make them. *Seneca* is for having *Nero* to reflect upon this Sentence: Any Man can kill contrary to Law; but no Man can save besides my self.

3. But neither is this to be done without a reasonable Cause. And what these reasonable Causes are, tho' we cannot precisely define them, yet we must conclude, that they ought to be greater, after the Institution of the Law, than before, because the Authority of the Law, which it is fit should be maintained, is superadded to the other Causes of punishing.

XXV. What
reasonable in-
trinsic Causes
justify the do-
ing of it.

XXV. But the Causes of exempting any one from the Penalty of the Law are either intrinsic or extrinsic. It is intrinsic, when the Punishment compared with the Fact is too severe, if not unjust.

XXVI. What
extrinsic ones.

XXVI. Extrinsic is from a Man's former Merit, ¹ or some other Thing that

the *Locrians*; but that *Zaleucus* (not *Seleucus*) introduced the latter, as we learn from *STRABO*, *Geogr. Lib. VI.* For my Part, I think that in this Case, as in others, as little as possible ought to be left to the Judge's Discretion. The second Question is, whether a Judge, who is not himself a Sovereign, can inflict Penalties less than those established by the Laws? That is, not only in Cases where the Laws themselves allow him such a Liberty (for then the Difficulty vanishes) but in all Cases, without Exception. To this our Author replies, that such a discretionary Power is usually allowed to Judges of the first Rank, where he alledges the Example of the *Romans*, among whom the *Senate* might both augment and soften the Rigour of the Laws. On this Point see *Mr. SCHULTING's* Dissertation *De recusatione Judicis*, Cap. VII. § 3. This supposes what is true, that an inferior Judge cannot, as such, and without the Authority of the Sovereign, either increase or diminish the Punishment, when it is fixed by the Laws.

² See what is above in the Text and Notes, in this Book, Chap. IV. § 12. *GROTIUS*.

³ *De Ira Dei*, Cap. XIX. Num. 9.

⁴ *SYMMACHUS*, Lib. III. *Epist. LXIII.* For the Circumstances of Magistrates and Princes are quite different; the Judgment of the Magistrate is thought to be corrupted, if it be milder than the Laws direct: But it is in the Power of, and very becoming the Character of Godlike Princes to mitigate the Rigour of penal Laws. There is the same Distinction between a King and a Judge in *THEMISTIUS*, *Oration V.* *GROTIUS*.

Our Author doth not specify the Treatise of *St. AUGUSTIN*, from which he takes these Words. I am persuaded, however, that he quotes them from *CUJAS*, who, in his *Observat. XX. XXXII.* giving the Passage more at large, produces it as drawn from a Treatise *De Fato*; which doth not appear among that Father's Works. It is proper in this Place to observe how Authors copy one another, without speaking of it; and thus imprudently expose themselves to the Hazard of adopting and perpetuating the

Mistakes of others; for I have found the Words in question, quoted in the same Manner, and under the same Name, by *ARNISEUS*, *De Republica*, p. 271, 272. by *DIONYS. GODEFROY*, on the *Justinian Code*, Tit. *De Pœnis*, Leg. XV. by *JAMES GODEFROY*, his Son, in *Cod. Theod.* Tom. III. p. 307. by *CYRIACUS LENTULUS*, in *August.* p. 149. And I doubt not but many others have done the same, after some one of these Authors. It is very probable that *CUJAS* has either put one Author's Name for another, or without thinking on it, changed the Title of *St. AUGUSTIN's* Piece, from which he took the Passage. I find something like it in an Epistle, written by that Father, in the Name of his Clergy, in which exhorting the *Donatists* to a Conference with the Bishops of the predominant Party, he advises them to lay the Result of the Conference before the Emperor, that he might form a Judgment of the Merits of the Cause; because the ordinary Judges could only follow and execute the Laws already in being. *Epist. LXVIII.* As to the Passage of *THEMISTIUS*, here referred to, the Reader may see it at Length in *PUFENDORF*, B. VIII. Chap. III. § 17. Note 1.

⁵ *De Clementia*, Lib. I. Cap. V.

XXV. (1) For Instance, if in a Country where Hunting is prohibited under very severe Penalties, and even under Pains of corporal Punishment, a hot-headed young Fellow, or one who has not, and at present cannot have any Thing else to eat, should kill a Hare in the Road. In some Countries a Man is condemned to be hanged for a very moderate Theft. If any one, being reduced to extreme Poverty without any Fault of his own, should steal such a Sum, it would be an Act of great Severity to put him to Death: Clemency would require, at least, that his Punishment should be changed, and the Rigour of the Sentence softened, without any Alteration in the Law itself. See *PUFENDORF*, in the Chapter that answers to this, § 17.

XXVI. (1) See *TIRAQUEAU*, *De Pœnis tempe- randis*, Cauf. L. and *COVARRUVIAS*, *Var. Resolut. II.* 9. 5, 6.

speaks

speaks in his Favour; or even from great Hopes of him for the future: Which Kind of Cause will then most prevail, when the Reason of the Law (at least in that particular Fact he is accused of) shall cease? For tho' the general Reason³ of a Law without the Counterbalance of a contrary Reason be sufficient to maintain the Law in Force and Vigour,⁴ yet when the Reason ceases, as to this or that particular Case, it makes the Law be dispensed with, more easily and with less Detriment to its Authority. And this takes Place the most in those Crimes which are committed through Ignorance, tho' that Ignorance be not altogether blameless, or through an Infirmary of the Mind, that is superable indeed but not without great Difficulty; to which Circumstances, a Sovereign who professes Christianity, ought to have great Regard, after the Example of GOD himself, who in the *Mosaick* Dispensation was graciously pleased to provide, that Sins of this Kind should be expiated with certain Sacrifices, *Lev. iv. and v.* And in the New Testament he has declared both by Words and Examples, that he is ready to pardon such Sins upon Repentance, *Luke xxiii. 34. Heb. iv. 15. v. 2. 1 Tim. i. 13.* And it is observed by St. *Chrysostome*, that those Words of Christ in *St. Luke xxiii. 34. Father forgive them, for they know not what they do,*⁵ wrought so much upon *Theodosius*, that he freely forgave the *Antiochians*.

XXVII. And from hence appears the Error of *Ferdinand Vasquez*,¹ who said that the Laws were never to be dispensed with, but in such Cases as the Maker of them, had he been consulted, would have acknowledged that he did not design that they should be binding. For he has not distinguished between an equitable Interpretation of the Law, and a Relaxation of it. Whence it is, that in another Place² he reproves *Aquinas* and *Sotus* for saying, That the Law does still oblige, tho' the particular Reason of that Obligation cease, as if they took the Law to consist in the bare Letter, which they never thought of. But it is so far from being true, that every Relaxation of the Law, which may be made or omitted at Pleasure, is Equity properly so called, that that Relaxation, which is made either out of Charity or Policy, does not come within the Bounds of it. For it is one Thing, to dispense with the Law for some reasonable or even urgent Cause, and another to declare, that the Fact was never comprehended under the Intention of the Law. So much for taking away or exempting from Punishments: Let us now see how we are to put them in Execution.

XXVIII. From what has been already said, it appears, that in Punishments two things are to be considered, the Reason why and the End for which. The Reason why, is the Demerit; the End for which, is the Advantage of Punishment¹. No Body is to be punished above his Desert, according to those Passages of *Horace*,² which we have before quoted, and that of *Cicero*,³ *There is a Measure*, saith he, *and Moderation to be used in punishing, as well as in all other Things.* And therefore *Papinian* calls Punishment *the Valuation of a Crime*⁴. *Aristides* saith, *Leuſtr. II. That it is agreeable to human Nature, that Bounds should be set beyond which Revenge should never pass.* *Demosthenes* in his Epistle for *Lycurgus's* Children, says

XXVII. The Opinion, that there is no just Reason for dispensing with a Penalty but what is included in the Law by Way of tacit Exception rejected.

XXVIII. The Punishment is to be proportioned to the Crime.

^a § 2. n. 2.

² That is, in regard to the Person, who has acted against the Law, not in regard to every other Person who may violate the Law at the same Time.

³ PUFENDORF, and other Writers after him understand by that Term the Authority and Will of the Legislator. But this is a Mistake. The *general Reason* is no more than the particular Reason of the Law, considered as always taking Place in general, tho' it ceases in certain Cases in regard to such or such a Person; as in the Case of *sumptuary* Laws, the general Reason subsists, as long as the Subjects in general are not rich enough to support the Expences prohibited, without prejudice to their Circumstances; tho' some particular Persons may be so rich that the said Expences cannot do them the least Damage. However, in order to make the Application of this Instance just, it must be supposed that the Penalty annexed to the sumptuary Laws is corporal, or consists in something which strongly affects the Rich; for if, as is usually the Case, it be reduced to a Fine, as a Man of a very large Estate will suffer no more Damage from

the Fine imposed by the Law, than from the prohibited Expences, it would, on the contrary, be a Reason for aggravating the Penalty in Relation to him, lest the Easiness of transgressing the Law should encourage him to give frequent Examples of such Transgression.

⁴ GRATIANUS has collected and put together several useful Things upon this Subject, *Caus. I. Quæst. VII.* GROTIUS.

⁵ *Orat. XX. De Statuis.* See the Story in ZONARAS. GROTIUS

XXVII. (1) *Illustr. Contr. Lib. I. Cap. XXVI.*

² *Ibid. Cap. XLVI.*

XXVIII. (1) The People of *Milan* argue very judiciously upon this Affair in a Speech of theirs related by GUICCIARDIN, *Lib. XVII.* Compare what we have said in this Chapter, § II. and what we shall say in *B. III. Chap. XI. § I.* GROTIUS.

² *Epist. ad Brutum XV.*

³ *Digest. Lib. XLVIII. Tit. XIX. De Pænis, Leg. XLI.*

that

that we are not to observe barely an Equality in Punishments as in Weights and Measures, but to have Regard to the Purpose and Intention of the Delinquent. But within the Bounds of this Demerit, and with Respect to the Advantage thence arising, Faults may be more or less punished.

XXIX. *Regard is to be had here to the Motives which we are to compare with one another.*

^a *Jam. i. 15.*

XXIX. 1. In the Demerit of the Crime, we are to consider, ¹ the Motive that induced, the Reason that ought to have restrained, and the Disposition of the Person either to one or the other. There is hardly any Man wicked for nothing, and if there be any one who loves Wickedness for its own sake, he is a Sort of Monster. The greatest Part of the World are drawn into Sin by their Affections ². *When Lust hath conceived it bringeth forth Sin.* Where under Lust or Appetite, I comprehend also that vehement Desire of declining every Thing that may hurt us, which of all others is the most natural, and consequently the most innocent. And therefore those Sins, that are committed to escape Death, Imprisonment, Pain, or extream Poverty, seem to be the most excusable.

2. Agreeable to which is that of *Demosthenes*, ² *If a rich Man be unjust, it is fit that he should be much more severely punished, than a poor Fellow whose Poverty forces him to commit the same Crime. For before Judges, who have any Sense of Humanity, Necessity pleads strongly for Indulgence, whereas they who in Affluence and Plenty do an Act of Injustice, can have no tolerable Pretence to urge in their Favour.* Thus does *Polybius* excuse the *Acar-nanians*, who to avoid the imminent Danger, that threatned them, ³ broke the Articles of the Treaty concluded with the *Greeks* against the *Ætoli-ans*. And *Aristotle* says, ⁴ *Incontinence is more voluntary than Cowardice: For that proceeds from a Prospect of Pleasure, this from an Apprehension of Pain. And this Pain doth, as it were, transport a Man out of himself, and tends to his Destruction, whilst the Privation of Pleasure doth no such Thing; and therefore Incontinence is the more voluntary Vice.* To the same Purpose there is a famous Passage in *Porphyry*, Lib. III. *De non esu Animalium.*

3. All other Appetites do tend to some Good, either real or imaginary. Those Things that are really good, besides the Virtues and their Acts, which never lead to Sin (*ἀν' ἀκολασίᾳ γὰρ αἱ ἀρεταί*, ⁷ *For the Virtues follow one another*) do either themselves afford Pleasure, or are the Cause of such Things as procure it, such as Abun-

XXIX. (1) *CHRYSOSTOM X. De Statutis: & ὅ δὲ πᾶν, &c. For every Offence does not deserve the same Correction, but what might easily have been amended requires the greater Punishment.* And in his second Oration entitl'd *Cur obscurum sit vetus Testamentum*, he proves from hence that a Slanderer is worse than a Whoremonger, Thief or Murderer. *GROTIUS.*

² In his first Oration against *Stephen*, p. 616. *Edit. Basil 1572.*

³ This is not exactly related. The Historian says on the contrary, that tho' the *Acar-nanians* had been excusable, as well as any other People in the same Case, to have used Delays, and endeavoured to avoid War with the *Ætoli-ans*, their Neighbours, from whom they had every Thing to fear; Nevertheless the Embassadors of the other States of *Greece*, their Allies, having addressed themselves first to them, they immediately confirmed the Resolution taken in the general Assembly, frankly and without Hesitation; and on this Occasion, as on all others, the Consideration of their Duty had more Weight with them than the fear of Danger, *Lib. IV. Cap. XXX. p. 415. Edit. Amstel.*

⁴ (*Ethic. Nicom. Lib. III. Cap. XV. init.*) There is the same Thought in a fine Passage of the Emperor *MARCUS ANTONINUS*, *Lib. II. [Sect. X. which may be found quoted in PUFENDORF's Law of Nature and Nations, Lib. I. Chap. IV. Sect. VII. Note 7.] PLUTARCH* in comparing *Romulus* with *Theseus*, in regard to the first's having killed his Brother, and the other his Son, concludes *Theseus* the most excusable, because urged to that excess of Rage by stronger Impulses, and such as few Persons are capable of resisting; namely Love, Jealousy, and Credulity in the false Reports of his

Wife. *Compar. Thef. & Rom. (p. 38. Vol. I. Edit. Wech.) GROTIUS.*

In the Passage of *PORPHYRY*, which our Author calls *insignis locus*, the Philosopher says, that a Man, who for his own Preservation or that of his Children or Country, takes other People's Goods, ravages a Country or plunders a City, may plead in his excuse the Necessity that reduced him to it; but that he who should do the same Things, to enrich himself, or live in Luxury and Voluptuousness; in a Word to gratify irregular Desires of Things not necessary, is deemed unfit for Society, an intemperate and abandoned Wretch, p. 291, 292. *Edit. Ludg. 1620.* The Translator of my Edition, *FRANCIS DE FOGEROLLES*, pleasantly translates: *Deinde per regionem & urbem incedens, &c. for, aut regionem vel urbem vastaret, &c.* This I observe by the Way, as an Example of that Interpreter's Blunders, of which he has no small Number.

⁵ See the fine Comparison of *SOLOMON* between a Thief and an Adulterer, *Proverbs vi. 30, &c. GROTIUS.*

⁶ *PHILO* the *Jew* observes, that every Passion does indeed put the Soul out of its natural Situation, or transports a Man out of himself, and is a Kind of Disease, but that none of them is stronger and more dangerous, than Concupiscence; because it is the only one, that has its Source in our own Hearts and Wills, whereas the other Passions arise, as it were, from without, and in a manner make their Entrance in Spite of us. *De Decalogo. (p. 764. Edit. Paris.) GROTIUS.*

⁷ This is a Maxim of the Stoicks, who add, that he that has one Virtue has them all. *DIOGEN. LAERT. Lib. VII. § 125.*

dance of Riches. But Distinctions that raise us above others, as they are separated from Virtue and Profit; and Revenge, ⁸ are imaginary not real Goods: And the more they deviate from Nature, the worse and more detestable they are. And these three Appetites St. John expresses in these Words. ^b ἐπιθυμία σαρκός, ἐπιθυμία τῶν ὀφθαλμῶν, ἀλαζονεία τῆς βίης. *The Lust of the Flesh, the Lust of the Eyes, and the Pride of Life.* The first whereof comprehends the Desire of Pleasure, the second of Profit, the third of Vain-Glory and Resentment. And ⁹ Philo in his Exposition of the Decalogue derives all that is Evil from *Desire of Riches, Honour, or Pleasure.* And Lactantius in his sixth Book makes *all Virtue to consist, either in restraining our Anger, in bridling our Lusts, or in moderating our Avarice.* For almost all our unjust and wicked Actions do spring from these Affections. And this is what he repeats elsewhere.

XXX. 1. The Cause which in general ought to restrain a Person from offending is Injustice. For we are not treating here of every Sort of Offence, but of those which have Relation to some other Person besides that of the Offender. Now the greater the Damage is, that is done to another, the greater is the Injustice. Therefore Offences actually consummated hold the first Place, the next those which have proceeded to some Acts but not to the last of all; amongst which that is the most heinous which has proceeded the farthest. In either Kind that is the most notorious Injustice which disturbs the publick Order, and therefore hurts the most: Next to it is that which touches particular Persons; with Respect, in the first Place, to their Life; in the second, to their Family, the Foundation of which is Marriage; in the last, to particular Goods and Effects whose Possession is desirable, whether by directly taking them away, or by causing Damage in any fraudulent Manner.

2. These Things are capable of a more subtle Division; but the Order we have observed is that which GOD himself has followed in the Decalogue. For under the Name of Parents, who are our natural Magistrates, it is reasonable to understand other Rulers also, by whose Authority human Society is preserved. After this follows the interdicting of Manslaughter; then the Establishment of Matrimony, by prohibiting Adulteries: Then Thefts and Falshoods; in the last Place Offences not consummated and imperfect. Now among the Causes restraining, Consideration must be had not only of the Quality of what is directly done, but also of what may probably follow; as in the Attempt of setting a Town on Fire, or breaking down a Dam, we ought to regard the extream Calamities and Deaths of a Multitude of People.

3. To that of Injustice, which we have laid down as a general restraining Cause, there is sometimes annexed some other Vice, as for Instance, want of Affection towards

XXX. And Causes too which ought to restrain us: Whereof the Degrees of the Precepts in the Decalogue with Respect to our Neighbour and some other Things.

⁸ SENECA, *Epist. XVI.* Our natural Wants have some Bounds to them, but those that result from a false Opinion are infinite. See St. CHRYSOSTOM, in *Tract. Moral.* ad Rom. vi. ad 2 Cor. xi. 12. ad Ephes. i. 14. GROTIUS.

⁹ This Passage has been inserted above with several Things preceding it, *Lib. I. Cap. II. § 8. Num. 9. Note 43.* The Passage of LACTANTIUS is in *Instit. Divin. Lib. VI. Cap. V. Num. 13.*

XXX. (1) There is a little Note here in the Original, that has a pleasant Mistake in the writing of it. It is: *Vide locum insignem in Lucæ verbis apud XIPHILINUM ex DIONE.* This is in the Edition of 1642. the last before the Author's Death, to which that of 1646. which followed it, is conformable. In the later Editions, as it was not known what this *Lucæ* meant, it was changed into *Lucii*; and because XIPHILINUS has abridged the Lives of the Emperors, the Word *verbis* has been changed into *vita*. The Corrector ought to have been so good as to inform us who this *Lucius* is, and in what Part of his Work the Abridger has writ his Life. Or rather, he ought to have left *verbis*, and found Words agreeable to the Subject, in the Discourse of Somebody, whose Name, by Mis-

take, might have been confounded with that of LUKE. I believe I have made this Discovery. MARCUS ANTONINUS, having received Advice of the Revolt of *Cassius*, makes a fine Harangue to his Soldiers, and tells them amongst other Things: "Is it not a very hard Fate to be obliged to maintain War upon War? Is it not strange to see one's self engaged in a Civil War? But is it not harder, and more strange, to find, that there is no longer any Fidelity in Man, and that he, whom I looked upon as my best Friend, rises up against me, and lays one under the Necessity, contrary to my Inclination, of taking Arms against him, without having ever done him the least Injustice, or failed in any Thing whatsoever in regard to him?" P. 277. *Edit. H. Steph.* He says afterwards that *Cassius* has violated the Laws of Friendship, p. 278. D. This squares perfectly well with our Author's View; which is to shew, that there are Circumstances, relating even to the Person of the Criminal, which make his Crime more odious. Hence it is not difficult to conceive how this Error in the Writing crept in. The Author, (or perhaps the Person, who copied his Notes, when he sent them to the Press) intending to say in *Marci verbis*, may

towards Parents, Inhumanity to Relations, Ingratitude to Benefactors, which aggravate the Offence ². The frequency of the Offence is still a stronger Indication of a depraved Mind; because an evil Habit is worse than a single Act. And hence we may understand how far the Practice ³ of the *Persians* was agreeable to natural Equity, ⁴ that the preceding Course of Life be brought into Account with the Offence itself. For this ought to take Place in those who, being innocent in other Respects, have been on a sudden prevailed upon by some Temptation to commit a Crime; not in those who have perverted their Whole Course of Life: With Respect to whom GOD himself says in *Ezekiel*, ^a that he makes no Account of their former manner of Life, and to whom therefore may be applied that of *Thucydides*, ⁵ *They deserve double Punishment in that from being good Men they are become bad*: Because, as he says in another Place, ⁶ *They have acted in a Manner unworthy of themselves*.

^a C. xviii. v.
24.

4. And therefore the antient Christians did very well to require that in proportioning of ecclesiastical Punishments, they should not look upon the ⁷ bare Offence, but at the same Time also the Course of Life both before and after the committing it, as appears from the *Ancyran* and other Councils. But, besides, when a Law is made against that which is in itself a ^b Vice, it superadds a special Aggravation to it; as St. *Austin* shews in these Words, ⁸ *The Prohibition of a Law renders all Offences doubly criminal. For to be guilty of what is not only bad in itself, but also forbidden, is not to be reckoned a single Sin*; and *Tacitus* in these, ⁹ *If you are for doing what is not yet forbidden, you may fear lest you may be forbidden: But if you transgress in Things actually prohibited, with Impunity, there is neither Fear nor Shame remaining to restrain you*.

^b Rom. vii. 13.

XXXI. The Capacity also of the Offender either for one or the other, which Capacity is variously considered.

XXXI. 1. The Fitness of a Person, either to reflect upon the Causes that might restrain from offending, or to receive the Affections that excited to it, is usually observed from the Constitution of the Body, the Age, Sex, Education, and Circumstances of the Act itself. For Children and Women, and People of a dull Disposi-

have confounded the Name of one Evangelist with that of another. Those Names which were familiar to him, might easily come into his Thoughts in a mere Citation, writ in haste and without attending to Things themselves. This Observation will help to discover the Origin of some other Mistakes, which occur either in the Text or Notes of our Author. He might have added a Passage of *ARISTIDES* very applicable here, and is in a Discourse, which he sometimes cites in this Chapter: "No Man, says that Orator, suffers Injuries patiently; but the most sensible, and such as excite implacable Repentment, are those we receive from them who ought to be the farthest from committing them." *Orat. Leuct. II. Tom. II. p. 144.*

2 The following Passage is cited by our Author in a Note, but without saying from whom: "To have been once ignorant of the Duties of Life, is the Effect of human Frailty: But to fall often into the same Faults is Madness. For the more Faults we commit, the more rigorously we deserve to be punished." These Words are a Fragment of the twenty first Book of *DIODORUS SICULUS*, and are to be found in *Num. 15.* of the Collection made of those Fragments. *QUINTILIAN* has a Thought of the like Nature in *Declam. CCCX.* And in *Declam. CCXLVIII.* &c.

3 If in the Course of the guilty Person's past Life the Good outweighed the Evil, he was treated with Favour. This we have from *HERODOTUS*, *Lib. I. Cap. CXXXVII.*

4 *ASINIUS POLLIO* said, *That a Man is to be judged by the general Tenour of his Conduct and Inclinations.* *CICERO* also maintains, *That in all important and enormous Affairs, Judges are to consider the Will, the Intention, and the Deed of the Person accused, not from the Crime laid to his Charge, but from his Manners and general Conduct.* *Orat. pro P. Sylla. (Cap. XV.) GROTIVS.*

Our Author does not say from whence he has taken this Fragment of *ASINIUS POLLIO*: I can find it neither in *QUINTILIAN*, nor elsewhere. But as to the Matter itself we may add to the Authorities alledged by our Author, and by *PUFENDORF* in the Chapter which answers to this, (§ 22.) *CICERO, De inventione, Lib. II. Cap. XI.* And *APULEIUS, Apolog. Num. 891. Edit. Scip. Gentil.*

5 One of the *Lacedemonian Ephori* says this in Relation to the *Athenians*, who boasted of their Promises against the *Medes*, *Lib. I. Cap. LXXXVI. Edit. Oxon.*

6 *Lib. III. Cap. LXVII.*

7 The twenty fifth Canon of the Council of *Ancyra*. *St. CHRYSOSTOM* upon *2 Cor. ii. ὁθεν μανθάνομεν, &c.* From whence we learn that Penance ought to be determined and proportioned, not only according to the Nature of the Sins, but also according to the usual Inclinations and Carriage of the Persons sinning. And in his third Book *De Sacerdotio: ὃ ἡ ἀπλὴν, &c.* For we must not suit the Punishment to the Measure only of the Offences, but we must inquire too into the Disposition of the Offender. *GROTIVS.*

8 *De vera Relig. Cap. XXVI.* *St. CHRYSOSTOM* comparing the *Jews* with the *Greeks* or *Pagans*, says with Reason, that the *Jews* are most criminal, because they have the Law of GOD: And adds, that he who has had most Instruction, deserves to be punished the most severely when he violates the Law. *GROTIVS.*

9 *Annal. Lib. III. Cap. LIV. Num. 4.* This Passage is not to the Purpose. For the Historian is not there speaking of the Vertue of the Prohibition of a Law to render that more criminal, which is already bad in itself, but of the Effect that proceeds from Impunity, in regard to those, who venture to transgress notwithstanding the Prohibition.

tion, and of a bad Education, do not so well distinguish just from unjust, lawful from unlawful. And again, those in whom Choler abounds are subject to Anger, as those of a sanguine Constitution are to Lust; besides, the Inclinations of Youth and old Age are different. Thus *Andronicus Rhodius*, ¹ *The natural Disposition of a Man seems to plead somewhat in his Excuse for doing amiss, and to render his Offence more tolerable.* The Thought of an imminent Evil increases Fear, and the Sense of a fresh Injury inflames Anger, so that those Passions will scarce ever suffer Reason to be heard; and the Offences occasioned by such Affections are in Truth less odious than those which arise from the Desire of Pleasure, which on the one hand is not altogether so violent, and on the other may be put off, and easily ² without Injustice find another Matter to work upon. To which Purpose is that of *Aristotle* in the seventh Book of his *Nicomachia*, ³ *Anger is more natural than a Desire of superfluous and unnecessary Things.*

2. For this must be always observed, that the more the Judgment is hindered in making its Choice, and the more natural the Causes are by which it is hindered, the less is the Offence. So *Aristotle* in the fore-mentioned Book, ⁴ *A Man, who, being not at all, or but lightly moved by an impulse of Desire, seeks after forbidden Pleasures, or flies at the approach of a slight Pain, I call more intemperate than one who is urged by a vehement Passion. For what may not such a one be supposed to do, if he was to feel the Violence of Juvenile Affections, or were oppressed with the Want of those Things which it is grievous for Nature to be without? With which agrees that of Antiphanes,*

⁵ *If when he is Rich* ⁶ *he acts such Villany,*
What would he do if urg'd by raging Want?

As also what we frequently read in Comedies of the Amours of old Men. From these Causes therefore it is that we are to examine the Merit of the Offence, and accordingly to settle and determine the Punishment.

XXXII. 1. But here we must observe, that what the *Pythagoreans* assert, that Justice is ¹ *τὸ ἀντιπαινεῖν τοῦ θός*, that it consists in Retaliation, or a Suffering by Way of Punishment just as much as is the Mischief one does, must not be so understood as if he who has deliberately and without such Reasons as very much lessen the Crime, done a Damage to another, ought himself to suffer the same Damage and no more. For that this is not so, that very ² Law, which is the most perfect Pattern of all Laws, shews, when it commands Theft to be punished with a four-fold or five-fold Restitution. And by the *Athenian* Law a Thief, ³ besides the Penalty of double Damage, was imprisoned for some Days, as *Demosthenes* against *Timocrates* shews. Laws, says St. *Ambrose*, ⁴ *Command that those Things that are stolen from any one, be restored by inflicting corporal Punishment upon the Person, or by laying a greater Mulct upon him than the Thing stolen was valued at, to the End they may either by the one deter, or by the other discourage a Thief from stealing.* *Aristides*

XXXII. *That the Punishment may exceed the Proportion of the Damage done and robbery.*

² *Exod. xxii. 1, &c.*

⁴ *Offic. Lib. III. Cap. III.*

XXXI. (1) *In Paraph. (Lib. VII. Cap. X. p. 444. Edit. Heins.)* GROTIUS.

2 Lust, says St. CHRYSOSTOM, requires to be satisfied by the Company, not of this or that particular Woman, but of any Woman whatsoever. *In Galat.* TERTULLIAN observes, that the more difficult it is for unmarried Persons to preserve their Continency, the more excusable they appear when they fail in it. For, adds he, what is hard to perform, is easily excused. But the more easy it is for a Woman to marry lawfully, the more culpable she is in falling into a Sin which she might thereby have avoided: *AD UXOR. Lib. I. (Cap. I. and III.)* See the Passage of MARCUS ANTONINUS referred to a little above, in which that Emperor cites the Philosopher THEOPHRASTUS. GROTIUS.

3 *Cap. VII. p. 92. B. Tom. II. Edit. Paris.*

4 *Cap. VI. p. 90.*

5 This Sentence, which our Author cites only in two Latin Verses of his own, is taken from STOBÆUS, and is in the Original thus,

*Ὅταν ἐυπορῶν τις ἀσχερὰ πλεῖστη πραγμάλᾳ,
τί τῶτον ἀπαρήσαντα πλεῖζεν προσδοκᾷ.*

Florileg. Tit. II. De Malitia.

6 “When you see (says St. CHRYSOSTOM) a rich Man unjust, avaricious, and griping, lament his Fate the more, because being rich he is guilty of such Crimes; for his Punishment will be so much the greater.” *De provident. Lib. IV. GROTIUS.*

XXXII. (1) Or, as HARMENOPULUS expresses it *ταῦτο πάθειαι.* (*Promptuar. Lib. I. Tit. II. § 34.*) GROTIUS.

2 An Allusion to this Restitution of Double is made in the *Revelations* xviii. 6. APOLLODORUS tells us, that the *Minyans* having unjustly extorted a Tribute from the *Thebans*, *Hercules* obliged them to return them double the Value of it. *Bibliothec. Lib. II. (Cap. III. § 11. Edit. Th. Gal.)* GROTIUS.

^c (Tom. II. p. 133.) in *Leuētr.* II. ^c says, to those who prosecute injurious Persons in a judicial Way, the Laws allow greater Damages by Way of Revenge than they sustained. And Seneca, speaking of the Judgment after this Life, says,

³ *The Punishments*

Do there exceed the Greatness of our Crimes.

2. Among the *Indians*, as *Strabo* ⁴ observes, he that had maimed another, was, besides the suffering of Retaliation, to have his Hand cut off. And in the great Morals which go under the Name of ⁵ *Aristotle*, we read, *It is not reasonable that he who has put out another's Eye, should only be punished with the Loss of his own, but that he likewise suffer something more.* Neither indeed is it equitable that the injured and the injurious Person should suffer alike, as ^d *Philo* shews very well, where he treats of the Punishment of Manslaughter. And we find also that some Offences, tho' not consummated, and therefore less ⁶ than if they had been consummated, bear a Punishment suited to the Injury designed, as we have an Instance in the *Jewish Law* ^e concerning ⁷ false Witness, and in the ⁸ *Roman Law* concerning him who went armed with an intent to kill somebody. From whence it follows, that a severer Punishment should be contrived for Crimes actually committed; but since nothing can be severer than Death, and this cannot be repeated, as ⁹ *Philo* observes in the Place above-mentioned, one is obliged to stop here; however, there may sometimes be the Addition of Torments, according to the Heinousness of the Fact.

^a *Lib. II. De Special Legib. p. 789, &c.*

^e *Deut. xix. 19.*

XXXIII. *The Opinion of harmonical Proportions in Punishments rejected.*

^a *De repub. Lib. VI. Cap. ult.*

XXXIII. Now the Greatness of a Punishment is not to be estimated from what it is simply in itself, but with respect to the Person, who suffers it. For the same Fine that is burthensome to a poor Man, is not so to one that is Rich; and a Mark of Infamy which is but a trifle to a mean Person, is very gracious to a Man of Quality. This Diversity is very much considered in the *Roman Law*, upon which *Bodin* ^a framed his harmonical Proportion; whereas here is only a simple arithmetical Equality of the Demerit and the Punishment, as there is in Contracts, of the Goods and the Money, tho' the Goods may be worth more in one Place than another, and likewise the Money. But it must be owned, that often in the *Roman*

³ *Scelera taxantur modo
Majore nostra*

This Passage, which is taken from the *Hercules furiosus*, Ver. 746. is wrong applied, as the learned *GROŃOVIVS* observes. It should be read *vestra* according to the excellent *Florence Manuscript*, which he follows in his Edition. And the Sense of the Poet is, that Kings and Magistrates are more severely punished in the infernal Regions, than private Persons and common People.

⁴ *Lib. XV. p. 1036. Edit. Amst.* Other Nations of the *Indies* punish Theft with Death, as *NICOLAUS DAMASCENUS* observes. *GROTIUS*.

What our Author says here, upon the Authority of *NICOLAUS DAMASCENUS*, is not to be found amongst any of the Fragments of that Author, which have been collected from all Parts, nor even amongst those that he himself collected to send to *M. PEIRESC*, and which may be seen in his Letters, *Part I. Epist. CCLXIV.*

⁵ *Lib. I. Cap. XXXIV. p. 166. Vol. II. Edit. Paris.*

⁶ *PLINY* says of the Lion, that when he receives a Wound he observes with wonderful Sagacity the Person who gave it him, and singles him out amongst the greatest Crowd. But if the Person who aimed at him misses his Blow, he contents himself with throwing him down and dragging him along, but does not wound him. (*Hist. Natur. Lib. VIII. Cap. XVI.*) *GROTIUS*.

⁷ This appears too by the Law concerning a Husband, who to get his Wife's Portion, had accused her falsely of not being a Virgin. *Deuteronom. xxii. 19.* and also by another Law against him, who unjustly prosecutes a Person in order to possess him-

self of his Goods. *GROTIUS*:

The first of these Laws says, that the Husband shall not only keep his Wife without Power ever to repudiate her, but shall also pay a Fine of an hundred Shekels for the Benefit of her Father, that is to say, double the Portion, which the Husband gave in those Times to the Father of the Woman they married, as appears from *Genesis xxix. 18. xxxiv. 12.* and this Portion was generally settled at fifty Shekels, *Exod. xxii. 17.* So in the Case now before us, the Husband, who had endeavoured to dishonour his Wife by accusing her of Incontinency, was considered on the same Foot, as he who had actually deprived a Maid of her Honour by ravishing her, according to the Law in the same Chapter of *Deuteronomy*, ver. 28, 29. and his Punishment was still more rigorous, as he was obliged to pay double the Portion; whereas the other paid but fifty Shekels. In regard to the second Law, alledged here by our Author, for an Example, *Exod. xxii. 9.* it relates to a Trust: And ordains, that in case the Person, with whom any Thing is deposited, denies or retains it fraudulently, and is legally convicted thereof, he shall pay double to the Proprietor. On the contrary, if the Proprietor has accused him unjustly, he also shall be condemned to pay double the Value of the Thing deposited: Consequently, both the one and the other are punished, as if they had actually stolen the Thing deposited, as appears from *Verse 7.* of the same Chapter.

⁸ *Digest, Lib. XLVIII. Tit. VIII. Ad Leg. Cornel. de Sicariis, &c. Leg. I. Princ. § 3.* See the Observations of the illustrious Mr. *BYNCKER-SHOECK*, *Lib. I. Cap. X.*

⁹ *De Legib. Special. Lib. II. p. 789.*

Law

Law this is not done *ἀνευ προσωποληψίας*, that is, without too great a Respect had to Persons and Qualities no Ways relating to the Fact; a Fault from which the Law of *Moses* is entirely free. And this, as we said, is the intrinick Valuation and proportioning of a Punishment.

XXXIV. But that which induces Men to mitigate the Severity which the just Proportion between the Crime and the Punishment allows of, is their Charity for the Criminal, unless a juster Motive of Charity to many Persons incline them to the contrary for some intrinick Reason, which is sometimes the great Danger they are in from the Offender, but commonly the Necessity of making him a publick Example. Which Necessity usually arises when there are some general Encouragements to Vice, that cannot be repressed without sharp Remedies. Now the chief Encouragements are Custom and the easiness of committing the Offence.

XXXV. Upon account of this easiness the Law of GOD given to the Jews punishes Theft committed in a Field more severely than that which is committed in a House, *Exod. xxii. 1. 7. 9.* *Justin* says of the *Scythians*, No Crime with them was more severely punished than Theft; for to them who had neither Houses nor Inclosures for their Herds and Flocks, what Security could there be, if stealing was allowed of? Like to which is that in *Aristotle's Problems*, Sect. XXIX. The Law-giver considering that it was impossible for the Owners to have always an Eye on their Goods in those Places, appointed them the Law for a Keeper. The Custom of any Fact, tho' it somewhat takes off from the Crime (it was not without Reason, says *Pliny*, that he pardoned him for a Fact which was indeed forbidden, but yet commonly committed) yet in some Respect it requires a more rigorous Punishment, because as *Saturninus* says, When Offenders grow too numerous, there is a Ne-

XXXIV. That a Punishment is to be alleviated out of Charity, unless a greater Charity opposes it.

XXXV. How the easiness of offending inclines to Punishment, and how the Custom of offending either excites us to punish, or dissuades us from punishing.

XXXIII. (1) See the Chapter of PUFENDORF which answers to this, § 25.

XXXV. (1) See the Rabbi MAIMONIDES, *Director. Dubitant.* II. 41. CICERO says, that those Crimes deserve the greatest Punishment, which are the most difficult to be guarded against. *Orat. pro Sext. Rosc. Amerin.* (Cap. XL.) GROTIUS.

2 Lib. II. Chap. II. Num. 6.

3 Num. 14. p. 814.

4 At Athens, those who stole in Baths were punished with Death, if the Thing stolen were worth more than ten Drachmas, (that is, about two Crowns) as DEMOSTHENES informs us. *Orat. Advers. Timocrat.* See also *Digest.* Lib. XLVII. Tit. XVII. *De furibus balnearii*, Leg. I. GROTIUS.

The Law of Solon recited by DEMOSTHENES in the Place here referred to, is in p. 476. *Edit. Basil* 1572. That Law does not mention such as steal in Baths, but only those who robbed in the *Gymnasia*, or Places of Exercise, and in the Ports. The learned CASAUBON however in his Comment upon the Characters of THEOPHRASTUS, (Cap. VII. or *Περὶ λογοποιίας*, p. 81. *Edit. Needh.*) cites also this Law to prove the same Thing our Author finds in it: *Morte* (says he) *pledebantur apud Athenienses fures balnearii, si rei furtivæ æstimatio erat, ὥς ἐξ δέκα δεσχυρῶς, Ait Demosthenes contra Timocrat.* ALCIAT. before him. *Parerg.* Lib. II. Cap. XXXVIII. and PETER VITTORIO, *Var. Lect.* Lib. VII. Cap. XVII. had insinuated the same Thing: The great CUIJAS seems also to have been of the same Opinion. *Not. in PAUL. Recept. Sentent.* Lib. V. Tit. III. § 5. Nay further in the Collection of the *Athenian Laws*, compiled and digested by SAMUEL PETIT, Lib. VII. Tit. V. The Law in Question is recited with the Addition of some Words, which expressly mention those who steal in Baths: For after the Word *ὀφέλοιο* there is *ἐν τῶν βαλανείων*. I have not the Comment of that learned Gentleman, to see from whence he has taken this Addition; but in the various Readings of the last Edition of DEMOSTHENES, published by WOLFIIUS, which is the most ample we have, I find nothing, that intimates that the

Text is defective in this Place; and I am inclined to believe, that the Words *ἐν τῶν βαλανείων* have been supplied by Conjecture, on the Passage of ARISTOTLE, cited in the preceding Note. However it be, it is probably upon the Authority of the learned Persons I have mentioned, that our Author gives us the Fact, as founded upon the Law of Solon: For in another Place, where he mentions it, he only quotes the Passage of ARISTOTLE. See the *Florum Sparso ad Jus Justinian.* p. 189. *Edit. Amstel.* But unless there be some good Manuscript, or some other Passage of an antient Author, in which the Law of Solon is found, with the Supplement of the Words *ἐν βαλανείων*, there is no Reason in my Opinion to thrust them in by Conjecture. The Law specifies the Places; but does not intimate that it intends all those in general, where there might be the same Facility to steal; we ought to keep to what it declares. It might afterwards have been extended to Thefts committed in Baths, and other publick Places; but that was either by Vertue of a new Law, or of a long Custom, which acquired the Force of a Law, and which gives no Authority for ascribing such general Views to Solon. As to the *Fures balnearii* amongst the Romans, they were commonly condemned to the Mines, or other Works for the Use of the Publick. But the Punishment was sometimes less and sometimes also extended even to Death. See CUIJAS and Mr. SCHULTING upon the Passage in PAULUS the *Civilian*, to which I have referred above in this Note. Even in antient Times all Theft was punished with Death, if we may believe SERVIUS, from whom our Author cites these Words, in the Passage of his *Florum Sparso*, &c. before referred to. *Capitale enim crimen apud majores fuit [Furtum] ante poenam quadrupli.* In *Æn.* VIII. 205.

5 [*Epist.* Lib. IV. Ep. IX. Num. 17. *Edit. Cellar.*]

6 *Nonnunquam evenit, ut, &c.* *Digest.* Lib. XLVIII. Tit. XIX. *De Pœnis.* Leg. XVI. § 10. See the *Varie Lectiones* of WILLIAM DE RANCHIN, Lib. I. Cap. XI. where he had collected several Authorities upon this Head.

cessity for exemplary Punishment. But in passing of Judgments Clemency, in making of Laws Severity, ought to take Place, due Regard being still had to the Time when Laws are made or Judgments are passed. For the Benefit arising from Punishment is chiefly regarded, in regulating the Manner how a certain Sort of Crime is to be punished in general, and this the Laws do: Whereas in examining in what Manner each Criminal in particular is to be punished, one considers rather how great his Crime is.

XXXVI. *The use of Clemency in mitigating Punishments.*

^a Senec. De Clement. Lib. 1. Cap. 2. in fin.
^b Ibid. Cap. 20.

^c Cap. 24.

XXXVI. 1. Now what we said, that *Where there are not great and urgent Reasons to the contrary, we ought to be ready rather to mitigate the Punishment,* makes up the other Part of Clemency. For the former consisted, we told you, in the absolute Remission of the Punishment: *Because it is difficult to find the just Balance,* says Seneca, ^a *therefore let the Inequality be on the milder Side.* And in another Place, ^b *If it can be done safely, let the Punishment be quite remitted; if not, let it be moderated.* And in Diodorus Siculus, an Egyptian King is ^c commended for inflicting ² *less Punishments than the Crimes deserved.* Capitolinus ^c says of Marcus Antoninus, *That his Custom was to award to all Crimes a less Punishment than what by the Laws they used to be punished with.* Isæus the Orator said, that Laws ought to be made severe, but ³ that the Punishments should be gentler than the Laws require. And it is the Advice of ⁴ *Isocrates, That Punishments be inflicted below the Degree of the Offence.*

2. ⁵ St. Austin gives Marcellinus. in the Execution of his Office, this Counsel: *I am in a great Concern, lest perhaps your Highness should think that Criminals are to be punished according to the utmost Severity of the Law, that their Sufferings may be equal to their Crimes: And therefore in this Letter of mine I beseech you, by the Faith you profess in CHRIST, and by the Mercy of our Lord himself, that you do it not, nor permit it to be done.* The same Author has likewise this Passage; ⁶ *So terrible is the Threatning of Divine Judgment, even to the very Revengers of Crimes themselves, and who are not moved to this Office by any Provocation of their own, but are only the Executors of the Laws, and the Revengers not of their own, but other Mens Injuries, as Judges ought to be, to the End they might think that the Mercy of GOD is necessary on account of their own Sins, and that they might not look upon it as a Breach of their Duty, if they shew any Clemency to those over whom they have the Power of Life and Death.*

XXXVI. (1) It is in B. I. where he says, that after the publick Sacrifices, at which the Kings of Egypt were always present, the Chief Priest recounted the King's Virtues, amongst which he included that, which consists in not punishing the Guilty so rigorously as they deserve, and on the contrary in rewarding the Good beyond their Merit. *Bibliothec. Hist. Lib. I. Cap. LXX. p. 45. Edit. H. Steph.* So that it was an Encomium given to all their Kings, in order to exhort them indirectly to deserve it; as the Historian observes a little lower.

2 The Emperor Justin II. writing to the Huns, says, *That it was the Custom of the Romans to punish Offenders less rigorously than their Crimes deserved.* GROTIUS.

I find this in the Extracts of *Embassies* made by MENANDER, *Protector*, Chap. XIV. amongst the *Embassies* taken from the History of the Emperors Justinian, Justin, and Tiberius. But the Passage is in an Answer of the Emperor Justin, by Word of Mouth, to the Embassadors of Bajan, Prince of the Avarians; and not in a Letter writ to that People, who were Part of the Huns.

3 This is what the Emperor Henry I. designed by the Symbol of a Pomgranate with the Motto *Subacre, something sharp.* King Theodorick said, that it was dangerous to punish, but always safe to forgive. *Nam qui periculose justi sumus, sub securitate semper ignoscimus.* CASSIODORE, *Var. XI. 40.* GROTIUS.

Our Author recites the Words of ISÆUS in Latin only, and I find nothing like them in the Writings of that ancient Orator, which all turn upon

Civil, and never upon criminal Affairs: But as I found the Passage cited in Greek by FRIDERICK LINDENBROG, as well as that of CAPITOLINUS and ISOCRATES, in a Note upon the Words of AMMIANUS MARCELLINUS (XXVIII. 1.) which have been quoted above, (§2. Note 2.) I suspected in my Latin Edition of this Work, that our Author in this Place cited upon the Credit of that Commentator who gives us the Passage of ISÆUS, without saying from whence he took it, in these Words: *χρή τις νόμος μὲν τιθεῖσθαι σφοδρῶς παροτρύνει δὲ κολλάζειν, ἢ ὡς ἐκείνοι κελεύουσι.* Since that I have found it in STOBÆUS, *Serm. XLVIII. De Regno Admonit.* But neither is it mentioned there from whence it is taken. We must conclude therefore, that it is a Passage in some Oration, not now Extant.

4 *Orat. Ad Nicocl. p. 19. D. Edit. H. Steph.*

5 *Sic tamen etiam ipsos criminum ultores, &c. (Epist. LIV.)*

6 *Unde mihi sollicitudo maxima incussa est, &c. Ad Marcellin. Comit. Epist. CLIX.* which Passage is cited in the Canon Law, *Caus. XXIII. Quest. V. Cap. I.* See Macedonius's Letter to St. AUSTIN, and the answer of that Father, *Epist. LIII. and LIV.* The former demands, why it is the Duty of an Ecclesiastick to intercede for Criminals, as the Ecclesiastick believed it to be: *Officium Sacerdotii vestri esse dicitis, intervenire pro reis.* See what is said in regard to Theodosius the younger in the Extracts of JOHAN. ANTIOCHEN, taken from the Manuscript of Mr. DE PEIRESC (p. 850.) GROTIUS.

XXXVII. We hope we have omitted nothing that is of any great Moment towards the understanding this difficult and obscure Subject: For the four Things which ¹ *Maimonides* says are chiefly regarded in Punishments, viz. the Greatness of the Offence; that is, of the Damage, the Frequency of such Offences, the Vehemency of the Desire, and the Easiness of committing the Offence, we have referred to their proper Places; as also the seven Things about Punishments considered by ² *Saturninus*, tho' very confusedly. For as to what relates to the Person of the Offender, that Consideration principally belongs to the Capacity of Judging, and as to the Person who suffers the Injury, this conduces somewhat towards estimating the Greatness of the Fault. ³ The Place where the Injury was done, frequently adds some peculiar Aggravation to the Crime, or is considered under the Facility of committing it. The Circumstance of Time, as it is long or short, so it increases or diminishes the Freedom of Judging, and sometimes helps to shew the Depravity of the Mind. The Quality of the Offence is partly referred to the several Kinds of Desires, partly to the Reasons which ought to restrain a Man from ⁴ the Crime. The Event, to the Reasons restraining. And the Quantity ⁵ to the Nature and Degree of the Desires.

XXXVIII. That the Desire of inflicting Punishment is often the Occasion of War, we have shewn above, and we have many Instances of it in History. And this Reason of War is generally joined with that of Reparation of Damage, since the same Fact is generally both vitious in itself, and injurious to others; from which two Qualities there arise two different Obligations. Now that Wars are not to be entered into upon the Account of every Offence, is sufficiently clear; for indeed, even the Laws themselves do not exercise their vindictive Power upon all Offences, tho' they may safely do it, as hurting none thereby but those who are guilty. *Sopater* rightly observes, what we have likewise already mentioned; that smaller and common Offences ought to be passed by, not punished.

XXXIX. 1. But what was said by ¹ *Cato*, in his Oration for the *Rhodians*, that it is not reasonable a Man should suffer Punishment upon Account of having had an Intention to do ill, was indeed, in that particular Case, not observed amiss, because they could produce no Decree of the *Rhodians*, but had only some little Conjectures of a wavering and uncertain Design, yet this must not be received as a general Maxim. For the Intention of the Will, when it has proceeded to some external Actions, (internal Actions being, as we have said before, free from human Punishment) is usually a sufficient Ground for Punishment. *Crimes*, says ² *Seneca* the Father, in his *Controversies*, are punished, even tho' not put in Execution. And, He who intended to do an Injury, has done it already, ³ says the other *Seneca*. Not only the actual Accomplishment, but the very Contriving of Mischief, is punished by the Laws, said *Cicero*, ⁴ in his Defence of *Milo*. It was *Periander's* Saying,

XXXVII. What the Hebrews and the Romans had regard to in Punishments, may be referred to the Places above mentioned.

XXXVIII. Of War made for the exacting of Punishment.

XXXIX. Whether a War on the Account of Offences just begun is lawful; explained by a Distinction.

XXXVII. (1) *Director Dubitant*. Lib. III. Cap. XLI. See also the *Decretals*, Lib. V. Tit. XI. De Homicid. voluntar. vel casual. Cap. VI. GROTIUS.

² Sed hæc quatuor consideranda sunt septem modis: Causâ, personâ, loco, tempore, qualitate, quantitate, & eventu. Digest. Lib. XLVIII. Tit. XIX. De Pœnis, Leg. XVI. § 1.

³ *PHILO* the Jew observes, that Circumstances render a Crime more or less enormous. For Example, says he, it is not the same Thing whether you strike your Father or a Stranger; whether you speak ill of a Magistrate or a private Person, or do an unlawful Thing in a profane or sacred Place, upon a Festival or another Day. De legib. special. Lib. II. (p. 805.) The same Thing may be found in a Law of the Digest. Persona atrocior — nam populi Romani. [Our Author reads it thus, with Reason, instead of *Prætoris*, in which he follows *Cujas's* Correction. *Observ.* IX. 16.] In conspectu an. &c. Digest. Lib. XLVII. Tit. X. De injuriis & famosis libellis, Leg. VII. § 8. GROTIUS.

See the Observations of Mr. BYNKERSHOEK, Lib. I. Cap. VIII.

⁴ The more attentively a Man considers a bad Action which he designs to commit, the more ought he to be shocked at the Turpitude of it.

⁵ The more violent the Desire is, the more eager we are, for Instance, to steal a large Sum of Money.

XXXIX. (1) *Noct. Attic.* Lib. VII. Cap. III. p. 384. Edit. Gron. 1706.

² *Excerpt. Controv.* IV. 7. This was not a general Rule. See above, § 18. Note 1.

³ *De Ira*, Lib. I. Cap. III. He says elsewhere, that a Highwayman is such, even before he robs and murders Travellers, because he intends to do so. Sic Latro est etiam antequam, &c. De Benefic. Lib. V. Cap. XIV. *PHILO* the Jew says, that not only those who kill are to be deemed Murderers, but even those who either openly or privily do all they can to deprive any one of Life, tho' they have not as yet executed their Design. De legib. special. Lib. II. (p. 790). GROTIUS.

⁴ *Orat. pro Milon.* (Cap. VII.) A Roman was accused

⁵ Punish not only Offenders, but such as design to offend. So the Romans thought they had just Occasion for entering into a War against King *Perseus*, unless he would make Satisfaction for ⁶ designing Hostilities against them, as having for that Purpose provided himself with Arms, Men, and a Fleet. And this very Thing is rightly observed in *Livy*, ⁷ in the Speech of the *Rhodians*; no Customs or Laws of any State in the World punish a Man with Death, if he only intended the Destruction of his Enemy, without having done any Thing towards the Execution of it.

2. But neither is every bad Intention, tho' already declared by some Act, a sufficient Ground for Punishment: For if all Offences, tho' actually committed, are not punished, much less ought those to be punished, that are only projected, and commenced. What *Cicero* says, does in many Cases take Place, ⁸ *I do not know whether it be not sufficient for him who gave the Provocation to repent of his Injury*. In the Jewish Law there is no particular Punishment appointed for Offences that relate to Religion, or tend to take away a Man's Life, when the Execution is not full and compleat; unless as to the latter, when ⁹ an Attempt is made in a judicial Way; because it is easy to mistake in divine Matters, as being Things that do not fall under our Senses; and a sudden Transport of Anger may have a reasonable Plea for Pardon.

3. But yet for any one to attempt the Invasion of the Marriage Bed, when there was so great a Choice of Matches; or in such an equal Division of Possessions, to go about by fraudulent Methods to enrich one's Self at another's Loss, was a Thing by no Means to be suffered. For that Law in the Decalogue, *Thou shalt not covet*, (tho', if you look to the Scope of the Law, that is, the τὸ ἀνδροματικόν, or *Spirituality* of it, it is of larger Signification, ¹⁰ for the Law requires a perfect Purity of Mind in all) yet as to what relates to the external Precept, the ἐπιβολὴν ὁρμητικὴν, or *Carnal Command*, it refers to such Motions of the Mind, as are discovered by open Acts, as is very evident from the Evangelist *St. Mark*, x. 19. who expresses that same Precept by the Words, *Μὴ ὑποσερήσης*, *Defraud not*, and that, when he had before mentioned, *Μὴ κλέψης*, *Do not steal*: And in this Sense the *Hebrew* Word, and the *Greek* answering to it, are found both in *Mich. ii. 2.* and several other Passages.

4. And therefore Offences that are only begun, are not to be revenged by Arms, unless in a Case of great Concern, or that the Affair proceeded so far, that the Action has been already attended with some mischievous Consequences, tho' not those, as yet, which were intended, or at least with some extreme Hazard; that so it may appear, that we have Recourse to this Method only, either to prevent some future Mischief, (of which we have treated above, on the Head Of *Self-Defence*) or to vindicate a wounded Honour, or to obviate a pernicious Example.

XL. 1. We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, which at first, as we have said, was in every particular Person, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme

XL. Whether it be lawful for Kings and States to make War upon such as violate the Law of Nature, tho' they have committed nothing against them, or their Subjects; this explained, and the Opinion that would have Jurisdiction naturally necessary towards Punishing rejected.

accused and condemned, for having only promised a Lady Money, without having gratified his Desires with her. *VALERIUS MAXIMUS* says, on that Occasion, that it was not his Fact, but his Design, that was called in Question; and, that it was more disadvantageous to the Criminal, to have intended, than advantageous not to have committed, the Crime. *Metellus quoque Celer stuprosæ mentis acer punitor extitit*, &c. (Lib. VI. Cap. I. Num. 8.) *GROTIUS*.

⁵ *DIAGENES LAERTIUS*, Lib. I. § 98.

⁶ *Quodque belli parandi adversus Populum Romanum*, &c. *LIVY*, Lib. XLII. Cap. XXX. Num. 11.

⁷ *Neque moribus, neque legibus, ullius civitatis ita comparatum esse*, &c. Lib. XLV. Cap. XXIV. Num. 3.

⁸ *Est enim ulciscendi & puniendi modus*, &c. De Offic. Lib. I. Cap. XI.

⁹ *Extra judicium*. Our Author means here the Law of *Deuteronomy*, in Regard to false Witnesses, xix. 19. which he has cited above, § 32. Num. 2.

¹⁰ *St. CHRYSOSTOM* has several Things to this Purpose, upon *Rom. iii. 13.* and upon *Chap. viii.* *GROTIUS*.

Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For, as for others, their Subjection has taken from them this Right. Nay, it is so much more honourable, to revenge other Peoples Injuries rather than their own, by as much as it is more to be feared, lest out of a Sense of their own Sufferings, they either exceed the just Measure of Punishment, or, at least, prosecute their Revenge with Malice.

2. And upon this Account it is, that *Hercules* is so highly extolled by the Antients, for having freed the Earth ¹ of *Antæus*, *Busiris*, *Diomedes*, and such like Tyrants, *Whose Countries*, says *Seneca* ² of him, *he passed over, not with an ambitious Design of gaining them for himself, but for the Sake of vindicating the Cause of the Oppressed*; being, as ³ *Lysias* shews, the Author of great Good to Mankind, by punishing the Unjust. ⁴ *Diodorus Siculus* speaks thus of him, *He made States happy, by purging out of them unjust Men, and insolent Princes*. In another Place he says, ⁵ *He travelled over the World to punish the Wickedness of Men*. Of the same Person is that of *Dion Prusænsis*, *He punished bad Men; and either destroyed the Dominions of proud Tyrants, or transferred them upon others*. And for the general Care he took of all Mankind, *Aristides*, in his *Panathenaic Oration*, says, he deserved to be taken into the Number of the Gods. In like Manner is ⁶ *Theseus* commended for having destroyed the Robbers *Sciron*, *Sinis*, and *Procrustes*, and is therefore introduced by *Euripides*, speaking thus of himself, *In his Suppliants*,⁷

^a De Benef. 1.
1. c. 13. See
Isocr. Hel. Enc.

^b Lib. 5. c. 76.
p. 236. Ed. H.
Steph.

*My Acts of old have spread my Fame thro' Greece,
Where I, The Scourge of Villainies, am stiled.*

Valerius Maximus says of him, ^c *Every Thing that was monstrous or wicked, he subdued by the Bravery of his Mind, or the Strength of his Body*.

^c Lib. 5. c. 3.
n. 3. ext.

3. For the same Reason we make no Doubt, but War may be justly undertaken against those who are inhuman to their Parents, as were the ⁶ *Sogdians*, before *Alexander* persuaded them to renounce their Brutality ⁷; against those ⁸ who eat human Flesh, from which Custom ⁹ *Hercules* compelled the antient *Gauls* to desist,

as

XL. (1) And the Seas too, *PHILO*, *De legat.* *Ἡερακλῆς ἐκάρηγε γῆς, &c.* *Hercules cleared both Sea and Land, undertaking Enterprizes necessary and advantageous to all the World, Enterprizes designed purely for the Destruction of every Thing that was hurtful and pernicious amongst Men and Beasts.*

GROTIUS.

² Orat. XXXI. seu Funobr. Cap. V.

³ Lib. IV. Cap. XVII. p. 157.

⁴ See PLUTARCH, in his Life. Tom. I. p.

4, 5.

⁵ (Ver. 339, 340.) When the Herald says there,

Ἥ παῖσιν ἔν σ' ἔφυσεν ἀρχήσιεν παλῆρ.

*Did you from your Father this Vigour gain,
Was't he who made you thus a Match for all?*

Theseus replies,

Ὅσοι γ' ὕβρισταί χερσὶ δ' ἔκκολάζομεν.

*For all who are injurious. But we ne'er
Molest the Good.*

PLUTARCH, in his Life, *Ἀπὸ ἑλλάδι τινῶν* *He delivered Greece from some terrible Tyrants*. And again, *δὲν αὐτός, &c.* *Without being any ways injured himself, to vindicate others, and, for their Security, he employed his Arms against the Wicked.* GROTIUS.

⁶ PLUTARCH, *De fortuna Alexandr.* Tom. II. p. 328.

⁷ The same may be said of those who kill Strangers that come to dwell amongst them. This Example, which is in the first Edition, is restored by Mr.

BARBEYRAC, having been left out in all the other Impressions. The Omission he thinks was occasioned by the Authorities added after each Example, which either caused the Author inadvertently to strike out the Words *Hospites occidunt*, or the Printer to skip over them through Mistake. Our Author, without Doubt, had in View what is related of the *Scythians*, who sacrificed Strangers, and eat them, making Cups afterwards of their Skulls. STRABO, *Geograph. Lib. VII. p. 460. B. Edit. Amstel. (300. Edit. Paris.)* See also LACTANTIUS, *Inst. Divin. Lib. I. Cap. XXI.* where he speaks of the *Taurians*, a People of *Scythia*, beyond the *Euxine Sea*, amongst whom was a Law, that all Strangers who came into their Country, should be sacrificed to *Diana*. *Erat lex apud Tauros, inhumanam & feram gentem, uti Dianæ hospites immolarentur.* And OVID mentions this Practice as subsisting in his Time, *Lib. IV. Trist. Eleg. IV. ver. 63, 64.*

⁸ *Alexander the Great* reclaimed the *Scythians* also from this Custom. GROTIUS.

PLUTARCH, from whom our Author, no Doubt, takes this, says, that *Alexander* taught the *Scythians* to bury, and not to eat their Dead. *De fortun. Alexandr. p. 328. C.* In Regard to the Thing itself, see what I have said on PUFENDORF. *Law of Nature and Nations, B. VIII. Chap. VI. § 5. Note 5.*

⁹ See an Account in DIONYSIUS HALICARNASSENSIS, how *Hercules* abolished this, and many other inhuman Customs, making no Distinction in his Favours between *Greeks* and *Barbarians*. PLINY XXX. 1. crys up the no less Merit of the *Romans*, for the Good they did Mankind, *It cannot*

5 T

be

vii. De Beneficiis.

^d This he says in Regard to the Maxims of judicial Astrology. De civit. Dei, l. 5. c. 1.

as *Diodorus* relates; and against those who practise Piracy. If a Man, says *Seneca*, does not infest my Country, but is only vexatious to his own; tho' he is at a Distance from my Nation, yet if he disturb his own; so great a Depravity of Mind has cut him off from human Society, and makes him to me, and all the World, a Foe. And *St. Augustin*, ^a Such abominable Crimes do they allow of in their publick Decrees, that if any City upon Earth should injoin, or had enjoined, the like, it ought to have been, by the general Voice of Mankind, laid in Ruins. For of such Barbarians, and rather Beasts than Men, may be fitly said what ¹⁰ *Aristotle* spoke out of Prejudice concerning the *Persians*, who were indeed nothing worse than the *Greeks*; that War against such is natural; and as *Isocrates* said in his *Panathenaic*, ¹¹ the justest War is that which is undertaken against wild rapacious Beasts, and next to it is that against Men who are like Beasts.

4. And so far we follow the Opinion of *Innocentius*, and others, who hold that War is lawful against those ¹² who offend against Nature; which is contrary to the Opinion of *Victoria*, *Vasquez*, *Azorius*, *Molina*, and others, who seem to require, towards making a War just, that he who undertakes it be injured in himself, or in his State, or that he has some Jurisdiction over the Person against whom the War is made. For they assert, that the Power of Punishing is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature, concerning which Point we said something in the Beginning of the first Book. ^c And certainly, if the Opinion of those from whom we differ be admitted, the Consequence is, that one Enemy shall have no Right to punish another, even ¹³ after the War is begun, upon the Account of any Cause that has no Relation

^c Ch 2. § 1. & § 5. n. 3.

be sufficiently expressed, says he, how much is owing to the Romans, for destroying those Monsters, who imagined it an Act of great Devotion to murder a Man, and thought it very much for their Health to eat him when they had done. Add to this what we shall say in this Chapter, Sect. XLVII. Num. 9. So *Justinian* commanded the Princes of the *Abasgi*, not to castrate their Subjects Children. *PROCOPIUS* mentions this Affair, *Gothic*. IV. and *ZONARAS*, in his Life of *Leo-Isaurus*. And the *Incha's*, Kings of *Peru*, compelled by Force of Arms the neighbouring Nations, whom they could not reclaim by their Admonitions, to abstain from Incest, Sodomy, Eating of Man's Flesh, and such like abominable Practices, and by this Means obtained an Empire, of all we read of, excepting their Religion, the justest. *GROTIUS*.

Our Author, in the Text, gives us what he says of *Hercules*, upon the Authority of *DIDORUS SICULUS*, in whom we find nothing of it. He means *DIONYSIUS HALICARNASSENSIS*, as appears by this Note, which he added afterwards, without striking out the false Citation in the Text. But this other Historian is not more to the Purpose alledged, for he says directly the contrary of what he is called to attest. He tells us, that the Custom of offering up human Victims to *Saturn*, subsisted Even in his Time, amongst the *Gauls*, and other Western Nations. *Antiquit. Roman.* Lib. I. Cap. XXXVIII. p. 30. *Edit. Oxon.* Our Author therefore has confounded the *Gauls* with the antient Inhabitants of *Italy*, of whom it is said immediately after, that *Hercules* persuaded (not compelled) them to offer to *Saturn*, instead of human Victims, the Images of Men, which they were to throw into the *Tyber*. He might have remembered, that *JULIUS CÆSAR*, in his Description of the Customs and Manners of the *Gauls* of his Time, expressly says, that when they were afflicted with any grievous Malady, or other Danger, they either offered up human Victims, or made Vows to do so, to their false Deities. *Atqui ob eam causam, qui sunt affecti gravioribus morbis, &c.* *Bell. Gall. Lib. VI. Cap. XVI.* *CICERO* is also express upon that

Head, in his Oration *pro Fonteio*, Cap. X. See *HOTTOMAN* and *CIACCONIUS* upon the Passage of *CÆSAR*.

¹⁰ *ARISTOTLE* does not directly say the *Persians*, but the *Barbarians* in general; a Name which the *Greeks* gave to all other Nations. The Passage which our Author has in View, is in that Philosopher's *Politics*, where he says, that War, which he considers as a Species of Hunting, is naturally just against those People who are naturally formed for obeying, or, as he terms it, naturally Slaves. *Lib. I. Chap. VIII. p. 304. D. Vol. II. Edit. Paris.* He had said before, after the Poets, that *Slave* and *Barbarian* were the same. *Cap. II. p. 297. C.*

¹¹ Τὸν δὲ πόλεμον ἀπελάμβανον, &c. That is, "The most necessary and just War, in the Opinion of our Ancestors, is first, that which all Men make upon wild Beasts; and next, that made by the *Greeks* upon the *Barbarians*, who are naturally our Enemies, and are perpetually laying Snares for our Ruin." *Orat. Panathen. p. 460.* We see from this, that our Author does not give us exactly the Sense of the Passage.

¹² See *JOSEPHUS ACOSTA*, *De procuranda Indorum salute*, Lib. XI. Cap. IV. *GROTIUS*.

¹³ *Etiam post susceptum bellum ex causâ non puniendâ.* So it is in all the Editions before mine, in which I have thus restored the Text, *Post juste susceptum bellum.* The Reasoning required the Addition of that Adverb, which had been manifestly omitted through the Fault of the Printers. The Author reasons upon the Supposition of the Opinion's being true that opposes his own; so that, on this Supposition, no War is to be undertaken on Purpose to punish him against whom we take Arms; and yet this is what the Expression of the Text, as it stands, supposes. Besides, there is more Reason to doubt the Right of Punishing, in a War undertaken for some Cause that has no Relation to Punishment, than in a War expressly commenced to punish him against whom we take Arms; and yet the Word our Author uses here, plainly supposes the contrary. In that Case 'tis had been necessary to say, *saltem*, at least, and not *etiam*, even. In

tion to Punishment, which yet is a Right that most allow of, and the Practice of all Nations confirms, and that not only after the Enemy is subdued, but likewise during the War; not on Account of any Civil Jurisdiction, but of that natural Right which was both before the Foundation of Governments, and even is now still in Force in those Places, where Men live in Tribes or Families, and are not incorporated into States.

XLII. But here some Precautions are to be observed; the first of which is, that Civil Customs, tho' received among many Nations, not without good Reason, be not mistaken for the Law of Nature; much of which Kind were those which caused the Difference between the *Persians* and *Greeks*, to which may be properly referred what is said by *Plutarch*, ¹ *They disguise their Ambition and Covetousness, under a Pretence of civilizing barbarous Nations.*

XLII. *The Law of Nature is to be distinguished from civil Customs generally received.*

XLII. The second is, that among Things forbidden by Nature, we do not inconsiderately reckon those, of which we have not sufficient Evidence that they are such, but that are rather repugnant to some positive Law of GOD; under which Class, perhaps, may be ranked ¹ the Sin of single Fornication, some of the Familiarities that are called *Incest*, and likewise ² Usury.

XLII. *And from the voluntary divine Law not known to all Nations.*

XLIII. 1. The third is, that we carefully distinguish between general Principles, such as this, *That we ought to live honestly*, that is, according to right Reason, as also some that come very near to them, and are so manifest, that they can admit of no Doubt; as for Instance, that *We ought not to take that which belongs to another*: And between the Inferences drawn from them, of which some are obvious enough, as, that ¹ *Admitting Matrimony, Adultery ought not to be allowed of*; others again are more difficult to be discovered, as, that *That Revenge is criminal which has nothing in View but another's Sufferings*. It is here almost as it is in Mathematicks, where some Things are first Notions, or next to first Notions; some are Demonstrations, which are immediately both understood and assented to, some again are true, but not evident to all.

XLIII. *What is manifest in the Law of Nature is to be distinguished from that which is not so.*

2. As therefore, with Respect to the Civil Laws, the Ignorance of them, or of their true Meaning ³ excuses a Fact, so, with Respect to the Laws of Nature, it is reasonable ² that they should be excused, who either through Weakness of their Judgment, or their ill Education, violate those Laws. For as the Ignorance of the Law, if it is invincible, entirely exculpates one, so when attended even with

¹ Matt. x. 15.
² Luke xii. 47,
48.

In a Word, the Sense of this Passage appears to me inexplicable, without the Word I have added to it, and which might easily have been omitted, from the Resemblance of the initial Letters of the following Word *susceptum*. The Moment *justè* is added, there is no longer the least Difficulty, and the Force of the Reasoning is perceived. For, if the War be supposed to be unjustly undertaken, the Injustice of the Cause would make it less surprizing, that it should give no Right of punishing. For the Rest, we need not wonder that our Author did not observe this Omission in the new Editions he revised: We have seen before, Chap. XII. of this Book, § 10. an undoubted Omission, which is however in all the Editions; and it is remarkable, that the Word wanting there is the Adverb opposite to that wanting here, and of which the Letters are almost the same, I mean *injustè*.

XLII. (1) It is where, censuring the unbounded Ambition of *Cæsar* and *Pompey*, he says, that if they had desired Trophies and Triumphs, they might have satiated themselves with them, by making War upon the *Parthians* and *Germans*, without mentioning the *Scythians* and *Indians*, who would have found them sufficient Employment. He adds, that they would have had a fine Pretext for attacking those Nations, namely, the Desire of civilizing them. *Vit. Pompeij*, Vol. I. p. 656. D. Edit. Wech.

XLII. (1) *ASTERIUS*, Bishop of *Amasea*, Οἱ τοῖς τῷ βίῳ, &c. *Those who regard only the Legis-*

lators of this Life leave the Liberty of Whoredom without a Punishment. Add to this a Passage of *St. JEROME* to *Oceanus*, cited by us at Chap. V. Sect. IX. *GROTIUS*.

2 Usury considered in itself and kept within due Bounds, is very innocent, both by the Law of Nature, and by the Law of GOD. This our Author afterwards confessed, as we have observed before, in Chap. XII. of this Book, § 20.

XLIII. (1) *PHILO* the *Jew* says, that Adultery is punished in all Countries; and that it is lawful even to kill on the Spot such as are taken in the Fact. *In vita Joseph.* (p. 533. B. Edit. Paris.) *ULPIAN* the Lawyer describes Adultery as a Thing naturally dishonest, *Ut puta furtum, Adulterium, natura turpe est.* Digest. Lib. I. Tit. XVI. *De verborum significat.* Leg. XLII. And *PAPINIAN* says, that neither Sex nor Age render Adultery excusable, *Quum alias Adulterii crimen, &c.* Lib. XLVIII. Tit. V. *Ad Leg. Jul. de Adulter.* Leg. XXXVIII. § 4. According to *LACTANTIUS*, Adultery is contrary to the common Right of all Nations. *Item non Adulterare. Sed hoc præcepto, &c.* Epitom. Institut. Divin. (Cap. V. Num. 15.) *GROTIUS*.

2 *St. JEROME* observes, that in every Nation Men hold those Maxims to be the Law of Nature, in which they have been educated. *Et in omni conversatione unaqueque gens, — &c.* Lib. II. *Advers. Jovinian.* (Vol. II. p. 75. B. Edit. Basil.) *GROTIUS*.

Negligence,

Negligence, it lessens the Fault. And therefore those Barbarians who offend in these Matters, by Reason of their bad Education, *Aristotle* compares ³ to such as have their Appetites vitiated by some Distemper. *Plutarch* says, *There are some Distempers of the Mind that put a Man out of his natural Situation.*

3. *Lastly*, This must be added, which I shall now mention once for all, that those Wars which are undertaken for the exacting of Punishment, are suspected to be unjust, unless the Crimes be very heinous and manifest, or there be, at the same Time, a Concurrence of some other Cause. Perhaps it was not without Truth, that *Mithridates* said of the *Romans*, ⁴ *It was not the Crimes of Princes, but their Power and Majesty that they prosecuted.*

XLIV. *Whether War may be made for Offences against GOD only.*

XLIV. 1. The Order of our Discourse has now brought us to consider, those Offences that are committed against GOD. For the Question is, *Whether for the revenging of these a War may be undertaken?* which *Covarruvias* has treated of at large. But he, following others, thinks there is no Power to punish, where there is not a Jurisdiction, properly so called; which Opinion we rejected before. Whence it follows, that, as in Ecclesiastical Affairs, Bishops are said, in some Measure, *τὴν καθολικὴν περιεῖναι*, that is, ¹ *To have taken upon themselves the Care of the universal Church*: So Kings, besides the Charge of their particular Dominions, have upon them the Care of human Society in general. The chief Argument for the Opinion that such Wars are unjust, is this, that GOD alone is sufficient to revenge the Crimes committed against himself, whence the Sayings, ² *The Injuries of the Gods are left to the Care of the Gods*; and ³ *Perjury has GOD for its Revenger.*

2. But certainly the same may be said of other Offences. For, no Doubt of it, GOD is sufficient to punish them likewise, and yet these are justly punished by Men, as there is none who denies. Some will further insist upon this Argument, and alledge, that other Offences are punished by Men, as other Men are thereby hurt or endangered; in reply to which we must observe, that not only those Offences are punished by Men which directly hurt others, but those too which do it indirectly and consequentially, as Self-Murder; for Instance, Bestiality, and some others.

3. Now Religion, tho' of itself it tends to procure us the Favour of GOD, yet it has likewise its peculiar Effects, and those very great, upon human Society. Nor is it undeservedly called, by ⁴ *Plato*, *The Bulwark of Power*, and *The Bond of Laws and good Manners.* ⁵ *Plutarch*, in like Manner, calls it *The Cement of all Society, and the Foundation of the legislative Power.* And, according to *Philo*, ⁶ *The Worship of one GOD is the most effectual Charm, and indissoluble Tie of Kindness*

³ *Ethic. Nicom. Lib. VII. (Cap. VI. p. 91. B.)* GROTIUS.

I do not find the Passage, which our Author cites from *PLUTARCH*, without mentioning the Treatise from which he takes it.

⁴ *Quippe non delicta Regum illos, &c.* JUSTIN, *Lib. XXXVIII. Cap. VI. Num. 1.*

XLIV. (1) This Passage is in the *Constitutions* ascribed to St. CLEMENT. We find in St. CYPRIAN, that all Bishops are bound in Duty to watch for the Good of the whole Church, of which the Members are dispersed in different Countries, *Omnes enim nos decet, &c.* Epist. XXX. Edit. Pamel. (XXXVI. Fell.) That Father remarks elsewhere, There is but one Episcopacy, of which each Bishop holds his own respective Part entire, *Episcopatus unus est, cujus a singulis in solidum pars tenetur.* De unitat. Eccles. (p. 108.) There are many Instances to be found in his Works, of this universal Care of all the Churches, and especially in Letter LXVII. (LXVIII. Edit. Fell.) See also St. CHRYSOSTOM, in *laudibus S. Eustathii.* GROTIUS.

² TACITUS attributes this Expression to the Emperor *Tiberius.* Annal. Lib. I. Cap. LXXIII. Num. 4.

³ Another Emperor, ALEXANDER SEVERUS, uses this Reason to justify the Impunity granted to Perjury by the Roman Law, *Jurisjurandi contempta religio, satis Deum ultorem habet.* Code, Lib. IV. Tit. I. De rebus creditis, &c. Leg. II.

⁴ This is very conformable to the Doctrine of that Philosopher, and to the Maxims he lays down in several Places. But I find no where the very Words attributed to him by our Author, and which he gives us only in *Latin*, both here, and in his Treatise *De imperio summarum Potestatum circa sacra*, Cap. I. § 13. The learned BOECLER quotes them exactly in the same Manner, in his Dissertation intitled, *Roma sub septem regibus*, Vol. II. p. 485. But neither does he direct us to any Passage; which shews that he copied them here without any other Examination, as is often done by him and others.

⁵ *Advers. Colot.* p. 1125. E. Vol. II. Edit. Wech.

⁶ [*De Monarchia*, Lib. I. p. 818. B.] He observes elsewhere, that the Belief of one GOD is the most efficacious Cause of Concord, and the most indissoluble Tie of Love and Unity amongst a People. *De Fortitud.* (p. 741. D. E.) JOSEPHUS says, that the best Means to unite Men, is

Kindness and Friendship. Irreligion is attended with all the contrary Effects,

— 'Twas ⁷ Ignorance of GOD
That first plunged wretched Men in Wickedness.

Every ⁸ Error, says *Plutarch*, in Matters of Religion, is pernicious, and if accompanied with Passion, it is so in the highest Degree. In *Jamblicus* we find this Sentence of *Pythagoras*, *The Knowledge of GOD is Virtue, and Wisdom, and perfect Happiness.* Hence *Chrysippus* called ⁹ Law the Queen over all Affairs divine and human; and, according to *Aristotle*, ^a among publick Cares, the first and chiefest is that which concerns divine Things. So the *Romans* defined ¹⁰ *Jurisprudence* to be *The Knowledge of Things divine and human*: And *Philo* makes the whole Business of kingly Government to consist, In ¹¹ *taking Care of private, publick, and sacred Things.* ^{a Pol. l. 7. c. 8.}

4. Now all this must be considered as holding true, not in one State only, as when *Cyrus* says, in *Xenophon*, ¹² that *Subjects, the more they fear GOD, the more loyal and obedient they will be*, but likewise in the general Society of Mankind. ¹³ *Take away Piety, saith Cicero, and you destroy, at the same Time, Fidelity, human Society, and the most excellent Virtue, Justice.* And in another Place, ¹⁴ *To know what is the Deity, what the Counsel, what the Will of the supreme Governor and Lord of the World, is the Foundation of Justice.* And of this, one evident Argument is, that *Epicurus*, after he had taken away divine Providence, ¹⁵ left nothing to Justice but an empty Name, to which, as he allowed no other Original but that of the Agreement of Men, so neither would he have it continue longer than it made for the common Benefit; and thought, that the only Reason that ought to restrain Men from injuring others, should be the Fear of Punishment. His very Words to this Purpose, which are very remarkable, are extant in ¹⁶ *Diongenes Laertius.*

5. *Aristotle* likewise observed this Connection, when in his fifth *De Repub.* Ch. xi. speaking of a King, he says, ¹⁷ *For a People will less fear ill Treatment from a Prince whom they believe to be religious.* And *Galen*, (in his ninth Book, *De placitis Hippocratis & Platonis*) after he had said, that there are many Questions concerning the World and the Divine Nature, which are of no Use in Morality, owns that the Enquiry about Providence is of the greatest Use toward the Practice both of private and publick Virtues. The same was likewise observed by *Homer*, who

to bring them into one and the same Opinion, concerning the Divinity, without differing in their Way of Life and Manners. *Contra Apion*, Lib. II. (p. 1072. F.) GROTIVS.

The last Passage is not much to the Purpose, because the Question there is not concerning the Effects of Religion in general, but of Uniformity of Religion, as appears from only reading the Passage, and the Sequel of the Discourse. Our Author quotes a little lower in the Text, a Passage of a Pagan Philosopher, which is more applicable to the Subject, viz. what *JAMBlichus* says, after the *Pythagoreans*, that the Knowledge of the Gods, or Religion in general, is the highest Degree of Virtue, Wisdom, and Happiness. *Protreptic.* Cap. III. p. 7. Edit. Arcer.

⁷ *SILIUS ITALICUS*, *De bello Punic.* (Lib. IV. ver. 794, 795.) *JOSEPHUS*, enquiring into the Reasons why many antient States were very ill regulated, says, that it proceeded from their first Legislators having neither known the true Nature of GOD, nor given themselves the Trouble to make known what they might comprehend of it, and to frame their Laws by that Standard. *Contra Apion*. Lib. II. (p. 1078. E.) See there some excellent Thoughts that follow immediately after. GROTIVS.

⁸ *De Superstit.* init. p. 164. E. Vol. II. Edit. Wech.

⁹ The Passage of this Philosopher, taken from his Book upon Law, is cited in the *Digest*, Lib. I. Tit. III. *De legib.* &c. Leg. II.

¹⁰ *Jurisprudentia est divinarum atque humanarum rerum notitia, justique atque injusti scientia.* *Digest.* Lib. I. Tit. I. *De Just. & Jure*, Leg. X. § 2.

¹¹ *De creatione Magistrat.* (p. 723. B.) *JUSTIN MARTYR*, exhorting the Emperors to have a due Regard for Religion, represents to them, that such a Regard is worthy of a Prince, See what is said by *COVARRUVIAS*, *Relect. in Cap. Peccatum*, Part. II. § 10. GROTIVS.

¹² *De Cyri Institution.* Lib. VIII. Cap. I. § 9. Edit. Oxon.

¹³ *De Natur. Deor.* Lib. I. Cap. II.

¹⁴ *De finib. bon. & mal.* Lib. IV. Cap. V. *PHILO* the Jew says, that Piety and Humanity, or Justice, proceeds from the same Quality of Mind. *De Abraham.* GROTIVS.

¹⁵ He asserted, that there was nothing just by Nature, and that if Crimes were to be avoided, it was only because they were inevitably attended with the Fear of Punishment; upon which *SENECA* declares against him. *Illic dissentiamus cum EPICURO, &c.* Epist. XCVII. GROTIVS.

¹⁶ Lib. X. § 150, 151.

¹⁷ *Politic.* Lib. V. Cap. XI. p. 409. E.

^b Lib. 36. c. 2. n. 16.
^c Georg. l. 16. p. 1104. Ed. Amst. 761. Ed. Parif.
^d Inst. Divin. l. 5. c. 14. n. 12.
^e De Ira Dei, c. 7. n. 23.

in the sixth and ninth Book of his *Odyssees*, to *savage and unjust Men*, opposes those who have *Sentiments of Religion*. So *Justin*^b from *Trogus Pompeius* commends the Justice of the antient *Jews*, as being mixt with Religion; as does also *Strabo*^c, saying, *They were People who were really just and religious*. If it is *Piety*, says *Lactantius*,^d to know *GOD*, the Sum of which Knowledge is, that you worship him, he must be altogether ignorant of Justice, who does not hold to the Religion of *GOD*: For how can he know Justice, who is ignorant of the Source from whence it is derived? And the same Author elsewhere,^e *Justice properly belongs to Religion*.

6. Now the Usefulness of Religion is even greater in that great Society of Mankind in general, than in any particular Civil Society; for in a Civil State it is partly supplied by the Laws, and the easy Execution of the Laws; whereas, on the contrary, in the universal Society of Mankind, the Execution of Right is very difficult, as being to be performed no other Way than by Force of Arms, and the Laws are very few, which themselves, moreover, derive their Force chiefly from the Fear of a Deity; from whence those who offend against the Law of Nations, are every where said to violate the Law of *GOD*. It was not amiss therefore, that the Emperors asserted, that¹⁸ *The Corruption of Religion was an Injury to all the World*.

XLV. Which are the most common Notions of a *GOD*, and how they are contained in the first Precepts of the Decalogue.

XLV. 1. To take a closer View of the whole Matter, we must observe, that the true Religion, which has been common to all Ages, is built upon four fundamental Principles; of which the first is, that *There is a GOD, and but one GOD only*. The second, that *GOD is not any of those Things we see, but something more sublime than them*. The third, that *GOD takes Care of human Affairs, and judges them with the strictest Equity*. The fourth, that *The same GOD is the Creator of all Things but himself*. These four are expressed in so many Commandments of the Decalogue.

2. For in the first is plainly delivered the Unity of *GOD*; in the second, his invisible Nature, by Reason of which any Image of him is forbid to be made, *Deut.* iv. 12. as¹ *Antisthenes* also said, *He is not seen with the Eyes, there is nothing to which he bears any Resemblance, so that no Man can know him by an Image*. And² *Philo*, *It is a profane Thing to represent the Image of him that is invisible, by any Picture or Statue*. *Diodorus Siculus*,^a speaking of *Moses*, says, ^b *He made no Image of the Divinity, because he did not believe GOD to be of human Shape*. The *Jews*, says *Tacitus*,^c conceive *GOD* in their Minds only, and him as but one; esteeming them profane who frame Images of Gods, out of perishable Matter, after the Likeness of Men. And *Plutarch* assigns this Reason for *Numa's* removing Images out of Temples, *Because GOD cannot be conceived but by the Mind only*. In the third Commandment is implied, *GOD's Knowledge and Care of the Affairs, and even of the Thoughts of Men*. For this is the Foundation of an Oath, in which we call *GOD* to witness what passes in our Hearts, and at the same Time submit to his Vengeance; whereby we likewise acknowledge his Justice and Power. In the

^a In Fragm. (e lib. 40.)
^b Dion Cassius observes the same Thing. l. 36.
^c Hist. l. 5. c. 5. n. 8. See also *Strabo*, *Geogr.* l. 16.

¹⁸ *Quia quod in Religionem divinam, &c. Cod. Lib. I. Tit. V. De Hæreticis, &c. Leg. IV.* But the bare Inscription of this Title shews, that *ARCADIUS* and *HONORIUS* extended their Maxim much farther than our Author designed to admit it; for what they called *A Crime against Religion*, consisted in not receiving all the Opinions of the Ecclesiasticks, who had got Possession of the Minds of those Princes.

XLV. (1) The Philosopher *Antisthenes* [and not *Antiphanes*, as our Author calls him in his *Exposition of the Decalogue*] said, as *CLEMENS ALEXANDRINUS* informs us, that the Divinity being invisible, and resembling nothing which is the Object of our Senses, it follows, that no one can know him by any Image. (*Protreptic. Cap. VI. p. 61. Edit. Oxon.*) Which Thought *SENECA* seems to have borrowed, *Ipse, qui ea tractat, qui condidit, &c. Natur. Quæst. Lib. VII. Cap. XXX.* *PLUTARCH* says, that it was injurious to the Divinity, to resemble him to Things below him; and besides, that he was to be conceived only by the Thought. *Vit. Num. (p. 65. B. C. Vol. I. Edit.*

Wech.) See also *DIONYSIUS HALICARNASSENSIS*, upon *Numa's* Conduct, in Regard to the corporeal Representations of the Divinity. *GROTIUS*.

There is nothing upon this Head in *DIONYSIUS HALICARNASSENSIS*. Our Author, who refers us to him, as if it were in his *Roman Antiquities*, had the Fact from *St. CYRIL*, who might easily have taken one Author for another; for he, as well as *PLUTARCH*, makes it an Honour to the *Pythagorean* Philosophy, that *Numa* took Care to remove the Images from the Temples. *Contra Julian. Lib. VI. p. 193. Edit. Spanheim.* On the contrary, *DIONYSIUS HALICARNASSENSIS* endeavours to shew, *Lib. II. Cap. LIX.* that *PYTHAGORAS* lived four Generations after *Numa*, and that therefore the latter could not have learned the Philosophy of the other.

2 In the Letter of *Agrippa* to the Emperor *Caligula*; and he speaks there of the Opinion which the *Jews* always had upon this Subject. (*De legat. ad Cajum. p. 1032. E.*) *GROTIUS*.

fourth is delivered the Origin of the whole World, from GOD its Author, ³ in Memory of which the Sabbath was instituted of old; and that indeed to be observed with a peculiar Sanctity, above all other Rites. For the Breach of any other ceremonial Observations was, by the Law, left to be punished at the Discretion of the Judge: But of this the Punishment was capital; because the Violation of the Sabbath did, from the very Manner of its Institution, imply a Denial of GOD's Creation of the World. Now the very Notion of GOD's having created the World, gives a tacit Indication of his Goodness, and Wisdom, and Eternity, and Power.

3. And from these speculative Notions follow the practical, as, that *GOD is to be honoured, loved, worshipped, and obeyed*. Therefore, said *Aristotle*, ⁴ he who denies that GOD is to be honoured, or his Parents loved, must be reduced to better Reason, not by Argument but by Punishment. ⁵ And again, that in different Places different Notions, as to what is Virtue and Honesty, prevail, but in this of honouring GOD the Agreement is universal: Now the Truth of these speculative Notions, as we called them, may, no Doubt, be demonstrated by Arguments drawn from Nature, amongst which this is one of the strongest, That it is evident to Sense that some Things are made, or have a Beginning; now the Things that are made do necessarily lead us to acknowledge something that was never made. But because this Reason, and others like it, are not understood by all, it is sufficient that in all Ages, and through all Countries, a very few excepted, these Notions have been entertained, both by those who were too gross of Understanding to be conceived willing to impose upon others, and by those who were too wise to be imposed upon themselves: ⁶ Which general Consent, in so great a Variety, both of Laws and Opinions about other Matters, sufficiently shews that this Tradition has been derived to us from the very first Men in the World, and has never been solidly confuted, which even of itself is enough to make it be believed.

4. Agreeable to what we have now advanced, concerning GOD, is the Testimony of *Dion Prusænsis*, when he says, that *The Persuasion of a GOD is partly*

3 The Author of the Answers to the orthodox Christians, at the sixty-ninth Question, *ὡς ἐν φυλαχῇ, &c.* And therefore, that the Memory of the World's Creation might be preserved among Men, GOD, in Holy Writ, commanded a greater Honour to be paid to the seventh Number, than to any of the Rest. See also what goes before there. GROTIUS.

4 Topic. Lib. I. Cap. XI. p. 187. E. Vol. I. Edit. Paris.

5 Ibid. Lib. II. Cap. XI. p. 205, A.

6 DIODORUS SICULUS says, that there is a natural Piety or Religion, *φυσική ἐνλάχεια*. Fragment. (E. Lib. XXIII. Eclog. XI.) The Emperor JULIAN asserts, that Every one knows, without being taught, that there is a Divinity; and adds, that he makes himself as perceptible to the Soul as the Light to the Eye. Ad Heraclium, (Orat. VII. p. 209. C. Edit. Spanheim.) PHILO the Jew reasons in this Manner, Chance produces no Work of Art; now nothing can be made with more Art than the World; it was therefore made by a most skilful and perfect Artift. Hence, adds he, we come to discover the Existence of GOD. *De Monarchia*, (p. 815. E.) TERTULLIAN says, that the internal Sense of a Divinity is natural to the Soul, *Animæ enim a primordio, conscientia DEI, deus est*. Advers. Marcion. (Lib. I. Cap. X.) He observes elsewhere, that GOD is first known by Nature, and then by Doctrine: We know him by Nature from his Works; by Doctrine from the Preaching of the Gospel, Lib. I. Adv. Marcion. (Cap. XVIII.) St. CYPRIAN maintains, that it is the Height of Wickedness not to acknowledge him, of whose Existence it is impossible to be ignorant. *Atque hæc est summa delicti, &c.* De Idolorum

vanitate, (Cap. V. Num. 9. Edit. Cellar.) GROTIUS.

All these Passages, we see, tend to prove, that the Consent of Mankind in acknowledging a Divinity, arises from the Conformity of that great Truth to the natural Light of Reason; whereas, in the Text, our Author considers that Consent as a Proof of an universal Tradition, come down to us from the first Men. He seems thereby to return to the alternative, laid down by him in the first Edition; for in that he expresses himself thus, *Quæ consensus — satis ostendit, aut lucem aliquam animis insitam, quæ vi suapte animum feriat, aut traditionem a primis hominibus, &c. quorum utrunvis ad fidem faciendam satis est*. However, in his Treatise upon *The Truth of the Christian Religion*, Lib. I. § 2. he does not ascribe the Consent in Question, to the Force of natural Lights, but advances another Alternative; namely, either a Revelation from GOD himself, or a Tradition come down from the first Men. Let us observe also, that St. CYPRIAN's Argument, which he cites here, is founded, as appears by what precedes, upon a poor Reason, I mean, upon those Expressions which dropt from the Pagans themselves, *O Deus, si dederit, &c.* See the *Octavius* of MINUCIUS FÆLIX, Cap. XVIII. p. 90. Edit. Davis. with the Note of that judicious English Commentator. Besides, the Passage is ill applied here. For St. CYPRIAN's Design is to prove the Unity of the Godhead; whereas the present Question relates only to the Existence of a Divinity in general; at least, the Proof deduced from the Consent of Mankind, can be alledged no otherwise; for Mankind are far from being agreed in acknowledging one only Divinity.

born with us, as being gained by Arguments of our own Reason; and partly ⁷ acquired by Tradition. ⁸ Plutarch calls the same, *An antient Opinion, which, for its Certainty, is equal to any Argument that can be brought or imagined, it being the common Foundation of Piety.* And ⁹ Aristotle says, *All Men are persuaded that there are Gods.* ¹⁰ Plato says something to the same Purpose; in his tenth Book of Laws.

XLVI. *That those who first violate these Notions are punishable.*

XLVI. 1. And therefore those Men are not entirely blameless, who, tho' they are too stupid to find out, or comprehend, the Arguments that serve to demonstrate these Notions, do yet reject them, since these Truths lead to Virtue; and besides, the contrary Opinion has not Arguments to support it. But because we are here discoursing of Punishments, and those such Punishments as relate to Men, we must distinguish between the Notions themselves, and the Manner of rejecting them. That there is a Deity, (one or more I shall not now consider) and that this Deity has the Care of human Affairs, are Notions universally received, and are absolutely necessary to the Essence of any Religion, whether true or false. *He that cometh to GOD,* (that is, he who has any Religion, for Religion, by the Hebrews, is termed *A Coming to GOD*) *must believe that he is, and that he is a Rewarder of them that diligently seek him.* Heb. xi. 6.

2. Thus ¹ Cicero too, *There still are, and always have been, some Philosophers, who thought the Gods had no Regard at all to human Affairs; whose Opinion, if it were true, what Piety could there be, what Holiness, what Religion? For the Reason why we ought to practise these Virtues, with a holy and pure Heart towards the immortal Gods, is because they observe them, and have done good to Mankind. The principal Part of Religion, says ² Epictetus, consists in having right Conceptions of the Gods, as of self-existent Beings, that superintend and dispose of all Things with Wisdom and Justice.* ³ Ælian remarks, that none, even of People the most unpolite and uncivilized, did ever sink so low as to entertain and profess Atheism, but that a Divinity, and a Providence, were allowed and affirmed by all. ⁴ Plutarch, in his Book of *Common Ideas*, declares, that *If we take away a Providence, we quite destroy the Notion of a GOD. For GOD must be conceived and understood to be, not only an immortal and an happy, but also an affectionate, a careful, and a beneficent Being.* Nor, as Lactantius, ^a *can there any Honour be due to GOD, if he does nothing for him who worships him; nor any Fear, if he is not angry with him who worships him not.* And indeed it is all one, if we regard the moral Effect of such Notions, whether we deny a GOD, or deny he is concerned in the Management of human Affairs.

^a De Ira Dei, c. 6. n. 2.

3. Wherefore even out of meer Necessity, as it were, that these two Notions have for so many Ages been preserved ⁵ among all the People of the known World. And from hence Pomponius ⁶ ascribes Religion to the Law of Nations. And Socrates, in ⁷ Xenophon, says, that *To worship the Gods is a Law and Maxim that*

⁷ Ὑπόληψις ἐπιτελής. Our Author does not say in what Discourse of that antient Orator this Passage is to be found. It is probably that which he cites below, in the next Paragraph, Num. 3. But I have not the Book at present, to look for the two Passages.

⁸ In Amator. p. 756. B. Vol. II. Edit. Wech.

⁹ De Cælo, Lib. I. Cap. III. p. 434. E. Vol. I. Edit. Paris.

¹⁰ Lib. X. p. 887. Edit. Steph.

XLVI. (1) *Sunt enim Philosophi, &c.* De Natur. Deorum. Lib. I. Cap. II.

2 (Enchirid. Cap. XXVIII. init.) SENECA says, the Worship of the Gods consists first in the Belief of their Existence, then in the Acknowledgment of their Majesty and Goodness, without which there is no true Majesty. *Primus est Deorum cultus, &c.* Epist. XCV. GROTIUS.

3 Var. Hist. Lib. II. Cap. XXXI.

4 De communib. notit. adv. Stoic. (p. 1075. E. Vol. II. Edit. Wech.)

5 SENECA, Epist. CXVII. *That there are Gods; among other Arguments that might be urged to*

prove it, we from hence conclude, because that such an Opinion is implanted in all Mankind: Nor is there any Nation so abandoned, so uncivilized, as not to believe it. And in his fourth Book, De Beneficiis, Chap. IV. *Nor could all the World have conspired in so much Madness, as to address Deities who can neither hear their Prayers, nor give them any Assistance.* Add to this, PLATO, Protagor, and Lib. X. De legib. and some fine Passages in JAMBlichus, about the Beginning of his Treatise, concerning the Mysteries of the Egyptians, where he says, *It is as natural for Man to know there is a GOD, as it is for a Horse to neigh.* GROTIUS.

6 *Veluti [Jus Gentium est] erga Deum religio, &c.* Digest. Lib. I. De Justit. & Jure, Leg. II. The Law of Nations is here understood to be that which the Light of Nature discovers, and which is therefore received by all Nations never so little civilized.

7 XENOPHON, Memorab. Socrat. (Lib. IV. Cap. IV. § 19. Edit. Oxon.)

every where prevails. Which ⁸ Cicero, both in his first Book *Of the Nature of the Gods*, and in his second *Of Invention*, does also assert. And *Dion. of Prusa*, Oration xii. calls it *An Opinion common to all Mankind, both to Greeks and to Barbarians, necessary for, and naturally implanted in all who have the Use of Reason*. And a little farther he styles it, *A powerful and eternal Persuasion, which at all Times, and in all Places, was begun, and is continued*. Xenophon, ^b in his *Feast*, says that both *Greeks and Barbarians* think and allow, that all Things, whether present or future, are known to the Gods.

^b In conviv. c. 4. § 47.

4. It is my Judgment therefore, that those who first ⁹ attempt to destroy these Notions, ought, on the Account of human Society in general, which they thus, without any just Grounds, injure, ¹⁰ to be restrained, as in all well-governed Communities has been usual: It is what we read was practised towards ¹¹ *Diagoras of Melos*, and towards the ¹² *Epicureans*, who were expelled and banished all Cities that had any Regularity and good Manners amongst them. *Himerius*, an antient Rhetorician, in his Pleadings against *Epicurus*, ¹³ *Do you punish me then for my Opinion? No; but for your Impiety: You may propose your Sentiments, but you must not be impious*.

XLVII. 1. Other general Notions, as that *There is but one GOD*, that *No Object of our Sight is GOD*, not the World, not the Heavens, not the Sun, nor the Air; that *The World is not eternal, nor its compound Matter, but that it was created by GOD*, have not the same Degrees of Evidence as the former, and therefore the Knowledge of them in some Nations, through Length of Time, we find effaced, and almost extinguished; to this did contribute the Remissness of the Laws, which made but little Provision for them, because not deemed so absolutely necessary, but that without them some Sort of Religion might be kept up.

XLVII. But not others which is shewn by an Argument drawn from the Mosaic Law.

2. The Law of GOD, tho' delivered to a Nation, which by the concurrent Proof of Prophecies and Miracles, either seen or transmitted to them by incontest Authority, was infallibly assured of the Truth of these Notions, tho' it utterly detested the Adoration of false Gods, did not sentence to Death every Offender in that Case, but such only whose Crime was attended with some particular Circumstance; as, for Instance, one who was the Ringleader and Chief in seducing others, *Deut. xiii. 1, &c. 6, &c.* or a City that began to ¹ serve Gods unknown before, *Deut. xiii. 12, &c.* or him who paid divine Honour to any of the Host of Heaven, ² hereby cancelling the whole Law, and entirely relinquishing the Worship

⁸ Our Author here cites CICERO's first Book, *De Natur. Deor.* and his second, *De inventione*. The first Passage is, *Quæ est enim gens, aut quod genus hominum, quod non habeat sine doctrina anticipationem quamdam Deorum?* Cap. XVI. As to the other Treatise, I find nothing in it that has any Relation to the Subject, except the Beginning of a Passage already quoted, § 8. Note 5. See also the *Tusculan Questions*, Lib. I. Cap. XIII.

⁹ Therefore those only who dogmatize can be lawfully punished. See what I have said upon PUFENDORF's *Law of Nature and Nations*, B. III. Chap. IV. § 4. Note 1.

¹⁰ *Moxus* the Lydian, having taken the City of *Crambus* by Siege, drowned all the Inhabitants, *ὄν ἀθίς*, *As Athiests*, because they neither acknowledged nor worshipped any GOD. NICOLAUS DAMASCENUS, in *Excerpt. Peiref.* GROTIUS.

If a People, tho' Athiests, lived morally well, their Athiesm would be no Reason for extirpating them, whilst they did not endeavour to infect others with the bad Principles wherewith they are imbued. See above, Note 9.

¹¹ The Athenians expelled him their City; or, as others say, that Philosopher having fled for Fear of being punished, they set a Price upon his Head. See ARISTOPHANES's Comedy of the *Birds*, with the Note of the Greek Scholiast, and VALERIUS MAXIMUS, Lib. I. Cap. I. Num. 7. extern.

¹² See ÆLIAN, *Var. Hist.* IX. 12. and the Commentators upon that Place.

¹³ HIMERIUS, *Actio. in Epicur.* Our Author has taken this Passage from the *Bibliothèque* of PHOTIUS. *Cod. CCXLIII. p. 1083. Edit. Rothom.* 1653.

XLVII. (1) The Passage of *Deuteronomy* does not speak of the Introduction of an idolatrous Worship, practised by all the Inhabitants, but of the Toleration of that Worship, practised by some particular Persons, who solicited others with Impunity. See Mr. LE CLERC upon that Place.

² PHILO, upon the *Decalogue*, speaking of such Persons, *εἰς δ' οἱ καὶ πρὸς οὐκ ἰσότητος, &c.* But there are some whose Impiety goes farther still, who do not so much as make an Equality between GOD and his Works, but give all the Honour to these alone; so far from letting him have a Share of it, that they do not vouchsafe that Universal Being a bare Memorial, these Wretches are unmindful of him whom alone they ought to remember, industriously contriving a voluntary Forgetfulness. So MAIMONIDES expounds the Passage in *Deuteronomy*, Direct. III. 41. GROTIUS.

Our Author, in his Notes upon the New Testament, explains the Passage in *The Epistle to the Romans*, in another Manner, viz. *They have adored the Creature MORE than the Creator*; which, says he, is the common Signification of the Preposition *ὑπὲρ*, with an Accusative, when a Comparison is made;

ship of the true GOD, *Deut.* xvii. 2. (which by *St. Paul* is interpreted to be, *Worshipping the Creature, and not the Creator* : For *ωσπερ*, as well in this as other Places, is to be understood in an exclusive Sense, which from *Job* xxxi. 26, 27. appears to have been a Crime liable to Punishment for some Time, even among the Descendants of *Esau* ; or lastly, him who sacrificed his Seed to *Moloch*, that is, to *Saturn*, *Lev.* xx. 2.

3. Nor did GOD himself think the *Canaanites*, and their neighbouring Nations, tho' long addicted to vile Superstitions, ripe for Punishment, till by an accumulation of other Crimes they had enhanced their Guilt, *Gen.* xv. 16. And in Reference to the Worship of false Gods among other Gentiles, we read that *He winked at the Times of their Ignorance*, *Acts* xvii. 30. It was a true Observation of *Philo*,³ that every Man thinks his own Religion the best ; inasmuch as not by the Test of Reason, but Affection, he forms a Judgment of it. Parallel to which is that of *Cicero*, that no Philosopher approves of any Discipline but that of his own Sect ; who likewise adds, that it is usual with Men to be immoveably prejudiced in Favour of some Tenets, before⁴ they are in a Capacity of distinguishing betwixt Truth and Falshood.

4. As then they are excusable, and certainly do not deserve human Punishment, who having received no revealed Law, worship the Powers and Qualities of the Stars, or other natural Beings, or Spirits, either in Images, Animals, or any other Objects, or even the departed Souls of Men eminent for their Virtues, and useful in their Generations, or other spiritual Substances, especially if they were not themselves the Inventers of this Worship,⁵ and therefore do not forsake the Service of the true GOD : So, on the other Hand, those are not to be looked upon as People pardonably ignorant and mistaken, but as impious and perversely wicked,⁶ who pay divine Honours to evil Spirits under the Notion of such, to the Names of Vices, or to Men infamous for flagitious Lives.

5. Of the same Stamp are they likewise, who honour their false Deities with human Sacrifices ; to a Disuse of this detestable Rite the *Carthaginians* were compelled by⁷ *Darius* the *Persian* King, and *Gelo*⁸ King of *Syracuse*, which Action of theirs gained them much Credit and Applause. We have an Account in *Plutarch*,⁹ that the *Romans* thought to have punished some barbarous People for

made ; and he gives several Examples to prove it. As to the Passage of *JOB*, xxxi. 26, 27. it relates to the Fear of Chastisement from Heaven, and there is not the least Insinuation that Punishment was to be apprehended from Man : So that the Consequence deduced from it by our Author is not well founded.

3 In *AGRIPPA*'s Letter to the Emperor *Caligula*. *De Legat. ad Cajum.* p. 1031. B.

4 *Quæst. Academic.* Lib. IV. Cap. III.

5 Thus the *Jews* admitted into their Temple, the Sacrifices sent them by the Kings of *Egypt*, and the Emperors *Augustus* and *Tiberius*, as *PHILO* (*de Legat. ad Cajum.* p. 1036. C.) and *JOSEPHUS* inform us. *GROTIUS*.

But did those Princes thereby acknowledge the GOD of the *Jews*, as highly exalted above other Gods ? And would they not as readily have paid the same religious Homage to any other strange Divinity ? The Truth is, that Idolatry, of whatever Nature it be, ought less to be punished than Atheism, so long as it does not lead to the Commission of real Crimes that are punishable before Men ; and then it is not Idolatry, but the Crimes, which are punished.

6 If all such People acted in Consequence of their Idolatry ; that is, if they proceeded to Things actually criminal, after the Example of the Objects of their Worship, they are punishable. But if they do not follow their Principles, as has often happened in the Pagan World, nothing obliges, or authorizes the punishing them.

7 *Adferentes edictum* [*Darii*] *quo Pæni, &c.*

JUSTIN, *Lib.* XIX. (*Cap.* I. *Num.* 10.) This was *Darius*, the Son of *Hyaspes*, Father of *Xerxes*. See what has been said on this Head, § 41. *GROTIUS*.

8 He would not make Peace with the *Carthaginians* but upon this Condition. *PLUTARCH*, *Apophthegm. Reg. & Imper.* p. 175. A. Vol. II. *Edit. Wech.* See also *De sera Numinis Vindicta*, p. 552. *Iphicrates* is also said to have put a Stop to this barbarous Custom of sacrificing human Victims amongst the *Carthaginians*. See the Remark of *ISAAC VOSSIUS*, upon the Passage of *JUSTIN* cited in the foregoing Note. For the Rest, the Thing was the more abominable, as the People sacrificed their own Children, which the *Canaanites* also did, in Honour of *Moloch*. See a long Note of our Author upon *Deuteronomy*, xviii. 10. and *Mr. LE CLERC* upon *Leviticus*, xviii. 21.

9 He calls these People *Bletonesians* : A Name which I find no where else ; nor do I know that any Geographer has used it, unless the Word be corrupted, *Βλετῶν τῆς καλεσμένης Βλετονίας*, &c. *Quæst. Roman.* LXXXIII. p. 283. E. Vol. II. If more Examples are required of Nations, antient and modern, amongst whom the abominable Custom of sacrificing human Victims is established, the Reader need only consult a Dissertation of *GEORGE MOEBIUS*, some Time since Professor of Theology at *Leipsick*, intitled *De Sacrificiorum origine & materia*, and printed in 1660. at the End of his Treatise *De Oraculorum Ethnicorum origine, &c.*

making Victims of Men, but when, to extenuate their Guilt, they urged the Antiquity of this Custom, they were exempted from Punishment, but strictly enjoined to discontinue it for the future.

XLVIII. 1. But how shall we determine of that War which is brought against a Nation, for no other Reason but because they reject the Laws of Christianity, when proposed unto them. I shall not here stand to enquire whether it be such, or after such a Manner propounded, as it ought: But taking them both for granted, there are two Things which occur observable. The *first* is, that the Truth of the Christian Religion, in those Particulars which are additional to natural and primitive Religion, cannot be evidenced by mere natural Arguments, but depends upon the History we have of CHRIST's Resurrection, and the Miracles performed by him and his Apostles, which have been confirmed by unexceptionable Testimonies, but many Ages since, so that the Question now is of Matters of Fact, and those of a very antient Date; for which Reason ¹ this Doctrine cannot so easily gain Belief, and procure Mens Assent upon the first Promulgation of it, without the inward Assistance of GOD's Grace, in the Distribution of which his Methods are unsearchable; when he affords it plentifully, Merit in us is not the Motive, and when he withholds it, or dispenses it but sparingly, it is for Reasons not unjust, but concealed from Men, and therefore not punishable by any human Judicature. To this Effect is that Canon of the Council of *Toledo*, ² which forbids the Use of compulsive Means, in gaining Converts to Christianity, for *On whom he will have Mercy he will have Mercy; and whom he will he hardeneth*. It being the Practice of the inspired Writers to ascribe those Effects, whereof human Reason cannot discover the Cause, to the Divine Will.

2. The second Thing to be considered is, that it was not the Intention of the Author of Christianity, that any should be ⁴ forced by temporal Punishments, or be awed by the Dread of them, to a Profession of his Laws, *Rom. viii. 15. Heb. ii. 15. John vi. 67. Luke ix. 54, 55. Matt. xiii. 29.* In which Sense *Tertullian* is doubtless in the Right, when he says, ⁵ that *The Christian Religion avenges not it self by the Help of the Sword*. In an old Book, entitled *The Constitutions of Clement*, ⁶ it is said of CHRIST, that *He indulged every Man in the Freedom of his Will; not inflicting present Death as a Punishment for their Disobedience to his Laws, but bringing them to a strict Examination in the World to come.* To the same Purpose *St. Athanasius* says, ⁷ That Our LORD, using no Force, but allowing

XLVIII. That War cannot be justly made upon those who refuse to embrace the Christian Religion.

XLVIII. (1) Besides the Prejudices of Education, and the Attachment of all People to the Principles of Religion they have once imbibed.

2 *De Judæis autem præcipit sancta Synodus nemini deinceps ad credendum vim inferri.* Cui enim vult Deus, miseretur, & quem vult, indurat. *In Jure Canonico.* Distinct. XLV. Cap. V. *JOSEPHUS* says, that every one ought to serve GOD freely, according to the Light of his Conscience, and not to be compelled to believe such and such Things in Matters of Religion. *GROTIUS.*

The Jewish Historian says this, upon the Occasion of his Countrymen, who were for compelling some great Lords, Subjects of the King of *Tirachonitis*, to be circumcised. *Vit. Joseph. p. 1007. C.*

3 *SERVIUS* the Grammarian has observed, that whenever the Reason of an Event does not appear, and no Judgment can be formed of it, it has been customary to say, *It pleased the Gods.* [VISUM SUPERIS] *Ut ipse ait Neptunum, Junonem, Minervam, &c.* — *Quotiescunque autem ratio, vel judicium non adparet, sic visum, interponitur: Ut HORATIUS, sic visum Veneri, &c.* In *Æneid* III. 2. *DONATUS* makes the same Remark, *QUID SI HOC QUISPIAM VOLUIT DEUS, Pleraque repentinis impulsionebus nata mirisque proventibus, DEO adscribi solent. Ut, Descendo, ac ducente DEO, flammam inter & hostes Expedior. Et: Hinc me digressum vestris DEUS adpulet oris.*

Et SALLUSTIUS: Ut tanta repente mutatio non sine DEO videretur. In Eunuch. TERENCE. Act. V. Scen. II. (v. 36.) The Rabbi *ABARBANEL* says the Word *שׁוּׁר* is taken also in the same Sense. *GROTIUS.*

4 This Subject is treated by *GREGORY NAZIANZEN*, in his Oration, entitled, *Cum assumptus est à Patre:* And by *BEDE, Lib. XXVI.* *ISIDORE*, speaking of King *Sisebutus*, *Who, in the Beginning of his Reign, attempting to bring over the Jews to the Christian Faith, had indeed a Zeal for GOD, but not according to Knowledge; for he compelled them by the Power of the Sword, when he ought to have won them by Reason and Argument.* *RODERICUS* has transcribed this Passage in his History, II. 13. The later Kings of Spain, are, on this Account blamed, by *OSORIUS* and *MARIANA*. See the latter, XXVI. 14. XXVII. 5. *GROTIUS.*

5 *Lex Nova non se vindicat ultore gladio.* I have already observed in a Note upon *Vol. III.* of *TILLOTSON'S Sermons*, p. 13. that our Author, citing by Memory, had in View the following Words, *Nam vetus Lex ultione gladii se vindicabat, & oculum pro oculo eruebat, & vindictam injuriæ retribuebat. Nova autem Lex clementiam designabat. Advers. Judæos, Cap. III.**

6 *Τὸ ἀντεξέσσω τὸ ἀνθρώπων, &c.*

7 *Epist. ad solitar. vit. agent.* Vol. I. p. 855. A. *Edit. Colon. seu Lips. 1686.*

every one the Liberty of his Choice, was contented to address himself to all, in no other Terms than these, If any Man will come after me; and to his Apostles, ⁸ Will ye also go away? Thereby disclaiming all Violence and Compulsion; as St. ⁹ Chrysostom interprets this Passage of St. John.

3. The seeming Repugnancy that is in the Parable of the great Supper to this, because we read that some were ordered to be *Compelled to come in*, Luke xiv. 23. will be easily removed, if we consider, that, as in the Parable, so in the moral Explication of it, the Word *Compel* ¹⁰ signifies no more than *Earnestly to invite*; in this Sense do we find another Word of the same Signification, in Luke xxiv. 29. and nothing different is that in Matt. xiv. 22. Mark vi. 45. Gal. ii. 14. Procopius, in his secret History, informs us, that ¹¹ the Proceedings of Justinian were by wise Men censured, because in proselyting the Samaritans to Christianity, he made use of external Force and Menaces. And adds, that from thence several Inconveniencies arose, the Particulars of which may be seen in his Narrative.

XLIX. War may justly be made against those who persecute Christians, only for their being so.

XLIX. I. But they who punish Men, because they preach or profess Christianity, do, no Doubt of it, act against the Dictates of Reason; for the Christian Religion (considered untainted with Mixture, and in its primitive Purity) is so far from doing any Thing destructive to human Society, that in every Particular it tends to the Advantage of it. The Nature of it declares thus much, and those of a different Religion are forced to acknowledge the same. The Account given by Pliny ¹ of the Christians is, that *Binding themselves by Oath, they had abjured the Commission of Theft and Robberies, and falsifying their Word.* And of their Religion ² Ammianus says, that *Therein is nothing taught but what is agreeable to Justice and Clemency.* And it was a common Saying, ³ *Such a-one is a good Man, only he is a Christian.* And as to the Objection that all Novelties, particularly Assemblies and Conventicles, are to be feared, it is of no Force; for those Tenets which encourage the Practice of all Virtues, especially that of Obedience to Government, tho' before unheard of, leave not the least Room for Fear, nor ought the ⁴ Assemblies of honest and inoffensive People to be suspected, especially since they affect not any Privacy, unless compelled: What ⁵ Philo informs us to have been said by Augustus,

8 St. CYPRIAN, *Epist. LV. Turning to his Apostles, he said, Will ye also go away? Observing the Method of the Law, which leaving every Man to his own Liberty, and at his own Disposal, gives him the Choice of Life and Death, and so makes himself the Author of his own Fate.* GROTIUS.

9 Ἐγὼ δὲ λέγων· Μὴ καὶ ὑμεῖς θέλετε ὑπάγειν, &c. *Ad loc.* JOANN.

10 St. CYPRIAN, *De Idolorum vanitate*, with an Eye to this Passage, says, *But the Disciples, by the Advice and Order of their Lord and Master, dispersing themselves over the whole World, were to offer Men the saving Precepts of GOD, to bring them out of Darkness and Error to Light and Glory, and to hand the Blind and Ignorant to the Knowledge of the Truth. But lest this should be too slight a Proof of their Fidelity, and too nice and tender a Confession of CHRIST, Tortures, Crosses, and a thousand other Punishments, tempt and try their Strength and Constancy.* Cap. VII. Num. 6, 7. *Edit. Celler.* GROTIUS.

11 See the Letter of Theodahadus King of the Goths, to Justinian, in CASSIODORUS. *Var. X. 26.* GROTIUS.

XLIX. (1) *Seque sacramento non in scelus aliquod, &c.* Lib. X. *Epist. XCVII.* Num. 7. *Edit. Celler.*

2 He says this in Regard to George, Bishop of Alexandria, a turbulent Man, and a great Accuser, *Professionisque suæ oblitus, quæ nihil nisi justum suadet & lenè, ad delatorum causa feralia descisciebat.* (Lib. XXII. Cap. XI. p. 353. *Edit. Vales. Gron.*) The same Historian styles Christianity, a plain and sincere Religion. *Christianam Religionem absolutam & simplicem, anili superstitione confundens* (Con-

stantius, &c. (Lib. XXI. Cap. XVI. p. 318.) ZOSIMUS, another Heathen Writer, says, that the Christian Religion undertakes to deliver its Professors from all Manner of Vice and Impiety. (Lib. II. Cap. XXIX. Num. 7. *Edit. Celler.*) The Pagans generally termed it, a harmless and inoffensive Sect. *Seçta nemini molesta.* TERTULLIAN, *Scorpiaco*, (Cap. I.) JUSTIN MARTYR maintains, that of all Mankind the Christians contribute most to the Tranquillity of the Empire; because they teach, that whether Men do well or ill, they cannot conceal their Actions from the Sight of GOD; and that all Men are to expect either eternal Punishment, or eternal Happiness, according to their good or bad Behaviour in this World. *Apolog. II.* ARNOBIUS, speaking of the Assemblies of the Christians, says, that nothing was heard in them but what tended to inspire Humanity, Meekness, Modesty, Chastity, Liberality, Beneficence, and the Love of all Mankind. *In quibus (conventiculis) aliud auditur nihil, &c.* *Advers. Gentes, Lib. IV.* (p. 152, 153. *Edit. Salmas.* 1651. GROTIUS.

3 *Bonus vir Cajus Sejus, tantum quod Christianus.* TERTULLIAN, *Apologetic.* Cap. III. See also *Ad Nationes*, Lib. I. Cap. IV.

4 Our Author might very appositely have quoted here this Passage of TERTULLIAN, *Quum probi, quum boni coeunt, quum pii, quum casti congregantur, non est factio dicenda, sed Curia.* *Apologet. Cap. XXXIX. in fin.*

5 *De Legat. ad Cajum.* (p. 1035. E. *Edit. Paris.*) He shews elsewhere, how great a Difference there is between the Synagogues and the Mysteries of Paganism. *Lib. De Sacrificant.* (p. 856, & seq.)

gustus, of the *Jewish* Synagogues, is more truly and properly applicable to the Christian Congregations, That they were not Meetings for Revellings, or seditious Cabals, but pure Seminaries of Virtue.

2. They, therefore, who persecute Christians, as such, do make themselves justly obnoxious to Punishment. This is the Opinion of *Thomas Aquinas*. (Summ. Theol. ii. 2. *Quæst.* 103.) It was for this Reason that ⁶ *Constantine* commenced a War against *Licinius*, and other ^a Emperors, against the *Persians*; which Wars however relate rather to an innocent self Defence, of which we shall treat hereafter, than to a Punishment properly so called.

^a See *Menander Protector*.

L. 1. But as for those who use professed Christians with Rigour, because they are doubtful, or erroneous as to some Points either not delivered in Sacred Writ, or not so clearly but to be capable of various Acceptations, and which have been differently interpreted by the ¹ primitive Christians, they are undoubtedly very unjust; which is evident, both from what has been already said, and from the standing Practice of the *Jews*, who, tho' their Law had for its Barrier temporal Punishments, did not inflict any upon the *Sadducees*, for denying the Resurrection of the Dead, because (tho' infallibly true) it was not directly and explicitly asserted in their Law; but obscurely, under the dark Veil of Words or Types.

L. But not against those who are mistaken in the Interpretation of the Divine Law; this illustrated by Authorities and Examples.

2. But suppose the Error be more palpable, and such as one may be easily convicted of before equitable Judges, from the holy Scriptures, and from the concurrent Opinions of the primitive Fathers; even in this Case it is requisite to consider how prevalent the Force of a long standing Opinion is, and how much the Attachment every Man has to his own Sect, perverts his Judgment, and destroys the Freedom of it; an Evil, according to ² *Galen*, more incurable than a Leprosy. Very much to this Purpose says ³ *Origen*, *Ευχερεστερόν γάρ ἄνθρωπον, &c.* That a Man with more Ease can remove any Habit, tho' never so inveterate, than discard Notions that have been entertained a great While. Besides, to determine how criminal this is, it is requisite to be acquainted with the Degrees of Men's Understanding, and other inward Dispositions of Mind, which it is impossible for Men to find out.

3. According to St. *Austin's* Definition, ⁴ *An Heretick is one ⁵ who, out of a Desire of any temporal Interest, chiefly of Glory, and of being reputed the Head of a Sect, is the Author, or Follower, of new and false Opinions.* *Salvian's* Judgment of the *Arians* is thus expressed, ⁶ *They are Hereticks, but not wittingly: With Respect to us they are Hereticks, but not with Respect to themselves; for so unquestionably do*

seq.) which Passage is well worth reading. See something of the same Kind in *JOSEPHUS*, *contra Apion*, Lib. II. *GROTIUS*.

⁶ See *ZONARAS*, (in the Life of *Constantine*, Vol. III. init.) St. *AUSTIN* says, that if *Maximian*, Bishop of *Vagiae* in *Africa*, demanded Aid of a Christian Emperor, it was not so much to defend himself, as to defend the Church committed to his Care, against the Enemies of Christianity: *Auxilium ergo petivit, &c.* Ad *Bonifac. Epist.* L. These Words are inserted in the *Canon Law*, *Caus.* XXIII. *Quæst.* III. *Cap.* II. *GROTIUS*.

L. (1) Many Books of different Authors composed towards the Close of the last, and in the present, Age, are to be seen upon Toleration; in which Persecutors are entirely overthrown, as well by direct Proofs of the greatest Evidence, as unanswerable Arguments. All the World know these Works, which were published in several Languages, especially *French* and *English*. To these may be added the Observations of *MATTHIAS BERNEGGER*, published at *Strasburgh* in 1669. *Obs.* XV.

2. *De Natur. Facult.* Lib. I.

3. St. *CHRYSOSTOM* also says, that there is nothing so difficult as to resolve to change, in Point of Religion. In I. *ad Corinth.* Hom. II. *GROTIUS*.

4. *Quandoquidem Hæreticus est, ut mea fert opinio, &c.* *Cap.* I. These Words are inserted in the

Canon Law, *Caus.* XXIV. *Quæst.* III. (*Cap.* XXVIII.) He afterwards distinguishes between a Heretick, and a Person that suffers himself to be misled by the Arguments of a Heretick. *Ille autem, qui hujus modi hominibus credit, homo est imaginatione quadam veritatis ac pietatis illusus.* See the same Father's Letter, *CLXII.* cited in the following Canon. In *JUSTINIAN'S* Code Heresy is called *A mad Obstinacy*. *Nullus Hæreticis minorum locus, nulla ad exercendam animi obstinationis dementiam pateat occasio.* Lib. I. Tit. I. *De summa Trinitat.* &c. *Leg.* II. *princ.* *GROTIUS*.

But this Obstinacy is what Men can form no certain Judgment of, and those who are themselves in an Error, may look upon the Partisans of Truth as obstinate Persons; as the Authors I have mentioned in *Note 1.* of this Paragraph observe, and prove at large.

⁵ The Author of the Answers to the Orthodox, *Quæst.* IV. says, *Δηλοί εἰσιν, &c.* It is evident, that either the Ambition or Jealousy of the Breachers gave Birth to all the Heresies in the World. St. *CHRYSOSTOM*, upon *Gal.* v. *Ἡ γὰρ τῶν, &c.* For Ambition is the Mother of Heresy. *GROTIUS*.

⁶ *De Gubernat. Dei.* Lib. V. p. 150, 151. *Edit.* *Parif.* 1645.

they think themselves Orthodox, that they load us with the infamous Imputation of being Hereticks: What therefore they are to us, that do we seem to them: We are well assured, that their Conceptions of the Divine Generation are too mean; inasmuch as they assert the Son to be subject to the Father. And they think that we derogate from the Honour due unto the Father, by putting the Son on an Equality with him. The Truth is maintained by us, but they fancy it is so by them. GOD's Honour is advanced by us, but they imagine that their Belief is more conducive to it. They do not discharge their Duty, but in that very Omission do they place the chief Duty of Religion. In Reality they are impious, but in their own Thoughts truly pious. They are guilty of Error then, ⁷ but it is out of an honest Intention, from a Principle of Love, and not of Hatred, to GOD, since they believe that they honour and love the LORD. And that very Part of their Creed in which they are unorthodox, they look upon as the Perfection of their Love of GOD: And how they will be punished for their Errors at the Day of Judgment, ⁸ is a Secret to all but the Judge himself; but for the present, it is my Opinion that GOD does patiently bear with them, because he sees, that tho' their Tenets be false, yet do they proceed from a pious Zeal.

4. As to the Manicheans let us hear St. Austin, who himself was for a considerable Time tainted with their Heresy. ⁹ Let them, says he, exert their Rage against you, who know not what Labour and Pains the Discovery of Truth costs, and with what Care and Circumspection Errors are avoided. Let them exert their Rage against you, who know not how rare and difficult it is to surmount the Phantoms of a gross Imagination, by the Calm of a pious Judgment. Let them exert their Rage, who are not sensible what Trouble there is in curing the Eye of the inward Man, so as to be able to look upon its Sun. Let them exert their Rage, who are ignorant how many bitter Sighs and Groans we must emit, before we can arrive at the least Portion of divine Knowledge. Finally, Let them exert their Rage, who themselves are not seduced by any such Error as it is your Unhappiness to be fallen into. But as for my own Part, I cannot be at all severe against you, being persuaded it is my Duty to bear with your Infirmities, and to allow you the same mild and gentle Usage as others did me, when I blindly maintained, and madly persisted in these very Errors my self.

5. St. Athanasius, in his Epistle to the Hermits, sharply exclaims ¹⁰ against the Arians, because they were the first who introduced the Use of the secular Power against

7 AGATHIAS, in the first Book of his Histories, relating the ridiculous Superstitions of the *Almaines*, subjoins *ἑλέσθαι μὲν, &c.* But indeed whoever they are who offend against the Truth, they deserve rather our Pity than our Hatred, and are the more entitled to our Pardon: For they do not willingly deviate and stumble; but only when their Judgments are deceived in their Pursuit of Good, whatever they have once received, they are obstinately bent to retain. (Cap. V.) GROTIUS.

8 This St. CHRYSOSTOM observes also. Can any one tell, says he, how the Person whom you conceive to be in an Error, will accuse or excuse himself, in the Day when GOD shall judge the Secrets of all Hearts: Upon which he adds, that The Judgments of GOD are unsearchable, and his Ways past finding out. Homil. contra Anathematizant. GROTIUS.

9 *Contra Epist. Manichæi*, Quam vocant fundamenti, Cap. II. & III. p. 78, 79. Vol. VI. Edit. Basil. Fine Sayings, if this Father had not belied them by his Conduct! Consult Note II. upon this Paragraph.

10 It is with Reason we hate those People who were the first that introduced Persecution amongst Christians, and set so horrid an Example. See their Cruelties in EUSEBIUS, *De Vit. Constantin.* Lib. I. Cap. V. - XXXVIII. SOCRATES, *Hist. Eccles.* Lib. IV. Cap. XXIX. PROCOPIUS, *Vandalic.* Lib. I. where he speaks of Honoric, (or Huneric, Cap. VIII.) and Gothic. - Lib. I. (Cap. XIII.) concerning Amalaric; as also in VICTOR,

Uticens. St. EPIPHANIUS accuses the *Demi-Arians* of persecuting those who profess and teach the Truth; and of endeavouring to convert them, not by Persuasion, but by Enmity, War, and the Sword; so that, adds he, they have not ruined one City or Country, but many. GREGORY, Bishop of Rome, says to the Bishop of Constantinople, speaking of such Persecutors, that the converting of People to the Faith by Stripes is a new and unheard of Method of preaching the Gospel. *Nova & inaudita est ista prædicatio, quæ verberibus exigit fidem.* GROTIUS.

The Arians were, without Doubt, highly in the Wrong to persecute; but as we ought to do Justice to all the World, our Author should not have reproached them, as having been the first who dishonoured Christianity by a Conduct so opposite to the Gospel. The late Mr. BAYLE has very well observed, in his *Philosophical Commentary*, (Supplement, p. 364. 1 Edit.) and in his *Historical and Critical Dictionary*, at the Article of Arius, Notes A. G. that The Orthodox had been the Aggressors; for they had implored the secular Arm of Constantine against Arianism, before the Arians had proceeded to any violent Measures. See what follows. And EUSEBIUS, in the Life of Constantine, Lib. III. Cap. LXIV. & seq. SOCRATES, *Hist. Eccles.* Lib. I. Cap. IX. in Constantine's Letter to the Bishops and People. Our Author quotes this Life improperly, that has nothing in it of the Persecutions used by the Arians, against those of the opposite Party. He had probably in his Thoughts what

SOZOMEN

against Dissenters, endeavouring to bring over to their Opinion by Violence, Scourges, and Prisons, those whom they could not convince by Dint of Reason; ¹¹ Which, as he says, *shews that this Heresy is neither pious nor religious.* Spoken, very probably, in Allusion to that of St. Paul, ^a Gal. iv. 29. *As then he that was born of the Flesh, persecuted him that was born of the Spirit, even so it is now.* To the same Effect does St. Hilary deliver his Sentiments, in his Speech to Constantius. And we have an Account of ¹² some Bishops in the antient Gaul, who incurred the Censure of the Church for procuring the Execution of the Priscillianists; and in the East a Council was censured, for consenting to the Burning of Bogomilus. It was a wise Saying of Plato, that ¹³ *The only Punishment of one ¹⁴ under an Error, is to be better informed.*

^a See St. Jerome upon it, as cited in Canon Law, *caus. 63. qu. 4. cap. 13.*

SOZOMEN relates, *Hist. Eccles. Lib. II. Cap. XXV. XXVIII.* concerning the Degradation and Banishment of St. Athanasius. The Citation that follows is also faulty as to the Number of the Chapter, for it is in Chap. VI. XV. XVI. XVII. XVIII. and XIX. of B. IV. that SOCRATES speaks of the Violence and Cruelties, exercised by the Emperor Valens, at the Instigation of the Arians, against the Defenders of the Consubstantiality of the Word. For the Rest, our Author, in his Notes upon the Gospels, (in MATTHEW, xiii. 41. p. 257.) expresses himself differently upon this Head. He contents himself with ascribing to the Arians the Introduction of corporal Punishments somewhat rigorous, from whence they afterwards proceeded, says he, to the shedding of the Blood of those who were not of the same Opinion with themselves, in Point of Religion. But he confesses, that Constantine, after having declared, in his first Edicts, that all Persons should enjoy Liberty of Conscience; decreed afterwards Penalties, which were most of them pecuniary, against such as had separated themselves from the Communion of *The Great Church*, that is to say, of the strongest Party; which he did, (adds our Author) either out of Policy, or at the Solicitation of the Bishops, who were willing to spare themselves the Trouble of disputing every Day with their Opponents. *Seu quod imperio ita conducere arbitretur, seu quod Episcopi laborem quotidianæ disputationis subterfugerent, &c.*

¹¹ He adds, that it is the Property of Piety to use the Methods of Persuasion, not of Compulsion. *Epist. ad Solitar. Vol. I. p. 855. A.* One might take Advantage of so formal a Declaration of Saint ATHANASIUS: But the Truth is, that he, and several others of the Fathers, who have spoke the same Language, have often contradicted themselves in their Conduct, and even admitted or established Principles, in Consequence of which Persecution, on account of Religion, was only condemned by Halves; so loose and ill-digested were their Maxims. The great St. AUSTIN, in particular, has varied upon that Head, according to the Times, as our Author confesses in the same Place of his Notes upon the Gospel, which I have cited in the preceding Note. That Father, says he, long believed that those, who were called *Hereticks*, were not to be punished in any Manner whatsoever. But having many Combats afterwards to maintain against the *Donatists*, a pretty obstinate Sect, he changed his Sentiments, and approved of such Punishments as left the Criminal Time to repent; persisting otherwise to condemn capital Punishment, which he often opposed, in Regard to those People. See the Treatise of MARK ANTONY DE DOMINIS, *De Repub. Eccles. Lib. VII. Cap. VIII.* in which he has collected several other Passages of the Fathers upon this Subject.

¹² Idacius & Ithacius. SULPICIUS SEVERUS observes, that they were very unwise to apply, as they did, immediately to the Civil Magistrates, in order to engage them to expel the Priscillianists out of the Cities. *Tum vero Idacius, &c. (Hist. Sacr. Lib. II. Cap. XLVII. Num. 5. Edit. Vorst.)* A little lower, speaking of the Council of Bourdeaux, in which the two Spanish Bishops before-mentioned, appeared as Accusers of the Priscillianists, that Historian says, that he would not blame their Zeal against the Heresy, if they had not acted with too much Heat, from the Desire of overcoming; and he equally condemns the Accusers and the Accused. *Sequuti etiam accusatores, &c. (Cap. L. Num. 1, 2.)* Martin, Bishop of Tours, spared no Pains to induce Idacius to desist from his Accusation; he begged the Emperor Maximus not to shed the Blood of those unhappy People; he represented to him, that it was sufficient, and more than sufficient, if, after having been declared Hereticks by the Sentence of the Bishops, they were excluded the Churches; that it was a new and unheard of Attempt, in Ecclesiastical Affairs, to have Recourse to the Civil Magistrate. *Namque tum Martinus, &c. (Ibid. Num. 5.)* GROTIUS.

¹³ I find this Saying in the first Book *De Republica*, where that Philosopher speaks of those who, being ignorant of some Truth, are by that Ignorance generally led into some Error. p. 337. D. Vol. II. Edit. H. Steph. It is visibly from hence, that a Father of the Church has taken a Thought, quoted by our Author in the following Note.

¹⁴ Error does not deserve the Name of Crime according to SENECA,

THES. *Quis nomen unquam sceleris errori dedit?*
(Herc. fur. v. 1237.)

The same Philosopher says, No wise Man will hate those who are in an Error, for if he does he must hate himself. *Non est autem prudentis, errantes odisse: Alioquin ipse sibi odio erit.* De Ira, Lib. I. Cap. XIV. MARCUS ANTONINUS says, "Instruct those who err, if you can; if you cannot, remember that your good Nature was given you, that you might use it towards them, and that the Gods are indulgent to such Persons." Lib. IX. (§ 11.) St. CHRYSOSTOM says, that the Ignorant are neither to be punished nor accused, but to be instructed in what they are ignorant of. In Eph. iv. 17. AMMIANUS MARCELLINUS praises the Moderation of the Emperor Valentinian, in not molesting any one upon Account of Religion, and in suffering every Body to serve GOD in Peace, according to the Lights of his own Conscience. *Postremo hoc moderamine, &c. Lib. XXX. Cap. IX.* GROTIUS.

LI. But justly
against those
who are im-
pious towards
such as they be-
lieve to be Gods.
^a Thucyd. l. 1.
c. 126. & seq.
Ed. Oxon.
^b Diod. Sicul.
l. 11. c. 60.
& seq.

LI. 1. But ¹ to punish those, whose Deportment to the Objects which they esteem as Gods, is irreverent and irreligious, is more reasonable and just; and this, in Conjunction with others, was assigned a Cause of the Peloponnesian War ^a between the Athenians and Lacedemonians, and of Philip King of Macedon's War ^b with the Phocians, whose Sacrilege ² Justin represents to be such, that To have it expiated, the whole World should have united their Forces. St. Jerom, upon Daniel, Chap. v. says, ³ As long as the Vessels were kept in the Idol Temple at Babylon the LORD was not wroth, (for these Vessels they looked upon as dedicated to GOD, and applied them accordingly to Uses, in their mistaken Judgment, the best and most sacred) but immediately upon their polluting them with ordinary Uses, their Sacrilege was attended with a severe Punishment. And St. Austin thinks that GOD gave the Romans such great Dominions, ⁴ because they had a Zeal for their Religion, tho' a false one, and because (as Lactantius says) ⁵ they applied themselves to the principal Duty of Man, if not by a true Practice, at least with a good Intention.

^c Chap. 13. §
12. of this
Book.

2. We have already taken Notice, ^c that whatever GOD we invoke in our Oaths, the Violation of them will be punished by the only true GOD, ⁶ Because, as Seneca says, we believe that we affront GOD, which Opinion of ours makes us justly liable to Punishment. In this Sense I take too that other Passage of Seneca, ⁷ The Violators of Religion are in different Places differently punished, but no where are suffered to go unpunished. And it is thus also that I understand Plato, ^d when he speaks for inflicting Death upon all who despise Religion.

^d De legib. l.
10. n. 907,
&c. tom. 2.
Ed. Steph.

LI. (1) See some fine Passages upon this Subject, in B. V. and VI. of St. CYRIL, against the Emperor Julian. The Amphictyons, at the Persuasion of Solon, made War upon the Cirrhaeans, for having entered by Force into the Temple of Delphos; as PLUTARCH informs us in the Life of Solon, (p. 83. Vol. I. Edit. Wech.) So those who set themselves up for Prophets, and are not such, may be justly punished. See AGATHIAS, Lib. V. (where he speaks of such People that rose up at Byzantium, Cap. III.) GROTIUS.

2 Illum vindicem sacrilegii, &c. Lib. VIII. Cap. II. Num. 6.

3 Quamdiu vasa fuerunt, &c. (Vol. V. p. 581. B. Edit. Basil.)

4 Our Author does not say from whence he took this; and perhaps it is no where to be found, tho' a learned German, CHRYSOSTOPHER ADAM RUPERT, advances the same Thing in his Observations upon VALERIUS MAXIMUS, Lib. I. Cap. I. p. 19. without Doubt upon our Author's Authority. I very much suspect, that he has mistaken the Sense of the Father, or if that Father has said any Thing like it, he is not here entirely consistent in his Principles: For in his Treatise De Civitate Dei, Lib. V. Cap. XII. he proves at large, that the Divine Providence permitted the Empire of the Romans to increase, not on Account of their Attachment to their Religion, tho' false; but because of their civil Virtues. See also Lib. IV. Cap. XII. I find in the Notes of TESMAR, a Passage of Lett. V. to Marcellinus, wherein that Compiler discovers the Thought ascribed by our Author to St. AUGUSTIN; but it is just the reverse, and I shall give the Passage, in order to prove at the same Time the Truth of my Observation, and the Want of Judgment which TESMAR shews in this Place, as he does every where else. Ut, quamdiu

inde peregrinamur, feramus eos, si corrigere non valeamus, qui, vitiis impunitis, volunt stare Rempublicam, quam primi Romani constituerunt, auxeruntque virtutibus: & si non habentes veram pietatem erga DEUM verum, quæ illos etiam in æternam civitatem posset salubri religione perducere, custodientes tamen quandam sui generis PROBITATEM, quæ posset TERRENÆ CIVITATI CONSTITUENDÆ, AUGENDÆ, CONSERVANDÆQUE sufficere. DEUS enim sic ostendit in opulentissimo & præclaro Imperio Romanorum, QUANTUM VALERENT CIVILES, ETIAM SINE VERA RELIGIONE VIRTUTES, &c. This agrees very well with what the antient Doctor says in the Places of his other Work, which I have quoted.

5 He speaks of Idolaters in general, Nam isti fragilium cultores — aliquid tamen sapientiæ retinent, & HABERE VENIAM possunt, quia summum hominis officium, etsi non re ipsa, tamen proposito tenent. Instit. Divin. Lib. II. Cap. III. Num. 14. Edit. Cellar.

6 Injuriam sacrilegus DEO, &c. De beneficiis Lib. VII. Cap. VII. The Philosopher does not speak of those who affront false Divinities; but his Meaning is, as appears by the whole Series of the Discourse, that tho' by committing a Sacrilege, one does no Injury in Reality to the Divinity, whom he supposes a true GOD, because he is out of the Reach of all Harm; yet he who commits it deserves to be punished, because he believes he injures the Divinity, and others consider his Action on that Foot. Our Author, however, has since alleged this Passage, thus misapplied, in his Notes upon The Wisdom of SOLOMON, ver. 31. where, upon the Word Opinio, he says, adde, aut professo.

7 Et homicidii, veneficii, &c. Ibid. Lib. III. Cap. VI.

C H A P. XXI.

Of the Communication of Punishments.

I. 1. **O**UR Enquiry concerning the Communication of Punishments, relates either to those ¹ who are Accomplices in the Crime, or to others who are not so. Accomplices in a Crime are not said so properly to be punished for other Mens Faults, as ² their own. Who they are then, is easily learnt from what has been already ^a said, in Reference to the Damages consequent upon an Injury. For generally, by the same Means a Man may be Partaker of another's Crime, as he is made liable to the Reparation of such Damages; tho' an Obligation to this is not always attended with a Crime; but then only, when some more than ordinary Degree of Guilt concurs; whereas, to make a Man accountable for Damages received, the least Degree of Offence is frequently sufficient.

2. They therefore who command a wicked Action; who consent ³ to it, when their Consent is necessary for committing it; ⁴ who afford their Assistance; ⁵ who shelter the Author of the Action, or are in any other Respect accessary to it, either ⁶ in advising, ⁷ commending, or encouraging the Fact; they ⁸ who prevent it not, when

I. How the Partakers of the Crime must partake of the Punishment.

^a Chap. 17. of this Book.

I. (1) See PUFENDORF upon this Subject, *Law of Nature and Nations*, Lib. VIII. Cap. III. § 28. & seq. and Cap. VI. § 12.

2 TERTULLIAN, *De Resurrectione Carnis*, Chap. XVI. For they will say that their Assistants and Companions are at their Liberty, either of helping and associating with them or not, that it is at their own Choice, and in their own Power, either to be one or the other, being no less than other People endued with Freedom of Will; and that therefore, since they voluntarily concurred with them, they are as criminal as the Authors themselves. GROTIUS.

3 At the Death of St. Stephen, tho' Saul kept only the Cloaths of those who stoned that holy Man, he stoned him by their Hands; as St. AUGUSTIN observes. *Saulus manibus omnium lapidabat*. Sermon. V. *De Sanctis*. Cap. IV. See something like this, Sermon. I. in idem Argument. Cap. III. and Sermon. XIV. GROTIUS.

The Consent of Saul was not necessary; they would have stoned St. Stephen without him. So that this Example relates to another Class, or to the Case of those, who, concurring little or nothing to the actual Production of a Crime, are united in Will with those who commit it, and inclined to assist in it very much, if necessary.

4 As when a Man shakes Money out of one's Pocket, that another may seize it; or stops a Person, to give another Time to take something from him; or drives away Sheep or Oxen with a Piece of red Cloth; for Example, that they may fall into the Hands of a Thief; or places a Ladder against a Window; or breaks open a Door, or Window, for a Thief to enter; or lends him a Ladder to get up, or some Instrument of Iron to open with. These are the Examples mentioned in the *Institutes*; *Interdum Furti tenetur, qui ipse furtum non fecit*. Lib. IV. Tit. I. *De obligationibus, quæ ex delicto nascuntur*. § 11. See the Edict of THEODORICK, Cap. CXX. GROTIUS.

5 Hieronym. super parabolas, Cap. XXIX. Vol. VII. p. 53. C. Edit. Froben. 1537. Not only the Thief, but the Person who, being privy to the Theft, conceals it from the Party robbed, is guilty. CHRYSOSTOM. *De Statuis*, Orat. XIV. & οἱ ἄποχρηστές, &c. Not only those who forswear themselves,

but those who are acquainted with the Perjury, and conceal it, are criminal. GROTIUS.

6 See the *Institutes*, and Edict of THEODORICK, where cited Note 4. According to an antient Law of Athens, he who had advised a Crime was liable to the same Punishment as he that committed it. Καὶ ἑστὶν ὁ νόμος, &c. ANDOCID. (*Orat. I. De Mysteriis*, p. 219. Edit. Wech.) ARISTOTLE says, that without the Advice given, he that followed it would not have done the Fact. *Rhetoric*. Lib. I. Cap. VII. (p. 126. Edit. Victor. 527. Edit. Paris. Vol. II.) GROTIUS.

What is here quoted from ARISTOTLE, that Philosopher cites as from the Orator Leodamas, who grounds a Proof upon it, that he who gives bad Counsel is more criminal than he who follows it. Our Author, by Mistake, quoted here *De Poetica*, Cap. XVII. And it is necessary to remark further, that in the Passage of the *Institutes* to which he refers, the bare Advice is not considered as a Thing that renders a Person an Accomplice in Theft: The Emperor, on the contrary, intends, that he who only advises to rob, shall not be liable to any Prosecution, unless he has actually aided in the Robbery, in some Manner or other. *Certe qui nullam opem ad furtum faciendum adhibuit, sed tantum consilium dedit, atque hortatus est ad furtum faciendum, non tenetur furti*. This is clear, and I shall not enter into the Dispute of Interpreters upon the Sense of this Form, *Ope consilio*, or *Ope aut consilio*. A Dispute which arises from the Ambiguity of the Word *Consilio*, and the different Opinions of the Sects of antient Civilians upon this Subject.

7 According to St. CHRYSOSTOM, he who praises a bad Action, is worse than him who commits it: In Cap. I. *Ad Roman. circa fin.* By the Laws of the antient Lombards, he, who being present encourages a Person in doing ill, is deemed to commit the Crime himself, *Lib. I. Tit. IX. § 25*. See the Passages cited hereafter from PHILLO and JOSEPHUS in the Note upon § 17. GROTIUS.

See upon all this, PUFENDORF's *Law of Nature and Nations*, B. I. Chap. V. § ult. B. III. Chap. I. § 4. and the Notes upon the Abridgment of *The Duty of a Man and a Citizen*, B. I. Chap. I. § ult.

8 CHRYSOSTOM I. *Adversus Judæos*, Orat. I.

when under a strict Obligation of so doing, or who do not aid the Sufferer, when invested with a proper Power and Authority thereunto; they who dissuade not, when in Duty they stand bound to do it; and they who then disclose not the Matter, when they are so obliged: These are all justly liable to Punishment, if there appear in them such a Measure of Guilt as deserves Punishment; according to the Maxims laid down in the foregoing Chapter.

II. *The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so.*

^a *Quæst. in Levit. xxvi.*

^b *Liv. Lib. 1. Cap. 24. n. 8.*

^c *Lib. 29.*

Cap. 17. n. 2.

^d *Lib. 35. Cap.*

31. n. 14, 15.

^e *Idem, Lib.*

45. Cap. 23. n. 7, 8.

II. 1. This I shall illustrate by particular Instances. No civil Society, or other publick Body, is ^a accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge. St. Austin ^a very aptly distinguishes between the *peculiar Faults of Individuls, and publick Faults committed by the Concurrence of a Multitude*. Hence that Condition ^b so frequent in Treaties ^c *If the Violation was a publick Act*. The Locrians in Livy ^c tell the Roman Senate that the Publick was not any ways concerned in their Revolt. And the same Author ^d reports that Zeno in his Justification of the *Magnesiensians* did with Tears beseech T. Quintius, and the other Embassadors, not to ascribe to a whole City the Follies of one particular Person, but that every Man should at his own Expence pay for his respective Extravagance. And the Rhodians ^e beg of the Senate to distinguish betwixt the Fact of the Publick, and the Fault of particular Men; affirming that *there is no State which has not sometimes wicked Subjects and always an ignorant Mob to deal with*. So neither is a Father responsible for his Children's Crimes, nor a Master for his Servants, nor any other Superior for the Faults of those under his Care; if there be nothing criminal in his Conduct, with respect to the Faults of those, over whom he has Authority.

2. Now among those Methods that render Governours the Accomplices in a Crime, there are two of very frequent Use, and which require to be particularly considered, *viz.* Toleration and Protection. As to the first we thus determine, that a Man who is privy to a Fault and does not hinder it, when in a Capacity and under an Obligation of so doing, may properly be said to be the Author of it ². Cicero in his Oration against Piso says, that *it is much the same Thing, especially in a Consul, whether by destructive Laws and seditious Speeches he disturbs the publick Peace himself, or connives at such a Practice in others*. Thus ³ Brutus to Cicero; *Will you charge me with another's Crime? One is certainly guilty of another's Crime, if it was in his Power to have prevented it. To be in a Fault ourselves, or not to hinder others to be so* (says Agapetus ^f to Justinian) *are equally criminal*. And Arnobius, ^g *The Sufferance of an Offence makes the Offender more forward and audacious*. Thus Salvian, ^h *He who prevents not an ill Action, when it is in his Power, enjoins the doing of it*; and ⁴ St. Austin, *Not to obviate and oppose a Thing, is an Argument of our assenting to it*.

3. So by the Roman Laws, ⁵ he who kept not his Slave from being prostituted, when he might, was taken for the Prostitutor himself. And if a Slave with his Master's Knowledge commits Murder, ⁶ the Master is wholly accountable for it, be-

^f *Parænet. Cap. 28.*

^g *Adversus Gentes. Lib.*

4. p. 149. Edit. Ludg.

1651.

^h *De Gubernat.*

Dei. Lib. 7.

p. 266. Edit.

Paris 1645.

ὡσαύτε ἔν, &c. So then, not only those who commit a Robbery, but those who are impowered to prevent it, and do not prevent it, deserve Punishment, and that equally too: So likewise he, who hinders a Person's Cure, is as guilty, as if he himself had given him the Wound, says the same St. CHRYSOSTOM, upon 2 Cor. vii. GROTIUS.

II. (1) AMMIANUS MARCELLINUS relates, that the Embassadors of the *Quadi*, an antient People of Germany, used the common Excuse, that they had done nothing against the Romans by the publick Council of the Heads of the Nation, but that the Disorders had been committed by certain Robbers who were Foreigners. *Docere jussi, quæ ferebant, &c.* Lib. XXX. (Cap. VI.) St. CHRYSOSTOM, speaking of those, who raised a Sedition in Antioch, in which the Statues of Theodosius the Emperor and of the Imperial Family had been thrown down; observes, that the Body of the City had no Share in those Disorders; but that the Authors of them were certain insolent and inconsiderate Strangers; from whence he concludes, that it would be unjust

to ruin so great a City for the Folly of a small number of Persons, and to punish the innocent with the guilty. *Orat. III. De Statuis.* GROTIUS.

² *Nondum quæ feceris, sed quæ fieri passus sis, &c.* (Cap. V.)

³ *Alienæ igitur, inquires, culpæ me reum facies? Prorsus alienæ; si provideri potuit, ne existeret.* (Epist. Ad Brut. IV.)

⁴ *Qui desinit obviare, quum potest, consentit.* Our Author does not say from what Work of this Father he took these Words. I find them in the Canon Law, *Caus. XXIII. Quæst. III. Can. XI.* where they are cited as from the Comment of St. AUSTIN upon Psalm lxxxi.

⁵ *Imperator noster cum patre, &c.* Digest. Lib. LX. Tit. VIII. *Qui sine manumissione ad libertatem perveniunt, Leg. VII.*

⁶ *Si servus, sciente domino, occidit, &c.* Digest. Lib. IX. Tit. IV. *De naxalib. Actionibus, Leg. II. Princip.* See the Treatise of Mr. NOODT, *Ad Leg. Aquil. Cap. X.*

cause it seems to be the Master's Act ; and when one Slave seduces and conceals another, the Punishment due to such a Crime is by the *Fabian* ⁷ Law to be inflicted on the Master, if privy to it.

4. But as we said before, it is required that in Conjunction with the Knowledge there be sufficient Power to prevent it. ⁸ In this Sense are we to understand Knowledge, when the Laws pronounce it criminal. So that it is he who becomes accountable for a Fault, who being invested with sufficient Power did not prevent it ; and when Knowledge is punishable, it is likewise presupposed that there be an assent of the Will. As therefore, on the one Hand, ⁹ the Actions of Slaves, who have gone to Law to prove that they are of a free Condition, or slight and disregard their Master's Authority, ¹⁰ are not imputable to their Masters, because in that Case they could not prevent what was done by their Slaves ; nor those of Children ¹¹ to their Parents ; if not under their Direction and Government, because Knowledge without Authority will not amount to Guilt ; so, on the other Hand, are they not chargeable with any Crimes, tho' they have it in their Power, and could otherwise have hindered them, ¹² if they are not privy to them. For to make a Man accountable for another's Fault, there ought to be a Concurrence of Knowledge and Permission. All which will with respect to Princes and their Subjects hold equally good, because it is founded upon natural Equity.

5. And therefore *Proculus* thinks that of *Hesiod* not unreasonable.

¹³ Πολλὰκι καὶ ξύμπασα πόλεις καὶ ἀνδρὸς ἐπαυρεῖ,

For one bad Man a People often smart.

¹⁴ Because having proper Power, they exerted it not in preventing his Wickedness. So in the Grecian Army, as *Agamemnon* himself, as well as the rest, were dependent on the general Assembly, it was no Hardship that

¹⁵ The People suffer, when the Prince offends.

Creech.

⁷ Si servus, sciente domino, alienum, &c. JUL. PAUL. Rec. Sentent. Lib. V. Tit. XXX. Ad Legem Fabiam, § 2.

⁸ Scientiam hec pro patientia, &c. Digest. Lib. IX. Tit. I. Ad Leg. Aquil. Leg. XLV. Is autem accipitur, scire, qui scit, & potuit prohibere : Scientiam enim spectare debemus, quæ habet & voluntatem, Lib. XLVII. Tit. VI. Si Familia Furtum fecisse dicatur, Leg. I. § 1. See also Lib. XLVII. Tit. VII. Arborum furtum casarum, Leg. VII. § 5. and LEX WISIGOTHOR. Lib. VIII. Tit. IV. Cap. XI. XXVI. & alibi, Lib. IX. Tit. I. Cap. I. GROTIUS.

⁹ In delictis servorum scientia domini, &c. Digest. Lib. IX. Tit. IV. De noxalib. act. Leg. IV. Princ. In this Law our Author follows the common reading in former Times, in the Words. Aut quid si condemnat dominium ? Whereas the Florence Edition has: Aut qui condemnat Dominum ; which makes a different Sense, and means that the Slave has caused his Master to be condemned to leave him his Liberty : For the Word condemnare is sometimes used in regard to those who obtain a Sentence in their Favour ; as may be seen in the Examples alleged by the President BRISSON in his Law-Dictionary, and PETER DU FAUR, Semest. II. Lib. II. Cap. XXIII. p. m. 253, 354. I find however, that the great Cujas, in his Commentary upon JULIUS PAULUS, Ad Edictum, p. 43. and ANTONY DU FAUR, Ration. Vol. II. p. 922. prefer also the same reading our Author has followed. For the rest, see the Treatise of Mr. NOODT upon the Foundation of the Decisions of the Roman Law in regard to Crimes committed by Slaves, Ad Legem Aquiliam, Cap. X.

¹⁰ Culpâ caret, qui scit, sed prohibere non potest. Digest. Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. L. See also CIX. of the same Title,

with the Commentary of PETER DU FAUR, from whom our Author seems to have taken the Laws, and most of the Passages cited by him in this Place.

¹¹ This is determined in the Digest in regard to a Father, who suffers his Son to marry a Widow before the Time of her mourning be expired ; or who permits his Son or Daughter to betroth themselves at the same Time to two different Persons in the Name of a third ; or who suffers his Daughter, being become a Widow, to declare herself with Child, that she may be put in Possession of her deceased Husband's Estate : For in all these Cases the Father is branded with Infamy, as well as the Son or Daughter, if they were still under his Tuition. Et [infamia notatur] — [quæ intra id tempus, quo elugere virum moris est, in matrimonium collocata est,] &c. Digest. Lib. III. Tit. II. De his, qui notantur infamia, Leg. I. Si quis alieno nomine sponsalia, &c. Ibid. Leg. XIII. § 1. Idque & in patre, &c. Leg. XIX. GROTIUS.

¹² This is another Law cited by our Author in the Margin, which says, that when a Slave has committed some Offence merely of his own Head, and without his Master's Order, the latter is however obliged either to make good the Damage, or give up the Slave : Quod si servo suo non præceperit, &c. Digest. Lib. XLVII. Tit. VII. § 5. But this took Place whether the Master had or had not any knowledge of the Slaves bad Design. So that the Case is not to the Purpose here. See what I have said before on this Head in the tenth Chapter of this Book, § 21.

¹³ Oper. & Dier. Ver. 240, 241. Edit. Cler.

¹⁴ PROCLUS, In laud. vers.

¹⁵ Quidquid delirant Reges, plebsuntur Achivi. HOR. Lib. I. Epist. II. Ver. 14.

Because it was their Business ¹⁶ to have compelled him to restore the Priest his Daughter. So their Navy is afterwards said to be burnt by Pallas,

¹⁷ For the Fault of one offending Foe.

Dryden.

Which Affair Ovid, Metam. XIV. expresses thus :

*The Maid he stole, yet what himself alone
Deserv'd to bear was felt by all the Rest ;*

Because they did not hinder the Rape of the Virgin Priestess. And we have an Account in ¹⁸ Livy, that some Laurentine Embassadors having been ill used by Persons nearly related to King Tatius, demanded of him Satisfaction for this Infringement of the Law of Nations, but by the Interest his Relations had in him, together with their Intreaties, he was byass'd in their Favour, for which he brought upon himself the Punishment that was due to them. To this what Salvian says of Kings is very properly applicable, that ¹⁹ the Supreme Power, which is able to prevent the Commission of the greatest Villanies, does by Toleration manifest its Approbation of them. And ²⁰ in Thucydides we read that ὁ δυνάμενός, &c. He who can prevent a Crime, and does not, is more in Fault than the Actor. In Livy we find that the ²¹ Veientes and Latins excused themselves, by urging that it was without their Privity, that the Romans Enemies had received Assistance from their Subjects. But the Excuse of ⁱ Teuta the Illyrian Queen would not serve, when she endeavoured to vindicate herself by asserting, that not by her, but her Subjects the Piracy was committed ; because tho' acquainted with their Practice, she did not prohibit them. And the ^k Scyrians were long since condemned by the Amphictyones, for permitting some of their People to play the Pyrates.

ⁱ Polyb. Lib.
2. Cap. 8.

^k Plut. in vit.
Cimon. p.
483. C. Vol. 2.

6. Now

¹⁶ According to St. CYRIL in his fifth Book *Adversus Julian*. GROTIUS.

The Place which our Author means is in p. 175. Edit. Spanheim. But I do not find, that that Father gives such an Explication. He makes use of this Example only to retort upon Julian, the Apostate, the Reproach he had cast upon the true GOD, of being subject to great Wrath.

¹⁷ ——— *Pallasne exurere classem
Argivum, atque ipsos potuit submergere ponto
Unius ob noxam, & furias Ajacis Oilei.*
VIRGIL. *Æn.* I. 39. & seq.

*Naryciusque heros, a virgine, virgine raptâ,
Quam meruit solus, pœnam digessit in omnes.*
OVID. *Metam.* Lib. XIV. (Ver. 468.)

EURIPIDES in his *Troades*, introduces Neptune speaking thus, Ver. 69. & seq.

Οἶδ' ἤνικ' Αἴας εἶλκε Κασάνδραν βία,
I know it, when Ajax forc'd Cassandra.

And MINERVA replying,

Κ' εἶδεν γ' Ἀχαιῶν ἔπαθεν, εἰ δ' ἠκὺς ὤσο.
—— *The Greeks Regardless saw his Crime
Nor made him suffer for it.*

And upon the same Principle St. CHRYSOSTOM involves all the People of Antioch in the Guilt of the Sedition, wherein the Statues of the Emperor and the Imperial Family were thrown down, in his first Oration *De Statuis* : ἰδὲ τὸ ἀμάχημα, &c. Few were directly concerned in the Crime, but the Charge is common and universal. We are all upon their Accounts under sad Apprehensions, and expect ourselves every Moment to be punished for what they have dared to do : Whereas, had we expelled them the City, we might have prevented this, and had we managed the affected Part as we ought, we had not

now been labouring under our present Fears. And then afterwards, δι' αὐτὸ εἶναι, &c. For this very Reason, says he, shall you smart, shall you be severely punished, because you were not there, because you did not hinder them, because you did not restrain those furious Wretches, nor hazard yourselves for the Emperor's Honour. You had no Share in their Proceedings, you did not join them in their Audaciousness ; I commend you for it, and take it kindly ; but inasmuch as you did not hinder the Fact itself, you are deservedly prosecuted. GROTIUS.

¹⁸ Post aliquot annos, &c. Lib. I. Cap. XIV. Num. 1, 2.

¹⁹ Potestas quippe magna & potentissima, &c. De Gubernat. Dei, Lib. VII. p. 226. And PHILO in Flaccum, ὁ γὰρ ἐπιπλήττειν, &c. For he who has the Power of inflicting Punishments, might, if he pleased, have put a Stop to it altogether ; and if he did not hinder it, it is plain that he both permits and approves it. DION in Galba, τοῖς μὲν γὰρ ἰδιώταις, &c. All that a private Person has to do, is to see that he does not himself offend ; but Magistrates, and People in Government, are to take Care that others do not. In the fourth Chapter of the Synod of Pistes, inserted among the Capitularies of Charles the Bald, we have the following Sentence, He who neglects to reform what he might reform, does at the same Time give his Consent to the Fact ; and therefore, no Doubt of it, makes himself an Accomplice in the Crime. See NICETAS CHONIATES, Lib. II. De Andronico. GROTIUS.

²⁰ Where he speaks of those who suffer their Allies to be enslaved by some other State, tho' in their Power to prevent it, Lib. I. Cap. LXIX. Edit. Oxon.

²¹ The Author cites Lib. I. and VI. in the Margin. In the latter I find the Latins and Hernicians excuse themselves on that Account, because some of their Youth were gone to serve in the Army of the Volsci against the Romans : Responsum frequenti,

6. Now it is rational to conclude, that one must of Necessity know Things that are publickly and frequently transacted; for as *Dion Prusseensis* says, ²² *the Practice of considerable Numbers no Man can plead Ignorance of.* *Polybius* smartly reprehends the ²³ *Ætoliens*, because when they would not profess themselves Enemies to *Philip*, they permitted their Subjects to exercise Acts of Hostility against him, and advanced their prime Leaders to great Honours.

III. 1. Having thus discussed this Question, proceed we now, to shew how Guilt is contracted by Protection from Punishment: By the Law of Nature, as we observed before, ^a every particular Person, if himself not chargeable with any such Crime, has the Privilege of inflicting Punishment; but since the Establishment of States and Communities, it is judged reasonable to transfer this Right to the respective States or their Sovereigns, according to whose Discretion all Faults, as do properly concern them, are to be punished or remitted.

2. But the Right of punishing Offences against human Society is not so exclusively theirs, but that other publick Bodies, or their Governours have a Right to procure the Punishment of them in the same Manner as the Laws of a particular State allow ¹ every one an Action for certain Crimes. And much more have they this Right in regard to Offences, by which they are injured in particular, and which they may punish on that Account, in order to maintain their Honour and Safety, as we have said above. The State therefore, or Governour of the State, where the Delinquent is, ought to bring no Obstacle to the Right which belongs to the other Power.

IV. 1. But since for one State to admit within its Territories another foreign Power upon the Score of exacting Punishment is never practised, nor indeed convenient, it seems reasonable, that that State ¹ where the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demanded Person according to his Demerits, or else deliver him up to be treated at the Discretion of the injured Party. ² This is that delivering up so commonly to be met with in History.

2. Thus did the *Israelites* demand of the *Benjamites* the Delivery of those flagitious Wretches mentioned in the twentieth of *Judges*; and the *Philistins* of the *Hebrews* that *Sampson* as a Malefactor should be given them up, *Judges* xv. So did the *Lacedemonians* make War upon the ^a *Messenians*, because they did not deliver up a Person who had slain several *Lacedemonians*; and at another Time, ^b for protecting from Punishment those who had deflowered some Virgins sent to Sacrifice. And *Cato* was for having ^c *Cæsar* surrendered to the *Germans* for the unjust War he had

III. And so are they if they allow a Retreat and Admittance to such as have done an ill Thing some where else
^a Chap. 20. § 3.

IV. Unless they punish or deliver them up.

^a Pausanias, Lib. 4. Cap. 4.
^b Strab. Geogr. Lib. 8. p. 556. Edit. Amstel. p. 362. Edit. Paris. Casaub.
^c Sueton in Jul. Cæs. Cap. 24. See above Lib. 2. Cap. 3. § 5. n. 4.

frequenti, &c. Cap. X. Num. 7. But I find nothing of this Kind that relates to the *Veientes* in the first Book, and I much doubt, whether that People, who to the Destruction of their City, were almost always Enemies to the *Romans*; ever thought of making them such an Excuse upon the Case in Question. Our Author has expressed himself ill in this Place, thro' his having read ALBERIC GENTILIS hastily, from whom he has taken these Examples and some others, alledged by him in this Chapter; as appears also from the Manner in which he quotes the Passages of LIVY: For that Civilian in Chap. XXI. B. I. of his Treatise, *De Jure Belli*, puts also in the Margin, LIV. Lib. I. VI. In the Passage of the first Book LIVY says, that the *Romans* being at War with the *Sabines*, and the latter endeavouring on all Sides to bring the neighbouring States into their Party; some Volunteers of the *Veientes* joined them: But that State gave no Aid to the *Sabines*, to avoid breaking the Truce: At which the Historian expresses Surprise; without doubt for the Reason I have mentioned: *Publico auxilio nullo*, &c. Cap. XXX. Num. 7. See the Note of Mr. LE CLERC, and the *Animadversiones Historicae* of the late Mr. PERIZONIUS, upon the Truce there spoken of, Cap. IV. p. 170, & seq.

²² Orat. Rhodiac.

²³ Lib. IV. Cap. XXVII.

III. (1) *Actio popularis*. A Phrase in the Roman Law, which thereby gives every particular Person Power to prosecute civilly, but not criminally, those who have committed certain Offences. See *Digest*. Lib. XLVII. Tit. XXIII. *De Popularib. Action.* And the Interpreters on that Place.

IV. (1) For a Man's Case ought to be known, before he is delivered up. It is not reasonable, *ἀνέριτες ἐκδιδόναι*, to give up Persons untried. PLUTARCH in his *Romulus*. And the King of Scotland, in CAMDEN, at the Year MDLXXXV. tells Queen Elizabeth, That he would send *Ferniburst* and the Chancellor too into England, if by plain and legal Proofs they were found guilty of designedly breaking the Peace, or of having committed the Murder of *Ruffel* charged upon them. GROTIUS.

2 *Lucullus* demanded *Mithridates* of *Tigranes*, and upon his not giving him up, made War against him. APPIAN in his Life of *Mithridates*, and PLUTARCH in his *Lucullus*. The *Romans* required of the *Allobroges*, to deliver up the *Salgæ*, APPIAN, *Excerpt. legat.* XI. See PRISCUS, *Exc. legat.* XXI. of a certain Bishop, whom the *Romans* were for giving up to the *Scythians*. A Duke of *Benevento* was delivered up by a *Gascoigne* Prince to *Ferdinand* King of *Castile*. MARIANA XX. I. GROTIUS.

^d Plutarch in
Camill. p.
136, 137.
^e Appian Exa.
Legat 9. Lib.
5. 36.
^f Liv. xxi.
11.

^f Liv. xxxviii.
42.

^g Valer. Max.

vi. 6. Num. 5.

^h Liv. Lib.

38. Cap. 31.

Num. 2.

ⁱ Plutarch.

Narrat. amat.

p. 774, 775.

Vol. 2.

^k See the Treaty

between Eng-

land and Den-

mark, in *If.*

Pontanus de

Mari.

brought upon them. The Gauls likewise insisted^d upon having the *Fabii* delivered to them, because they had invaded them. Thus did the *Romans*³ demand of the *Hernicians* some who had laid waste their Fields; and of the *Carthaginians*^e *Amilcar*, not the famous General, but one who moved the *Gauls* to Rebellion,⁴ and afterwards *Hannibal*; and of *Bocchus* they required⁵ *Jugurtha* in these Words, according to *Sallust*, *That so you may ease us of the ungrateful Necessity of prosecuting not only a Villain, but you yourself for imprudently protecting him.* And the *Romans* themselves did deliver up those who outraged the *Carthaginian*^f *Embassadors*, and them likewise who had used the *Embassadors* of^g *Apollonia* in the same Manner. The^h *Achæans* demanded, that the *Lacedemonians* should deliver to them those who had laid Siege to *Larvicus*, adding that their Refusal would be by them construed a Violation of their Treaty. The *Athenians* issued out a Proclamation importing, that whoever had conspired against *Philip*, and betook himself to *Athens* for a Sanctuary,⁶ should be immediately delivered up; and thus did the *Bæotians* demand of the *Hippotenses* theⁱ Murderers of *Phocus*.

3. But we are to understand here, that a Prince or People is not absolutely and strictly obliged to deliver up an Offender, but only, as we said before, must either punish him or deliver him up. Thus we read, that the^j *Eleans* made War on the *Lacedemonians*, because they would take no Notice of those who had injured them, that is, would neither inflict condign Punishment nor deliver them up. For the Obligation is either to one or the other.

4. Sometimes indeed the Persons demanding are indulged the^k Choice in Order to give them a more ample Satisfaction. We find in⁸ *Livy*, that the *Cerites* signify to the *Romans*, *That the Tarquinians, tho' they had asked no more than the Liberty of passing, had yet entered their Country in Spite of them with a Body of Troops, and had taken by Force some of their Peasants to assist them in the Pillage, which was laid to their Charge; but that they were ready, if they pleased, either to deliver them up, or to punish them themselves.*

5. In a Clause of the second Treaty betwixt the *Romans* and the *Carthaginians*, which we find in *Polybius*, there is a Passage very ill pointed, and misunderstood by those who published that Historian: *If that* (what that is, by reason of a Gap in the preceding Words, we cannot tell) *be not effected, then let every Man by his own private Authority pursue his Right, which if he then cannot obtain* (that is if Justice be not done him) *the State shall be reputed guilty of the Crime.*⁹ *Æschines* in his Defence to the Accusation of Misconduct in his Embassy preferred against him by

3 Our Author no doubt took this Fact from *DIONYSIUS HALICARN.* who says that the *Hernicians* refused to give up the Offenders, by Way of Reprizals, *Antiq. Roman.* Lib. VIII. Cap. LXIV. p. 510, 511. Edit. Oxon.

4 It was before, not afterwards, that the *Romans* demanded *Hannibal* of the *Carthaginians*. *LIVY*, Lib. XXI. Cap. VI. and X. *DIOD. SICULUS*, *Fragm. E*, Lib. XXI. But it is true the *Romans* did afterwards demand *Hannibal* from *Antiochus*. Idem XXXVII. 45. This is *GRONOVIVS*'s Remark.

5 It is in the Speech of *Marius*'s Deputies. *Bell. Jugurth.* Cap. CIX. p. 504. Edit. Waff.

6 *DIOD. SIC.* Lib. XVI. Cap. XCIII. p. 557. Edit. H. Steph.

7 Our Author cites no Authority here: But *ALBERICUS GENTILIS*, from whom, as I have already observed, he has borrowed this Example with some others, (*Lib. I. Cap. XXI. p. 163.*) refers us in the Margin to *PAUSANIAS*, Lib. VI. The Passage is towards the beginning: And all that the Historian says, is that a War arose between the *Lacedemonians* and the *Eleans*, because the *Hellanicæ* (or Judges at the *Olympick Games*) had caused a *Lacedemonian* named *Lichas*, to be scourged. Cap. II. p. 178. Edit. Græc. Wechel. So that our Author changes the Persons, and makes the *Lacedemonians* the Aggressors; whereas the *Eleans* were so: And he advances besides another Circumstance,

of which there is nothing in *PAUSANIAS*, I mean, the refusal to deliver up or punish the Offenders. Nor is there any thing to be found of it either in *XENOPHON*, *Hist. Græc.* Lib. III. Cap. II. § 16. or in *THUCYDIDES*, Lib. V. Cap. L. where the same Fact is related? But our Author having read that Example in *ALBERICUS GENTILIS*, immediately after another taken also from *PAUSANIAS*, Lib. IV. Cap. IV. which he quotes himself above, and in which we see a War actually declared against the *Messenians* by the *Lacedemonians*, under Pretext, that the former would not deliver up a *Messenian* called *Polychares*, who killed as many *Lacedemonians* as came in his Way; our Author, I say, conceived from thence, that the same Thing was precisely the Subject of the following Example, which the *Civilian*, whom he used, expresses thus: *Hæc belli causa Eleos inter & Lacedæmonios: Quod Lacedæmonius vir ab Eleis habitus malè.*

8 *Transfuentes agmine infesto, &c.* Lib. VII. Cap. XX. Num. 6, 7.

9 He represented to that Prince, as he had also done in the Assembly of the *Amphietyons*, that those who had plundered the Temple of *Delphos* in Person, or who had advised the plundering of it, ought to be punished, and not the Cities, of which they were Inhabitants, which had offered to deliver them up, in order to their being tried. *Orat. de mala obita legatione*, p. 262. B. Edit. Basil 1572.

Demosthenes asserts, that when he was treating with *Philip* King of *Macedon*, concerning a Peace between him and *Greece*, among other Things he told him, it was reasonable, that not the Publick, but those only who committed the Crime, should smart for it, and that there was no colour for punishing those States, which were willing to bring to Justice all suspected Persons. And *Quintilian* in his 255th Declamation says, that in his Judgment ¹⁰ they who afford Shelter and Sanctuary to Deserters and Rebels, are almost as criminal as the Deserters and Rebels themselves.

6. And among the Inconveniencies resulting from the Disagreement of States, *Dion Chrysostom* in his Oration to the *Nicomediens* reckons this for one, that they who have been injurious to one State, may fly too and find Refuge in another.

7. This Discourse of giving Persons up suggests to us another Question, ¹¹ Whether they who have been delivered up by one State, and not received by the other, do still continue Subjects of the former. *Publius Mutius Scævola* ¹² was for the Negative, because such a Surrender is in some Manner a Banishment, just as if they had been solemnly interdicted the use of Fire and Water: But *Brutus*, and after him *Cicero* ¹ held the contrary; whom I think in the right, tho' not properly for the Reason assigned by *Cicero*; ¹³ because as there is no Gift, so can there be no Delivery of a Criminal without an Acceptance. For indeed no Act of Donation can be compleat, unless both Parties be agreed. Whereas by the giving up we are now speaking of, we are to understand no more than a Willingness to deliver a Subject of ours into the Hands of a foreign Power, to be treated as that foreign Power shall think fit. Now this Permission neither gives nor takes away any ¹⁴ Right, but only what before obstructed the Execution of the Punishment is thereby removed. And therefore if that Power will make no use of this Liberty, then is the Person that was delivered reduced to his former State of Subjection (this being a parallel Case with that of *Clodius* delivered up to, but not accepted by the *Corfians*) to be, at the Discretion of his own State, either ¹⁵ punished or not punished by them, as there are several Offences in regard to which they may do either one or the other. But the Privilege of a Subject, and other Rights or Properties, he is not by a bare Fact deprived of; he must be moreover condemned by a publick Judgment, unless there be some Law which declares, that the Moment one commits the Crime he is to be reputed as legally condemned, which cannot be said in the present Case. So Goods likewise when offered, but not accepted, continue his whose they were before. But if the Person, whose Delivery was accepted of, and who was actually seized on, shall chance afterwards to return, he is not then to be deemed a natural Subject, unless by an after-Act this Privilege be conferred upon him; in which Sense ¹⁶ *Modestinus's* Decision about a Person given up is certainly very true.

¹ *De Orator.*
Lib. 1. Cap.
40. and Lib.
2. Cap. 32.
Topic. Chap.
8. *Orat. pro*
Cæcin. Chap.
34.

8. What

¹⁰ *Bardas*, surnamed the Cruel, having taken Refuge with *Chosroez*, King of *Persia*, the Emperor *Basilius Porphyrogenetus* sent to desire *Chosroez*, not to protect a Rebel, who had attempted to dethrone his lawful Sovereign; and to consider, that in doing so, he would set an Example, which might prove of ill Consequence to himself. ZONAR. Vol. III. in *Basil. Porphyrogenetus*. See what LAONICUS CHALCOCONDYLAS says of some *Corfairs*, to whom the Island of *Lesbos* had given Refuge. *Hist. Turc.* Lib. X. init. GROTIUS.

¹¹ See PUFENDORF upon this Question, *Law of Nature and Nations*, B. VIII. Chap. XI. § 9.

¹² *Quem [deditum] hostes si non*, &c. Digest. Lib. L. Tit. VII. *De Legationib.* Leg. VII.

¹³ *Quo in genere etiam Mancini*, &c. The Opinion of *Brutus*, which the Orator here embraces, was not followed in the Affair of *Hostilius Mancinus*; as it seems to be deduced from the last Law of the Title *De Legationib.* which will be cited in Note 16. See what I shall say there, and in B. III. Chap. IX. § 8.

¹⁴ This is true generally speaking. But it may also happen, that the Giver up thereby deprives the Person given up of all his Rights: Which is to be judged of from the Circumstances. And such was

the particular Case which gave Occasion to the Question, as we shall see upon the ninth Chapter of the following Book, § 8.

¹⁵ As did the Roman Senate in regard to *Marcus Clodius*, whom, as our Author says, the *Corfians*, to whom he had been given up for having concluded a dishonourable Peace with them, would not receive; for he was executed in Prison at Rome: *Marcum Clodium Senatus Corfis*, &c. VALERIUS MAXIMUS, Lib. VI. Cap. III. Num. 3.

¹⁶ *An qui hostibus deditus*, &c. Digest. Lib. XLIX. Tit. XV. *De Captivis & Postlim.* Leg. IV. This Law is not without its Difficulties. As the Question in the particular Case, of which the Civilian MODESTINUS speaks here, was to know, whether *Hostilius Mancinus* retained the Rights of a Roman Citizen by the Refusal of the *Numantines* to whom he had been delivered up: It seems at first, that instead of the Words *nec a nobis receptus* these should be read *nec ab iis receptus*; and the rather as the Error might easily have crept in. And indeed, I find that several celebrated Lawyers have so conjectured long since, as FRANCIS BAUDOUIN in his *Jurisprudencia Muciana*, p. 48. ANTHONY FAURE, *Jurisprud. Papinian.* Tit. XI. Princip. VIII. Illat. I. p. 612. And JULIUS PACIUS in the

Margin

8. What we have said on this Head, does not only respect those who have always been Subjects of the Government they now live under, but them also who after the Commission of their Crimes fly thither.

V. The Privilege of Suppliants or Refugees belong not to Offenders but to the unfortunate, with an Exception.

V. 1. The so much revered ¹ Rights of Suppliants or Refugees, and the many Precedents of *Asylums*, affect not our last Conclusions; for they are intended only for the Benefit of them who suffer undeservedly, and not for such whose malicious Practices have been injurious to any particular Men, or to human Society in general. *Gylippus the Lacedemonian*, in ² *Diodorus Siculus*, speaking of the Privilege of Refugees has these Words: *It was the Design of the first Institutors of these Rights, that the Unfortunate should find Compassion, but that such who by their Villanies made Punishment their due, should not expect an Exemption from it.* And a little afterwards: *But let not those, who by Fraud and Avarice have made themselves miserable complain of Fortune, or dare to assume the Title of Suppliants, because that is due only to those* ³ *who are free from Guilt, tho' not from Infelicity; but the flagitious Lives of these have divested them of any Claim to Compassion or Protection.* Between these two Cases of Misfortune and Crime *Menander* puts this nice Distinction, that

^a Apud. Stob. T. 7.

^a Ἀλύχνημα καὶ ἀδίκημα διαφορὰν ἔχει;
Τὸ γὰρ διὰ τύχην γίνεσθαι τὸ δ' αἰρέσει.

*Misfortune and Injustice this Difference have;
The one from Chance results, the other's Choice.*

Not very foreign to this is that of ⁴ *Demosthenes*, *δικαιον*, &c. translated to this Effect by *Cicero*, in his second Book of *Invention*: *It is our Duty to have Compassion on such whose Misery is owing not to their Crimes but Misfortune.* And that of *Antiphanes*: ⁵ *A Fault unwillingly committed must be ascribed to Fortune, but if with Design to ourselves.* And that of *Lysias*, *Misfortune is no Body's Choice.* Accordingly by the best and wisest of Laws, he who by an accidental slip of a Weapon chanced to kill a Man, might safely betake himself to the ^b Cities of Refuge; and the

^b Deut. xix. 1, &c.

Margin of his Edition of the Body of Law. Three Authors, who say nothing of their having borrowed this Correction from any Body else. I do not however believe it necessary, without the Authority of some good Manuscripts. For these Words, *nec a nobis receptus*, may very well be understood as if the Lawyer, at the same Time that he denies that the Person in Question becomes a Citizen again by the Right of Postliminy, insinuates, that he might become so by *Rehabilitation*, and a new Ordinance of the People. This took Place in the Affair of *Mancinus*: For a Law of the People was necessary to reinstate him in his former Condition, in Consequence of which he obtained the Dignity of *Prætor*, as we find in the last Law of the Title *De Legationibus*, cited before: *De quo* [*Hostilio Mancino*] &c. It appears from thence, that *Scævola's* Opinion took Place in the Dispute under Consideration; as *BAUDOUIN* observes, (*ubi supra*, p. 47.) Mr. *THOMASIUS*, who pretends, that the Law in favour of *Mancinus* imported only a single Decision of the controverted Case, does not alledge sufficient Reasons for his Opinion. The very Office of *Prætor*, which *Mancinus* stood for a second Time, after having been *Consul*, supposes a *Rehabilitation*. See the Note of *ANDREAS SCHOTUS*, upon *AURELIUS VICTOR*, *De Vir. illust.* Cap. 59. Num. 4. So that our Author's Application of *MODESTINUS's* Words is not just.

V. (1) *Κανονες ιεραίας νόμοι*, &c. as *POLIBYUS* and *MALCHUS* call them in the *Excerpta Legationum*, that is to say, the Laws generally received in Relation to Suppliants. *GROTIUS*.

2 Οἱ γὰρ ἀπ' ἀρχῆς, &c. [Instead of ἀτυχημάτων the reading here should undoubtedly have

been ἀδικημάτων as our Author and the *Latin* Translator have expressed it in their Version: And I have not the Edition of *RHODOMANUS* to see whether he has corrected this manifest Error, which *HENRY STEPHENS* has let pass.] *Biblioth. Hist. Lib. XIII. Cap. XXIX. p. 345, 346. Edit. H. Steph.*

3 An antient Oracle delivers itself in the following Manner: (In regard to a young Man who in defending himself against a Robber had killed his Friend.)

Ἐλπίνας τὸν ἐταῖρον ἀμύνων· σ' ἐμίανεν
Αἷμα. πέλεις δὲ χέρεας καθαρώτατας ἢ πάρος ἦσθα,

*Endeavouring to assist, you've kill'd your Friend,
Not tainted with his Blood at all: Your Hands,
Much cleaner than they were before.* *GROTIUS*.

This Oracle is in *ÆLIAN. Var. Histor. Lib. III. Cap. XLIV.*

4 In *Aphob. Orat. II. (sub fin. p. 556.)* Which *CICERO* expresses in *Latin*: *Eorum misereri oportere, qui propter fortunam, non propter malitiam, in miseris sint.* *De Invent. Lib. II. (Cap. XXXVI.) GROTIUS.*

5 *PHILO* the Jew gives it for a Maxim, that Compassion is due only to the unfortunate, but that he who voluntarily does amiss, is not unfortunate, but unjust. *De judice* (p. 722. A.) The Emperor *MARCUS ANTONINUS* is for having the Disposition of Mind examined, to know whether Men act from Ignorance or Design; and for considering those Things that have a Connection with them. (*Lib. IX. § 22. Edit. Gataker.* *TOTILAS* distinguishes between what is done thro' Ignorance or Forgetfulness,

and the same Protection was allowed to ^c Slaves ; but the very ^d Altar of GOD was no Sanctuary to him, who was a premeditated Murderer, or a Disturber of the publick Peace ^e. Philo in his Explication of this Law says, That *no consecrated Place can afford Shelter to such vile Wretches*. The same was the Practice of the antient Greeks. The Chalcidians are said to have denied ^f the Delivery of *Nauplius* to the Grecians; the Reason assigned was, because he had proved himself innocent of the Crimes laid to his Charge.

2. Cicero, ^g Pausanias, Servius and Theophilus mention an *Altar of Mercy* among the Athenians, of which we have an ample Description in Statius. But for whom was this designed ? Let the Poet inform you, who tells you that

^h *The Distress'd have made it Sacred :*

And he says that those who came thither are

*Such as by Chance of War their Native Country fly,
Or of their Crowns divested seek a foreign Aid.*

Aristides makes it ⁱ the peculiar Commendation of the Athenians, that they always administred Succour and Relief to those, who thro' Misfortune became Objects of Pity. And again he says, that *the Distressed of all Parts of the World had this Felicity in common, that in the good City of Athens they were sure to find a Retreat of Security*. In *Xenophon* ^j we have *Patroclus Phliasius* in an Oration of his spoken at Athens, commending that City ; because that they who were any ways oppressed, or in Danger of being so, were sure to meet with a kind Reception, and a generous Assistance there. *Demosthenes* in a Letter of his in Favour of *Lycurgus's* Children speaks to the same Effect. And *Oedipus*, in a Tragedy of that Name, is introduced by *Sophocles*, upon his Retreat to *Colonos*, representing his Case in the following Manner :

fulness, and what with premeditated Design. *Gothic*. Lib. III. Cap. IX. (in a Letter which he wrote to the Roman Senate.) GROTIUS.

This *Antiphanes*, whom our Author cites in this Place, is the Orator ANTIPHON, whose Name is twice mis-spelt in this Chapter, and that in all the Editions ; for Example here in the Text, and at Paragraph XVI. See Oration XIV. and XV. p. 134. Edit. Wech. As to *LYSIAS*, I do not know where he says what our Author ascribes to him. But I happened to cast my Eye upon a Thought of this Orator very like that in the preceding Note. οὐ γὰρ οἰδικαίως ἀποθνήσκουσιν, ἀλλ' οἱ ἀδίκως, αἵτις εἰσιν ἐλαεῖσθαι. *Contr. Andocid. Orat. V. in fine*. The last Words of this Passage of *MARCUS ANTONINUS* are misunderstood by our Author, & simul ea consideres, quæ his coherent ; for they signify that we ought to consider that other Man as our Relation ; that is to say, by Nature, as *GATAKER*, and after him *Monfieur* and *Madam DACIER* translate it. The latter, by the Way, have committed a Fault in saying pour connoître s'il agit par raison, to know whether he acted by Reason, instead of s'il agit, or s'il pêche par ignorance, ou volontairement ; if he acted or offended thro' Ignorance or voluntarily.

^k *De legib. Specialib.* p. 790. D. Edit. Paris.

^l *PLUTARCH, Quæst. Græc. XXXII.* (p. 298. D. Edit. Wech. Vol. II.) *K. Pepin* received such as fled from the Tyranny in *Neustria*, and would not give them up. *FREDEGAR. In rebus Pipini*, Ad Ann. 688. The Emperor *Lewis le Debonnaire* gave Refuge also to those who fled to him from the Church of *Rome*, as appears from one of his Decrees made in the Year 817. and inserted in Vol. II. of the *Gallican Councils*. *Charles the Bald* acted in the same Manner with regard to those, who came over to him from his Brother *Lewis*. *AYMONIUS, Lib. V. Cap. XXXIV. Constantine Monomachus*

refused to deliver up *Cegena Patzinaca* to *Tyrachus* a Turkish Governor. See *ZONARAS, Vol. III.* in the Life of that Emperor. Nor would the Governor *Inunginus* deliver up *Osman* to *Eskisar*, as *LEUNCLAVIUS* tells us, *Hist. Turc. Lib. II.* The Portuguese made the same Refusal in regard to the Duke of *Albuquerque* according to *MARIANA XVI. 18.* GROTIUS.

^m *Lib. I. Cap. XVI.* *SERVIVS* upon the eighth Book of the *Æneid*, (Ver. 342.) *THEOPHYLUS* in his *Greek Paraphrase* upon the *Institutes*, Lib. I. Tit. II. § I. GROTIUS.

Our Author has apparently quoted *CICERO* in this Place upon the Authority of the Scholiast on *STATIUS*, who says: *Hanc aram CICERO, libro Tusculanarum, Misericordiæ nominat, &c.* In *Theb. XII. 481.* For I do not find, that *NIZOLIUS* himself Points out any Passage of the *Roman* Orator, that mentions this Altar. And the Scholiast, quoting by Memory, might have given, as from the *Tusculan Questions*, a Passage, which he had read in some Work not now in Being.

ⁿ *Urbe fuit media nulli concessa potentum
Ara Deum : Mitis posuit Clementia sedem,
Et miseri fecere sacram.*——
Huc victi bellis, &c.——

STAT. Theb. XII. 481. & seqq. 507. & seqq.

^o *Orat. Panathen. p. 187. B. Vol. I. Edit. P. Steph.* οὕτως ὁ παλαιός, &c. *Orat. Leuct.* I. p. 89. A. Vol. II. [And not *De Pace* as the Author quotes in the Margin.] *MARIANA* gives the *Arragonians* the same Praise. *Hist. Hisp. XX. 12.* The *Gepidæ* declared that they would all perish, rather than give up *Ildigisal* to the Romans or the Lombards, *PROCOF. Gothic. Lib. IV. (Seu Hist. Miscell. Cap. XXVII.) GROTIUS.*

^p (*Hist. Græc. Lib. VI. Cap. V. § 38. Edit. Oxon.*)

*The Woes I bear, are numerous and great,
But I only bear them : GOD is my Witness
That none of these Facts was ever once my Choice.*

To whom *Theseus* replies :

*You're Welcome, Oedipus, such Guests I value,
Depend on my Assistance and Protection,
I know my self I'm Man, and therefore subject
No less than you to human Casualties^e.*

^e Ver. 558.
See the whole
Passage which
is very well
worth reading.

So *Demophoon* the Son of *Theseus* thus speaks, in regard to the Descendants of *Hercules*, who had fled to *Athens* :

*This Country of ours has at all Times been
To the Distress'd a Refuge ; to those distress'd
Who justly claim a Right of being secure.
Ten thousand Dangers has its Friendship cost it
Of an impending ill^f.*

^f Euripid.
Heraclid. v.
330, &c.
^g See Eurip.
in his Hera-
clid. and Apol-
lodorus in his
Biblioth Lib.
2. Cap. 8. §1.

And this is the very Thing that *Callisthenes*^g cried up the *Athenians* for ; ¹² because that in the Defence of *Hercules's* Children, says he, they engaged in a War against *Eurystheus*, who then tyrannised over Greece.

3. But on the contrary, it is of Malefactors and profligate wicked People in the same Tragedy thus pronounced :

¹³ *The Lawless guilty Wretch who dares approach
The sacred Altars of the Gods and there
For Pardon sues,
To tear him from the Hopes of Sanctuary
And drag him down to Justice, for my Part
I cannot think't a Breach of Piety.
For 'tis but Reas'n that he who does what's ill
Should suffer for it.*

¹² The Words of *CALLISTHENES* are not taken, as might be conceived, from any of the Histories composed by that Philosopher, who was the Cousin and Disciple of *ARISTOTLE* : But I find them in *ARRIAN's* History of *Alexander the Great*. They are an answer, which he is there said to have given *Philotas*, and which was probably made use of to colour the Accusation, laid against him, of being concerned in a Conspiracy to kill *Alexander*. He said therefore to *Philotas*, that the Persons whose Memory was most honoured by the *Athenians* were *Harmodius* and *Aristogiton*, because they had killed a Tyrant, and subverted the Tyranny : Upon which *Philotas* asked him where it would be proper for him, who should kill a Tyrant, to take Refuge, to which *CALLISTHENES* replied, at *Athens* or no where, and gave for his Reason, what our Author reports of the Aid and Protection granted by that City to the *Heraclidæ*. De Exped. Alexand. Lib. IV. Cap. X.

¹³ The following Verses ought to be translated either from *SOPHOCLES* or *EURIPIDES* ; but from the Manner in which our Author expresses himself, it does not appear at first, which of those two Poets he means :

*Hunc qui facinorum conscius, nunc legibus
Fidens, ad aras voluitur supplex Deum,
Trahere ad Tribunal, nulla religio mihi :
Mala semper æquum ferre, qui fecit malè.*

Before this he only says : *De maleficiis hoc habes in eadem Tragedia*. Now he had quoted *SOPHOCLES*

first, *Oedip. Colon. Ver. 512. & seqq.* and afterwards *EURIPIDES* in his *Heraclidæ*, Ver. 330. & seqq. but without naming either the Poet or Tragedy, and as if he still quoted the same ; attributing besides to *Demophoon* the Words of the Chorus. I find the Original in *STOBÆUS*, where however the Edition even of our Author only refers us to *EURIPIDES* without mentioning the Tragedy. He believed it to be the *Heraclidæ*, because *STOBÆUS* cites it just before ; and from thence it was that he omitted the Verses in Question, in his *Excerpta ex Frag. & Comæd. Græc.* But these Verses are certainly not in the Piece above mentioned, nor are they to be found in the Fragments of *EURIPIDES*, which the late Mr. *BARNES* collected, after our Author, whose Translation he every where gives. However that be, the following are the Verses, which our Author translates in the same Manner in his *STOBÆUS* as here ; except that he has not suffered an Erratum of the Press in the first *Latin* Verse to creep in, which all the Editions of my Original, not excepting the first, have retained : *Nunc legibus, for nec legibus, &c.*

Εγὼ γὰρ οἶσι μὴ δίκαιος ὢν ἀνὴρ
Βωμὸν προσίξει, τὸν νόμον χαίρειν ἔων
Πρὸς τὴν δίκην ἀγχοῦ' ἂν ἔτρεπας θεός.
Κακὸν γὰρ ἄνδρα χεὶ κακῶς πᾶσχειν αἰεί.

Florileg. Tit. XLVI. De Magistrat. I have also let the same Fault pass in my Edition of this Work, because I had not then the *STOBÆUS* of my Author.

And

And in his *Ione* he adds :

*No barb'rous Hand must e'er presume to touch
The awful Place where Deities reside :
But, that their Temples to the Good should be
Of common Access, is what's highly fit,
To screen the Innocent from farther Mischiefs.*

Lycurgus the Orator relates, ^h that a certain Person named *Callistratus*, who was guilty of a capital Offence, having consulted the Oracle, had this Answer returned him, that if he would go to *Athens*, *τεύξειας τῶν νόμων, &c.* *he should have Justice done him* ; that upon Hopes of Impunity he fled ¹⁴ to *Athens*, to the Altar reputed the most Sacred there ; but that notwithstanding he was slain by Order of the State, a State the most strictly observant of every thing religious among them, and that so the Oracle's Prediction was accomplished. ⁱ *Tacitus* blames some of the *Grecian* Cities, because in his Time it was usual with them to encourage Wickedness by protecting the Authors of it, and to think that thereby they endeared themselves to their Gods. And in another Place he says, that ^k *Princes are the Representatives of the Gods*, but that neither *by the Gods are the Petitions of any but of the just regarded*.

^h *Orat. Ad-
versus Leo-
crat. (p. 156.
Edit. Weeb.)*

ⁱ *Annal. Lib.
3. Cap. 60.
Num. 2, 3.*

^k *Ibid. Cap.
36. N. 3.*

4. Upon the Whole therefore, such Criminals are either to be punished or delivered up, or at least obliged to quit the Country. Thus the *Cymeans*, as *Herodotus* tells the Story, when to give up *Paëtyes* the ¹⁵ *Persian* they were very unwilling, and to retain him they did not dare, permitted him to make his Escape to *Mitylene*. The *Romans* demanded of *Philip* of *Macedon*, *Demetrius Pharius*, who being overcome in Battle, had fled to him for Refuge ; *Perseus* the *Macedonian* King speaking in his own Defence to ¹⁶ *Martius*, with reference to those who were said to have attempted the Life of *K. Eumenes* says, *as soon as I was informed by you, that they were in Macedon, I strictly enjoined their immediate Departure out of the Kingdom, and have for ever forbid them Entrance into my Territories*. The *Samotheacians* sent to tell *Evander*, who was charged with this Attempt, ¹⁷ that if he dared not put himself upon his Trial, he must quit the Asylum of their Temple, and get off as well as he could.

5. But in most Parts of *Europe*, for some Ages last past, this Right of demanding fugitive Delinquents to Punishment, has not been insisted upon, unless their Crimes be such as affect the State, or are of a very heinous and malignant Nature. As for lesser Faults it has been the Custom to connive at them, ¹⁸ unless by the Articles of Treaty it has been particularly agreed on to the contrary. And here we must observe too, that Robbers and Pyrates, who by their Power have made themselves formidable, may very innocently be entertained and protected, so far as regards their Punishment ; because to bring them off from this pernicious Course of Life by

14. *MARIANA* in his twenty first Book relates, That in *Portugal* one *Ferdinand*, Lord High Chamberlain, was forced from the Church to which he had retired, and burnt for a Rape committed upon a Maid of Quality. See also about *Sanctuaries*, a Treatise of that great Man *PAUL* the *Venetian*, a Servite. *GROTIUS*.

15 He was not a *Persian*, but a *Lydian*, as *HERODOTUS* calls him in more than one Place. The Passage wherein I find what our Author says, is : *Οὐ βελόμβροι [οἱ Κυμαῖοι] εἰτε ἐκδόσεις ἀπολίσσεται, εἰτε παρ' ἐαυτοῖσι ἔχοντες πολιορκήσονται. ἐς Μυτιλήνην αὐτὸν ἐκπέμπουσιν.* *Lib. I. Cap. CLX.*

16 *LIVY*, *Lib. XLII. Cap. XLI. Note 8.* *APPIANUS* too has this Relation, *Excerpt. legat. Num. xx.* There is something like it in the *Latin* Author of the Life of *Themistocles* : *When he was publicly demanded by the Athenians and Lacedæmonians. Admetus King of the Molossi would not deliver up his Refugee, but advised him to provide for his Safety ; and for this Purpose ordered him to be conducted under a sufficient Guard to Pydna.* So also

the *Gepidæ* in *PROCOPIUS*, *Goth. III.* dismiss *Ildigis* the *Lombard*. Add to this *Theoderick's* Letter to King *Thrasamund* about the receiving of *Giselic*, *Ver. 43, 44.* and what is in the Life of King *Lewis* ; so the Emperor *Rudolphus* the Second removed from him *Christopher Sborowski*, as is testified by *THUANUS*, *Lib. LXXXIII. Anno 1585.* Queen *Elizabeth* answered the *Scots*, that she would either deliver them up *Bothwell*, or banish him *England*. *CAMDEN* has this Affair about the Year 1593. See *MARIANA* *xix. 6.* of *Alphonfus* Earl of *Gegion*, who was condemned by the *French* King, and denied Admission into *Spain*. *GROTIUS*.

17 *LIVY*, *Lib. XLV. Cap. V. Num. 8.*

18 As in the *Switzer's* League with the People of *Milan*, *Simlerus* relates this Matter. By the Treaties of the *English* with the *French*, it was provided, that Rebels and Deferters should be delivered up ; and by others of theirs with the *Burgundians*, that they should be expelled. *CAMDEN* at the Year 1600. *GROTIUS*.

Assurances of Pardon, when ¹⁹ other Expedients fail, is what the common Interest of Mankind requires; and therefore the Practice of this, either by King or Nation, is certainly warrantable.

VI. But all Sorts of Refugees are to be protected till their Cause be decided; and by what Law such a Decision is to be had.

VI. 1. Here likewise it is observed that Refugees are, whilst their Case is depending, entitled to Protection. Thus *Demophoon* to the Embassador of *Eurystheus* ¹:

*If you've any Crime to charge those Strangers with
We'll bear your Allegations, but you mustn't
Expect to take 'em hence by Force.*

And *Theseus* to *Creon*.

*You have offer'd, Sir, a base unworthy Thing,
Unworthy your self, your Ancestors and Thebes:
You're in a State where Laws and Justice reign,
And yet you think to do whatever you please,
And carry all before you, without Regard
To Piety or Manners.
And does this Place so destitute appear,
So mean and tame, so easy to impose on;
And myself so poor a Fool, so trifling,
So insignificant, so meer a Cypher?
Great Amphion's Government ne'er taught you thus,
A Government not us'd to educate
A wild and savage and inhuman People:
Nor will it, when it bears this odd Relation,
Approve your Actions; when it bears that you
The Rights of Heav'n break thro' no less than ours,
By tearing from us the unhappy Wretches
Who in our Kindness trusting sue Relief,
Were I at Thebes, and tho' my Claim were Just,
Yet would I not by Violence attempt
To vindicate my own Pretensions,
Without the Sov'reign's Leave, I cou'dn't forget
A Stranger's Duty in a foreign Land.
But you your Country shame, fix Scandal on't
It do'sn't deserve: And one can plainly see
That Age has robb'd you of your Reason.*

2. But if what is laid to the Charge of Refugees be not a Crime by the Law of Nature or that of Nations, then it must be determined by the Civil Laws of the State they come from, which is excellently shewn by *Æschylus* in his *Supplices*, where the King of *Argos* is introduced thus addressing himself to the Daughters of *Danaus* coming from *Ægypt* ³:

*If Ægyptus' Race should any Claim pretend
O'er you, by any Law or Rule of theirs,
Because they say they're your nearest Kinsmen,
Who could withstand the Plea, or argue't false?
Why, you must prove by your own Native Laws
That they have no such Pow'r.*

VII. How Subjects participate of their Sovereign's Crimes, or the Members of a Community of the Crimes of that Community; and how the Punishment of a whole State differs from that of particular Persons.

VII. 1. We have already seen by what means Rulers may participate of the Crimes of their Subjects, whether Natives or Foreigners. On the other Hand Subjects too may make themselves accessary to their Prince's Faults, by giving their Consent to them, or by acting at his Instance or by his Command what they cannot do with-

¹⁹ This Condition, which our Author supposes, is to be well observed; for otherwise the Exemption from Punishment would favour Robberies and Pyracies.

VI. (1) EURIP. *Heraclid*. Ver. 252, 253.

2 In one of SOPHOCLES's Tragedies, *Oed. Colon*. Ver. 904. & seq.

3 *Supplic.* p. 321. Edit. H. Steph.

out a Crime, but to treat of this will be more proper hereafter, ^a when we come to consider each Branch of the Subject's Duty. There is likewise a Communication of Guilt between a Community and the particular Persons who are Members of it; for (as St. *Austin* says in the forecited Place) ¹ *Where there is a Community there must needs be Particulars, because a Community is composed of Particulars, and Particulars collected and united, make up together what we call a Community.*

^a Chap. 26. of this Book.

2. But yet the Faults of this Body are, in Propriety of Speech, theirs only who consented to the Commission of them, and not theirs who were obliged to submit to the others, and the Punishment ² likewise of the whole Community, and that of particular Persons are distinct. As the Punishment of Particulars is sometimes Death, so ³ *the Death of a State, is the Ruin of it*, and this happens when there is an entire Dissolution of the Body Politick, of which we have already ^b treated, whereupon that State does, as ⁴ *Modestinus* says very well, as utterly lose its usufructuary Right as if by Death. Sometimes a servile State is imposed on particular Persons by Way of Punishment, as it was upon the *Thebans* by ^c *Alexander the Great*, exclusive of those who opposed passing the Act for breaking off the Alliance with the *Macedonians*. So likewise a whole Nation is sometimes brought to a ⁵ Civil Slavery, by being reduced into a Province. The Goods of particular Persons are sometimes confiscated, so a City is sometimes divested of all it has in common, as its Walls, Ports, Men of War, Arms, Elephants, Treasury and publick Lands.

^b Ch. ix. § 4.

^c *Plut. in Alex.* p. 670. *Tom.* 1. Edit. Wech.

3. But to punish particular Men with the Loss of their Properties, for the Faults of the Publick, to which they did not consent, is a Piece of great Injustice, as it is clearly evinced by *Libanius* in his Oration concerning the Sedition at *Antioch*. And he mightily approves the Proceedings of ⁶ *Theodosius*, who had punished the publick Crime with the Forfeiture of their Theatres, their Baths, and the Title of *Metropolitan*.

VIII. 1. But here occurs a Question very well worth our Consideration, *Whether or no a Punishment due to the Faults of a Community, may at any Time whatever be inflicted.* That it may, during the continuance of that very Community, seems reasonable, because tho' there be a Succession of the constituent Parts, the Body is still the same, as we have elsewhere ^a proved. But on the other Hand we must observe, that some Things are essential to a Community, as it is a Community, such as the having of a Treasury, Laws, &c. other Things are applied to it only as derived ^b from the single Members of it. In this Sense we give to a Nation the Character of Learned, or Valiant, because many of it are such. Of this Sort is the Merit or Demerit of an Action, for it belongs principally and directly to particular Persons, as having a physical Will, of which a Community as such is destitute. And therefore when they are extinct and gone, thro' whose Means the Publick contracted the Guilt, the Guilt also must cease too, and by Consequence the Obligation of Punishment; which (as we before ^c observed) can never subsist without some Demerit. *Libanius* in the above-mentioned Oration, says, *That in his Judgment, when none of the actual Offenders are yet in Being, no farther Satisfaction should be sought after.*

VIII. *How long after the Commission of a Fault may a Community be punished for it.*

^a Ch. 9. § 3.

^b See *Aristot.* *Pol. Lib.* 7. *Cap.* 13.

^c In the preceding Chapter.

VII. (1) In *LEVITIC. Quæst.* XXVI.

2 In the Original it is *Distinctæ enim sunt pœnæ*, &c. But I believe the Author intended *etiam*, instead of *enim*, which is perhaps a Fault of the Press that he overlooked. This however includes no Reason for what precedes it.

3 *LYCURG. Orat. Advers. Leocrat.* (p. 139. Edit. Wech.) *GROTIUS.*

4 *Si usufructus*, &c. *Digest.* *Lib.* VII. *Tit.* IV. *Quibus modis usufructus vel usus*, &c. *Leg.* XXI.

5 See before *B. I. Chap.* III. § 12. *Num.* 1. and *B. II. Chap.* V. § 32.

6 St. *CHRYSOSTOM* says the same Thing with

the *Pagan* Orator in his seventeenth Discourse upon the throwing down of Statues. The Emperor *MARCUS ANTONINUS* had formerly condemned the People of *Antioch* to suffer the same Punishment, as *Theodosius* did afterwards; according to *CAPITOLINUS*, (*Cap.* XXV.) *Severus* also destroyed the City of *Byzantium*, and deprived it of its Theatre, Baths, all its Honours and Ornaments. He even reduced it into a Village, and gave it to the *Perinthians*; as *HERODIAN* informs us, (*Lib.* III. *Cap.* VI. *Num.* 19. Edit. Boecler.) See also *ZONARAS*, and what we have said above, (*Chap.* V. § 32.) *GROTIUS.*

VIII. (1) *Orat. De Sedit. Antioch.*

6 C

Alexander

Alexander for punishing ² the Persians, ³ when not one of them who had injured the Greeks was then surviving. The Opinion of Curtius concerning the Extirpation of the Branchidæ by Alexander is, ⁴ that had these Severities been contrived for and executed upon the Authors of the Treason, it would have looked like Justice, and not Cruelty. But now their Posterity (who never saw Miletus, and consequently could not betray it to Xerxes) smart for their Predecessors Crimes. The same is Arrianus's Sentiment of the burning of Persepolis by way of Revenge, for what the Persians had formerly done to the Athenians: ἀλλ' εἰς ἐμοί, &c. In my Opinion, (says he) Alexander did not act discreetly in this Affair, nor do I think it any Punishment of those Persians who were long since dead.

3. The Answer given by ⁵ Agathocles to the People of Ithaca, upon the Complaint of some Damages done them, that truly the Sicilians had been much greater Sufferers by Ulysses, is perfectly ridiculous. Plutarch ⁶ in his Book against Herodotus says, it is very unlikely that the Corinthians should be for revenging upon the Samians an Injury received three Generations before. Nor is the Defence of this

² This is the Reason that Conqueror employed, when Parmenio would have dissuaded him from burning the Royal Palace of Persepolis: ὁ δὲ τιμωρῆσαο, &c. After which follows the Historian's Reflection: ἀλλ' εἰς ἐμοί δοκεῖ, &c. *De Expedit. Alexand.* Lib. III. Cap. XVIII. Our Author, who in the first Edition contented himself with citing ARRIAN once in this Place, added, in the following Editions, a like Thought of the same Author, which is placed after the Passage of QUINTUS CURTIUS. But his Memory has improperly multiplied one and the same Reflection upon one and the same Occasion; [for which Reason Mr. BARBEYRAC thought, he might suppress that superfluous and ill-grounded Repetition in the Text of his Edition.] What led our Author into this Error, was Alexander's saying elsewhere in a Letter to Darius, "Your Ancestors entered Macedonia, and the rest of Greece, and did great Damages, without our having given them any Cause for such Injuries. But I, on the contrary, tho', having been elected General of the Greeks, it was my Inclination and Duty, to revenge the Wrongs they have received from the Persians, have not entered Asia, till you had first commenced Hostilities." οἱ ὑμέτεροι πρόγονοι &c. *Lib. II. Cap. XIV.* The Historian says nothing here that tends to condemn the Motive of his Hero. The following Note will shew, that our Author had this Passage in View, which relates to the undertaking of the War in general against the Persians; whereas the other relates only to a particular Act of Hostility.

³ And therefore the Emperor Julian ascribes to a different Motive the War undertaken by Alexander against the Persians: "All the World knows, says he, that no War, reputed just, was ever undertaken upon such an Occasion; not that of the Greeks against Troy, or of the Macedonians against Persia. For they did not enter into it to inflict Punishments for Injuries of a very antient Date, not even upon the Grandchildren or Children of the Authors of them, but attacked those, who had insulted and dispossessed the Issue of the most deserving Persons of their Crowns: καὶ ὅτι μὴ εἰς εὐδοκίαν, (for so it should be read instead of εὐδοκίαν) ἀπογίνεσθαι. *Orat. II. De rebus gestis Constantii* (p. 95. *Edit. Spanheim.*) GROTIUS.

I have translated the Passage, according to the Version given us by our Author: But if he had considered the Context, he would have perceived, that in giving a false Sense to the Words in Question, he makes the Emperor say directly the reverse of what he did, and should, say. The Subject relates

to the War against Magnentius, who had possessed himself of the Empire. JULIAN would prove the Justice of that War, and for this Purpose compares it with those, which passed for the most just, as that of the Greeks against Troy, and of the Macedonians against the Persians; of which the first was undertaken to revenge the carrying away of a Woman, as he says afterwards, and the other, as he plainly insinuates here, had for its Motive the desire of revenging the Injuries Greece had formerly suffered from the Persians. Whereas Constantius took up Arms solely to bring to Reason an Usurper, who had deprived him of the Empire he had a Right to inherit, as the Son of Constantine the Great; to which the Word εὐδοκίαν relates, and which our Author judiciously substitutes instead of ἀδικίαν. Therefore what he ascribes to the Greeks and Macedonians must relate to Constantius; and the whole Passage be thus translated: Every one knows, that no War was ever undertaken upon so just a Foundation, not even that of the Greeks against Troy, nor of the Macedonians against the Persians; which pass however for just Wars. For our Emperor had not in View the revenging of some antient Injury, nor has he invaded the Sons or Descendants of those, from whom he had received it; but has attacked a Man who ravished the Empire from the Posterity, and lawful Successors of Persons renowned for their Merit. It is plain from his using the Plural, that he alludes to the Usurpation of the Empire in Prejudice of Constantius, and the Assassination of Constans his Brother, which were both the Acts of Magnentius. I conclude, therefore, that this Passage, far from proving that Julian assigns another Motive for Alexander's War against the Persians, than that of revenging the antient Injuries they had done the Greeks; serves, on the contrary, to confirm the Reality of that Motive. But I must not forget to observe on the other Hand, to our Author's Praise, that he has very happily corrected a manifest Corruption at the End of the Passage, in the Word ἀδικίαν. The Latin Translator, the learned Father PETAU, has extricated himself from that Difficulty, by not expressing the four last Words at all, of which that Word is one; and the illustrious Baron SPANHEIM has given no Intimation in the Margin of any Fault.

⁴ *Lib. VII. Cap. V. Num. 35.* See PLUTARCH, *De sera numinis vindicta*, p. 557. *B. Vol. II. Edit. Wech.*

⁵ See PLUTARCH, *Apophthegm.* p. 176. *D. E.* and *De sera numinis vindicta*, p. 557. *B.*

⁶ *De Herodot. maligni.* p. 859, 860. *Vol. II. Edit. Wech.*

and such other Proceedings which we meet with in *Plutarch*, in his *Treatise of the late Vengeance of GOD*, any ways well grounded. For GOD's Right is different from that of Man, as you will find more distinctly ^c by and by. Nor does the ^c § 14. Justice of conferring Honours and Rewards upon Children for their Father's Merits, infer the Equity of punishing them for their Faults: For a Benefit of such a Nature, that it may without Injustice be conferred on any Man, but it is not so with Punishment.

IX. Having thus traced the ways by which a Participation of the Crimes draws after it a Participation of the Punishment, we come now to shew how a Man may be obnoxious to Punishment, tho' free from Guilt; that this Matter may be apprehended, and there be no Confusion of Things really different by Reason of a Likeness in the Terms, it will be proper to premise some Directions.

X. 1. First that a Distinction should be made between an intended and direct Damage, and what is only consequentially such. Depriving a Man of what he has an indisputable Property in, I take to be a Damage directly done. A consequential Damage I apprehend to be, when a Man is intercepted of a Benefit, by the Removal of the Condition which alone could entitle him to it. *Ulpian* gives us this Instance, ¹ *If by opening a Well in my own Land I exhaust those subterraneous Channels, from which another is supplied, the Damage resulting to him from my using my own Property, is not imputable to me as a Fault.* And elsewhere he says, ² *that there is a great deal of Difference betwixt doing an Injury, and depriving a Man of some Advantage which he before enjoyed.* And *Paulus* ³ the *Civilian* says, *it is a preposterous Method to account ourselves rich, before we have acquired what makes us so.*

IX. Whether one free from the Fault may be liable to the Punishment.

X. A Distinction between what is directly intended, and what happens consequentially.

2. The Sufferings that redound to Children from the Confiscation of their Father's Goods, are not properly a Punishment inflicted on them, for they could not lay any Claim to those Effects, unless they had been possessed by their Father at the Time of his Decease. And this *Alphenus* very justly observes, when he says, ⁴ *that Children by the Father's Punishment lose what would have come to them from him, by what is theirs by Nature, or from any other Cause, they are not thereby divested of.* *Cicero* writes, that the Children of *Themistocles* were reduced to Want, and ⁵ that if *Lepidus's* Children had the same Fate, he thought it no Injustice. This he asserts to be antiently practised by all Nations, from the Rigour ⁶ of which the more modern *Roman* Laws somewhat abated. Thus too when the major Part of a Community (which, as we elsewhere said; represents the Whole) are guilty of a Fault, the Whole being, as we told you, obliged to bear the Blame of it in the Loss of their Civil Liberty, their Walls, and other Advantages, the innocent Part are equally Sufferers, but are so in those Things only which they held as Members of the Community.

XI. 1. Again it is to be observed, that one Man's Crime may be the Occasion of inflicting on another some Evil, or depriving him of some Good; tho' as to the Right of acting, that Crime is not the immediate Cause of the Action. Thus he who is Bail for another, suffers upon the account of the other's Debt, ¹ according to the old Proverb, *εγγυα ὡς δ' ἄτα, Be bound for a Man, and you will soon repent it*: But the immediate Cause of this Obligation is his own being Bail. And as he, who engages for the Purchaser, becomes answerable, not properly on the account of the Purchase, but upon his own Engagement; so he who vouches for an Offender, is made liable to Punishment, not for the Offence, but because he vouched for him; for which Reason his Sufferings ought to be proportioned according to the Power or Right he himself had to vouch, and not according to the Nature of the other's Offence.

XI. The Difference between a Crime's being the Occasion of Punishment, and its being the real Cause of it.

⁷ This is a false Consequence drawn by *PLUTARCH*. *De fera muminis vindicta*, p. 558. B. C.

X. (1) *Item videamus, quando damnum, &c.* Digest. Lib. XXXIX. Tit. II. *De damno infecto*, &c. Leg. XXIV. § 12.

² *Multumque interesse, &c.* Ibid. Leg. XXVI.

³ *Esse autem præposterum, &c.* Lib. XXXV. Tit. II. *Ad Leg. Falcid.* Leg. LXIII. Princ.

⁴ *Eum, qui civitatem amitteret, &c.* Digest. Lib. XLVIII. Tit. XXII. *De Interdictis & Re-*

legatis, &c. Leg. III.

⁵ *In qua [sententia] &c.* Epist. *Ad Brutum* XV. See also Epist. XII.

⁶ See the Interpreters upon the Digest, Lib. XLVIII. Tit. XX. *De bonis Damnatorum.* Leg. VII.

XI. (1) This is a very antient Saying, since it is ascribed to *Thales*, one of the Seven wise Men, as appears from *STOBÆUS*, *Florileg.* Tit. III. See *ERASM.* *Adag.*

2. From whence it follows, agreeably to the Opinion which we look upon to be the truer, that no Body ought to be put to Death upon the Score of any such Engagement, because no Man's Life is so entirely at his own Disposal, as that he may take it away himself, or authorize another so to do; tho' the *Greeks* and *Romans* held the contrary, ² thinking that Sponsors were accountable even to Loss of Life; as is evident from a Verse of ³ *Aufonius*, and the known Story of *Damon* and ⁴ *Pythias*, and from their inflicting capital Punishment on Hostages, as we shall elsewhere ^a have Occasion to observe. The Conclusion we make with respect to a Man's Power over his Life holds good likewise with respect to that he has over any of his Members; for the Amputation of any one of them is not allowable, unless it tends to the Preservation of the Body.

^a Lib. 3. c. 4.
§ 14.

3. But if Banishment, or a Fine, be the Terms of the Delinquent, and he becomes obnoxious to them, the Bail must stand to it; but in strictness of Speech, not as a Punishment of his own. Much the same is the Case of one who enjoys any Right, the Use of which depends on the good Will of another, such as a ⁵ *precarious* Right for Instance, with respect to the Owner of the Thing so lent, and the Right of Subjects with regard to that eminent Domain with which the State is invested for the publick Advantage. For the taking away any such Privilege, cannot be called the Infliction of a Punishment, but the Execution of an antecedent Right, which the Person who takes it away was before entitled to. Thus the slaying of a Beast, one for Instance which a Man has been criminally concerned with, (as is enjoined ^b by the Law of *Moses*) is not really a Punishment, because Beasts are not properly chargeable with any Crime, but it is the Exercise of that Dominion Man has over them.

^b Lev. xviii.
23. and xx. 15,
16. See *Maimon.* Duct.
Dubitant. iii.

^{40.}
XII. No Man properly speaking can be justly punished for another's Fault, and the Reason why.

^a In the following Paragraph. N. 1.

XII. 1. Having laid down these Distinctions, we assert that no Man, if entirely innocent, can be punished for another's Crime. Of which the true Reason is, not that assigned by ¹ *Paulus* the Civilian, that *all Punishment is designed for Mens Reformation*, for one may make an Example without the Person of the Criminal, provided it be in the Person of one who nearly touches him, as we shall shew you ^a presently; but because all Obligation to Punishment is grounded upon Guilt. Now

2 It is evident, that the *Hebrews* were also of the same Opinion, from *Reuben's* Proposals to his Father *Jacob*, *Gen.* xlii. 37. See also *JOSEPHUS*, *Antiq. Jud.* Lib. II. Cap. II. These Sureties are called *Ἀστυλῆχοι* (such as engaged their Life for that of another) by *EUTROPIUS*, in *Caligula*: And *Ἐγγυαὶ θανάτου*. *Sureties of Death*, by *DIODORUS SICULUS*, in *Excerpt. Peiresk.* [p. 245, where speaking of *Damon*, who was bound for *Phintias*, he says, *Ἐγγυος ἐνθὺς ἐγγενήθη θανάτου*) *St. CHRYSOSTOM* supposes this Custom, in the Comparison he makes of an innocent Man, who when another is condemned to die, is willing to suffer the Punishment, in order to save his Life. In *GALAT.* Cap. II. *St. AUSTIN* observes, it sometimes happens, that he, who occasions another's Death, is more criminal, than he who kills him; as for Example, when a *Surety* is punished with Death, in consequence of having been deceived by the Person, for whom he was bound. *Et aliquando qui causa mortis fuit, &c.* *Epist.* LIV. *Ad Macedonium.* *GROTIUS*.

One will be undoubtedly surprized to see *EUTROPIUS*, a *Latin* Author, in whose Writings there is not one *Greek* Word, quoted here upon the Use of the Word, *Ἀστυλῆχοι*. Our Author however had not in View the *Greek* Translation which we have of that Writer by *PÆANIUS*; but he confounds a *Greek*, with a *Latin*, Author; an Abridger of the *Roman* History, with one of the great *Historians*, whose Works remain in Part: For *DION CASSIUS* mentions one *Publius Afranius Potius*, who out of a foolish Adulation had sworn to die, if *Caligula* recovered his Health; and a Knight, as great a Fool, called *Atanius Secundus*, who had pro-

mised in that Case to fight amongst the *Gladiators* at the publick Shews. Both these Men expected great Rewards from the Emperor, for the Zeal that induced them to sacrifice their Lives for his: But instead of Gifts he compelled them to kill themselves, that they might not break their Oaths. *Lib.* LIX. p. 741. B. Edit. H. Steph. See further concerning the Expression, and Matter in Question, the Additions of *Mr. LE CLERC* to *HAMMOND'S* Notes upon *MATTHEW* xx. 23.

3 *Quis subit in pœnam capitali judicio?* *Vas. Technopœgnion Monosyllab.* p. 488. Edit. Tollii.

4 Or rather *Phintias*, which is the true Name. See *CICERO*, *De Offic.* Lib. III. Cap. X. and the Commentators upon him. I had Occasion to refer in Note 2. of this Paragraph to a Passage of *DIODORUS SICULUS*, wherein that *Pythagorean* Philosopher is so called.

5 See *PUFENDORF*, *B. V. Chap.* IV. § 6. *Law of Nature and Nations*.

XII. (1) *Si pœna alicui irrogatur, &c.* Digest, Lib. XLVIII. Tit. XIX. *De Pœnis*, Leg. XX. But *ZIEGLER* observes here, that the Civilian speaks of the Punishment of the Criminal himself, and not that of other Men. Our Author himself has cited him in that Sense, in the preceding Chapter, at the beginning of § 7. But indeed it is difficult enough to explain the Meaning of *Jus commentitium*, to which *PAULUS* refers the Establishment of the Maxim in Question. The Reader may consult on that Head the *Jurisprudentia Papiniana* of *ANTHONY FAURE*, Tit. I. Princip. II. Illat. V. *MARC. LYCKLAMA*, *Membran.* Lib. I. Eclog. IX. and the new Explanation of *Mr. WÆCHTLER*, in the *Acta Eruditorum* of *Leipsick*, Ann. 1714. p. 555.

Guilt must of Necessity be personal, because it results from our Will, than which nothing can be said to be more strictly ours, and it is therefore styled *ὡς ἐξ ἑαυτοῦ*, something entirely at our own Disposal.

XIII. 1. St. Jerome says, ¹ that neither the Virtues, nor the Vices of Parents are ascribed to the Children. And St. Austin, ² that it would be Injustice in GOD himself to condemn any innocent Person. Dion Chrysostom, in his last Oration, having asserted, that according to the Laws of Solon among the Athenians, the Parents Crimes affected the Children, says, that the Divine Law does not, as that there, extend the Punishment to the Posterity of Offenders, but every one's Misfortunes are owing to himself: Agreeable to which is that common Maxim, ³ *Noxa caput sequitur*, The Crime goes along with the Person. We ordain, say the ⁴ Christian Emperors, that where the Guilt is found, there the Punishment be laid. And again, Let every Man be answerable for his own Sins; and where Punishment is not due, let it not be dreaded.

XIII. Nor Children for the Faults of their Parents.

2. Philo says, it is just that ⁵ Offenders should themselves alone be punished, condemning that barbarous Practice of some Nations, who put to Death the innocent Issue of Traytors and Tyrants. So likewise does Dionysius of Halicarnassus, and shews ⁶ the Unjustness of the pretended Reason for it, because it is supposed they will imitate their Parents, since there is no more than bare Supposition and Uncertainty, and an uncertain Fear is not sufficient to put any Man to Death. Arcadius, the Christian Emperor, at the Instigation of some Body, I do not know who, ventured to say, in one of his Constitutions, That ⁷ the Children of Criminals, who are likely to follow their Examples, ought to be punished as their Fathers were. And Ammianus ^a reports, that young Children were executed, lest after they grew up they should take after their Parents. Nor is the Apprehension ^b of Revenge a more justifiable Reason, a Reason that gave Birth to the Greek Proverb,

^a Lib. 28. c. 2. in fin. Edit. Vales Gron. ^b See Victoria. De Jure belli. Num. 38.

XIII. (1). *Nec virtutes, nec vitia parentum liberis imputantur*, Epist. III. Ad Heliodor. De morte Nepotiani, Vol. I. p. 21. A. Edit. Froben 1537.

2 DEUS ipse foret injustus, si quemquam damnaret innoxium. Epist. CV. So our Author relates and quotes the Passage. I do not find it in the Letter he refers to: But there is the same Thought, expressed in other Terms, in that which follows: Quamquam vero immeritum & nulli obnoxium peccato si Deus damnare creditur, alienus ab iniquitate non creditur. Epist. CVI.

3 This Maxim is taken from what is said in the Digest, in Relation to Slaves: *Servi quorum noxa caput sequitur, ibi defendendi sunt, ubi deliquisse arguentur*, Lib. IX. Tit. IV. De noxalib. Action. Leg. XLIII. But the Roman Lawyers mean only by that, as appears from Paragraph V. of the same Title of the Institutes, and other Places, that the Action against the Master, for Damage done by a Slave, ought to be brought against him, who is in actual Possession of the Slave at the Commencement of the Suit; or against the Slave himself, if he was afterwards made free; and not against him who owned the Slave at the Time the Offence was committed. So that this is not directly to the Purpose. See what is already said above, Chap. V. B. II. § 32. Note. 7.

4 *Sancimus ibi esse pœnam, ubi & noxia est. Pro-pinquos, notos, familiares, procul a calumnia submo-venimus—Nec ulterius progrediatur metus, quam re-periatur delictum.* Cod. Lib. IX. Tit. XLVII. De Pœnis, Leg. XXII.

5 He maintains, on that Occasion, that Justice requires only the Punishment of the Guilty, as is expressly ordained by the Law of MOSES, (Deu-teron. xxiv. 16. De special Legib. Lib. II. (p. 802. E. 803. A. B.) The same Author observes else-where, that there is no Establishment more pernicio-ous to a State than not to punish a wicked Person, because defended of honest Parents, and not to reward a Man of Worth, because the Son of a bad Father. The Laws, adds he, ought to reward or

punish every one according to their personal Merit. (De Nobilitate, in fin. p. 910. A.) JOSEPHUS says, in regard to Alexander, King of the Jews, who fol-lowed a quite contrary Maxim, and caused the Throats of the Wives and Children of those he put to Death to be cut, as criminal against him; that such Punish-ment exceeded all Bounds of Humanity. (Antiq. Jud. Lib. XIII. Cap. XXII. OVID insinuates, that Jupiter Ammon was unjust in ordering Andro-meda to be fastened to a Rock, and punished in that manner for the Fault of Cassiope, her Mother, in boasting that she was more beautiful than the Nereids:

*Illic immeritam maternæ pendere linguæ
Andromedan pœnas injustus jusserat Ammon.*
(Metam. IV. 668, 669. GROTIUS.

I cannot help taking Notice in this Place to the Reader of a false Citation, which I have corrected. Our Author gives us the second Passage of PHILO, as from his Treatise upon Piety, (*Libro de pietate.*) Now it is well known there is no Work of that Jew which bears such a Title. The Mistake arose from the Resemblance between two Greek Words. Instead of *περὶ εὐγενείας*, our Author read, without thinking of it, *περὶ εὐσεβείας*.

6 I have observed in my Notes upon PUFEN-DORF, that this is not exactly related. The Histo-rian, far from refuting the Reason in Question, does not so much as decide, whether the Custom of punishing Children for the Crimes of their Fathers be unjust or not, and leaves it to be determined by the Reader, whether his Ideas of Equity were not sufficiently just, or that he did not care to offend those of his Country. Antiq. Rom. Lib. VIII. Cap. LXXX. p. 525. Edit. Oxon. (p. 547. Syl-burg.)

7 Cod. Lib. IX. Tit. VIII. Ad Leg. Jul. Ma-jestatis, Leg. V. § 1. See the whole Dissertation of JAMES GODEFROY, upon this Law in his *Opus-cula*, printed 1654.

⁸ *Who kills the Father and saves the Son's a Fool.*

But Seneca says, that ⁹ *nothing is more unjust, than to make any one inherit the Hatred one bore his Father.*

Herodot. l. 9.
c. 87.

3. Pausanias the Grecian General did no manner of Harm to the Children of Attaginus, who was the Author of the Theban's Desertion to the Medes, judging them entirely Guiltless, ^c *because they could have no Hand in that Affair.* And Marcus Antoninus, in a Letter of his to the Roman Senate, has the following Clause, ¹⁰ *And therefore you shall pardon the Children, Wife, and Son-in-Law of Avidius Cassius, (who had conspired against him) but why do I say pardon, when they have done nothing that has Occasion for it?*

XIV. The
Objection from
God's Proceed-
ings in Rela-
tion to the
Children of
Offenders an-
swered.

^a This is the
Opinion of the
Rabbi Simeon
Barsema, and
a very just one.
^b As in the
Examples of
Zimri and
Jehu.

XIV. 1. GOD indeed, in the Law given to the Hebrews, threatens to visit the Iniquity of the Fathers upon their Posterity: But as for him, he has an absolute and unlimited Dominion as well over our Lives as our Effects, as Things he has lent us, and which therefore without assigning any Reason and at any Time he may deprive us of. And therefore if by an unexpected and violent Death he snatches away the Children of Achan, Saul, Jeroboam, and Ahab, ^a it is by his Right of Property and not of Punishment, and he does thereby more severely punish the Parents themselves; for if they live to see their Children fall (which is the Case principally intended in the Law of GOD, whose Menaces on that account are not extended beyond ^b the Great-Grand-Children or fourth Generation, *Exod. xx. 5.* because that is a Sight which human Age may possibly arrive at) such a Spectacle must undoubtedly be a Punishment more afflicting to them than any Thing they suffer themselves, as is well observed by ¹ St. Chrysostom, to whom Plutarch agrees, when he affirms that *there is no Punishment so piercing as to see those descended from ourselves by ourselves made miserable*; or if they do not live so long as this comes to, yet to die under such an Apprehension must needs be a very sensible Affliction ². Tertullian says, that *the Hardness of Peoples Hearts forced GOD upon this severe Expedient, that so their Concern for their Children after them might induce them to be obedient to his Laws.*

2. It is at the same Time observable, that this grievous Punishment was inflicted by GOD for no other Crimes, but such as had a direct and immediate Tendency to his Dishonour, as Idolatry, Perjury and Sacrilege. The Greeks had the same Notion of this Affair ³: Those Crimes that were thought to affect the Person's Posterity, by them called *ἄγνη*, horrible Impieties, were all of this Nature; upon which Head Plutarch reasons excellently in his Book *De sera numinis vindicta*. In Ælian there is extant the following Delphick Oracle:

⁴ *Or soon or late Justice is sure to seize
The Authors of a Crime, nor can they scape
Inexorable Vengeance. Tho' from Jove
Descended, they and theirs shall one Time feel
The Weight of Heav'n's Anger: From Generation
To Generation shall dire Confusion run
And stalk thro' all the Family.*

⁸ ARISTOT. *Rhetoric*. Lib. I. Cap. XV. See *Adag.* ERASM. at the Proverb, Stultus, qui, patre cælo, liberis pepercit.

⁹ *De Ira*, Lib. II. Cap. XXXIV.

¹⁰ See also VULCATIUS in his Life of Avidius. Julian commends the like Humanity in Constantius, and shews ill Parents have often good Children, as Rocks produce Bees, a bitter Wood Figs, and Thorns the Pomegranate. He says also, ἀλλὰ καὶ τὸν πατέρα, &c. But you took Care not to let the Infant of the Deceased be involved in his Father's Punishment: This Proceeding of yours so full of Lenity and good Nature, is an evident Sign of perfect Virtue. (Orat. I. in fin.) GROTIUS.

XIV. (1) *Homil. XXIX.* In Cap. IX. Genes. PLUTARCH had said the same before him: Αἱ δὲ διὰ τῶν πατέρων, &c. (*De sera numinis vindicta*, p. 561. A. Vol. II.) GROTIUS.

² *Duritia Populi ad talia remedia compulerat, &c.* (Advers. Marc. Lib. II. Cap. XV. In QUINTUS CURTIUS *Alexander the Great* says to some Conspirators, who being condemned to die, desired him to spare their Relations; they did not deserve to know their Fate, that they might die with the more Regret; but by an Effect of his Goodness, he assures them, that their Relations should suffer nothing either in their Honours or Fortunes; because he had long abolished the Custom, which had prevailed amongst the Macedonians, of putting the Innocent to Death with the Guilty.

³ See PLUTARCH in his *Pericles*, and what was said above in this Book, Chap. XIII. § I. GROTIUS.

⁴ *Var. Hist.* Lib. III. Cap. XLIII. LIBANIUS says the same Thing speaking also of Sacrilege. There is something of the like Kind in a Discourse of that Orator published by GODEFROY. GROTIUS

He was treating there of Sacrilege ; and this is further ratified by the Story of the *Gold of Tholouse*, as it is related by ^c *Strabo* and ^d *Gellius*. We gave you above several such Sayings in Relation to Perjury. It is likewise observable, that those severe Threats of GOD are not always put in Execution by him, especially when the Children prove to be eminently virtuous, as is manifest from *Ezek. xviii.* and from several Examples produced by *Plutarch* in the above-mentioned Place.

3. And therefore in the Gospel, where there is a more express Declaration than formerly of the Punishments that after this Life await the impious, ^e there is no threatening advanced beyond the Sinner's Person ; and it is to this that *Ezekiel* in the aforecited Chapter chiefly alludes, tho' not so clearly, as it was usual with the Prophets. But it is not for Men to imitate GOD in this Respect ; nor is the Reason for it the same, because, as we said just now, GOD has Power over our Lives, to take them away without any regard to our Demerits, whereas Man cannot pretend to any such Power, unless for some enormous and personal Crime.

4. And therefore that very Divine Law ^e does strictly prohibit both the putting to Death the Children for their Fathers Faults, and the Fathers for the Childrens : Which Law was observed by some religious Kings, such as *Amashah*, even with respect to reasonable Practices. This Law is highly commended by *Josephus* and *Philo*, as one like it among the *Egyptians* is by ^f *Isocrates*, and one ^g among the *Romans* by ^h *Dionysius Halicarnassensis*. *Callistratus* the Civilian translates a Passage out of *Plato* ⁱ to this Effect, that *neither the Crime, nor the Punishment of the Father, does any way attain the Son*, and assigns this Reason, ^j *because every Man is answerable for his own Doings, and no one is made the Inheritor of another's Crime*. Would any State in the World (says ^k *Cicero*) tolerate such a Law-giver as should condemn the innocent Son or Grand-Child, for the Father's or Grand-Father's Offence ? Upon this account it was that to execute a Woman with Child was prohibited by the ^l *Egyptian*, ^m *Grecian*, and ⁿ *Roman Laws* ^o.

5 TERTULLIAN, *De Monogamia*. The four Grape that the Father eats, no longer sets the Childrens Teeth on Edge, for every one must die in his own Iniquity. Cap. VII. GROTIUS.

6 That Orator, in his *Praise of Busris*, which our Author cites in the Margin, makes no mention of a Law established in *Egypt*, that prohibited the putting of innocent Children to Death for the Crimes of their Fathers. But, in praising the Religion of the *Egyptians*, he says, that they pay more Regard to an Oath, than any other People ; and believe, that the Divine Vengeance will punish every Crime immediately, without deferring the Punishment of the Guilty, or transferring it to their Offspring, p. 391. I confess however, it is very probable, that the *Egyptians*, in whose Laws there was so much Equity, (as may be seen in BOECLER's Collection of them, Vol. II. Dissert. XXIII.) did not imitate the Barbarity of some other Nations, which as early as *Moses's* Time, very probably put innocent Persons to Death upon account of their Relation to the Guilty ; as the Prohibition itself of *Moses's* Law seems to insinuate. At least I do not see how such a Custom can be reconciled with the Law of the *Egyptians*, which our Author recites a little lower, concerning the Delay of punishing Women with Child. There would be more Cruelty without doubt in putting Creatures come into the World to Death, especially after having been long in it, than to let the Infant in the Womb perish with its Mother. And I cannot comprehend how such wise Legislators would have been guilty of so gross a Contradiction.

7 He does not commend it, as I have said already in Note 7. upon Paragraph XIII. He only says that those who were for introducing a contrary Practice, in regard to the Children of the Persons proscribed by *Sylla*, were looked upon by the *Romans* as doing a Thing highly odious, not only in the sight of Men, but of the Divinity, who so

manifestly punished them for it, in reducing them to a mean Condition, and not suffering any of their Descendants to remain, except on the Side of the Women. *Antiq. Rom. Lib. VIII. Cap. LXXX. p. 524. Edit. Oxon.*

8 *Εὐ δὲ λόγῳ, πατρὸς ὀνείδῃ καὶ τιμωρίας παίδων μηδὲν ἐνέπειθε.* *De Legib. Lib. IX. p. 856. D. Vol. II. Edit. Steph.* The Philosopher adds however an Exception to this Law of his imaginary Commonwealth ; which is, that if the Father, Grandfather, and Great-Grandfather have been all condemned to die successively, the Children ought to be banished from the State ; keeping however their Estates, except those inherited from their Fathers : ΠΛὴν ἐάν τινι πατὴρ, &c. *Ibid.*

9 *Crimen vel poena paterna nullam maculam filio infligere potest. Namque unusquisque ex suo admisso sorti subicitur, nec alieni criminis successor constituitur.* *Digest. Lib. XLVIII. Tit. XIX. De Poenis. Leg. XXVI.*

10 *Ferretne ulla civitas, &c. De Natura Deorum. Lib. III. Cap. XXXVIII.*

11 See DIODORUS SICULUS, *Lib. I. Cap. LXXVII.*

12 The same Historian says, in the same Place, that many of the *Grecian* States adopted this Law : And PLUTARCH attributes it to some of them. *De sera Numin. vindicta*, p. 552. *D. Vol. II. Edit. Wech.* It appears to have been in Force amongst the *Athenians*, according to what *ÆLIAN* relates, *Var. Hist. Lib. V. Cap. XVIII.*

13 *Imperator HADRIANUS Publicio Marcello rescriptit, liberam, quæ prægnans ultimo supplicio damnata est, liberum parere : & solitum esse servari eam, dum partum ederet.* *Digest. Lib. I. Tit. V. De Statu hominum, Leg. XVIII.* See also *Lib. XLVIII. Tit. XIX. De Poenis. Leg. III.*

14 PHILO the Jew praises this Law. *De Humanit. (p. 710. E.) GROTIUS.*

XV. Much less should other Relations be punished.

XV. But if the Laws sentencing to Death the Children of Delinquents be unjust; how much more then is that of the *Persians* and *Macedonians*, which ¹ takes away the Lives of all who are any ways related, ² that so (as *Curtius* says) whoever had offended against the Majesty of the King might fall with more solemn Sadness and more poignant Sorrow. This Law ³ *Ammianus Marcellinus* reports to be without a Parallel severe.

XVI. But yet may Children and Relations of Offenders be denied what they would otherwise have enjoyed.

^a § 13. n. 2.

^b Ch. 5. § 29. of this Book.

XVII Nor are Subjects properly punishable for the Prince's Crimes.

^a § 2.

XVI. 1. But it must be considered, that if the Children of Traytors have or expect to have any Thing whose Property is not in them, but in the Prince or People, it may be taken from them by Vertue of the Power they have to dispose of such Things, provided that the Exercise of this Power turns to the Offender's Punishment: Upon this Ground (as *Plutarch* ¹ relates) the Descendants of *Antiphanes*, as a Traytor, were for ever disqualified for Honours; and at Rome ² the Children of the proscribed, by *Sylla*. And so what is decreed in the aforesaid Law ^a of *Arcadius* against the Children of such is what may pretty well be borne with, Let them never be advanced to any Places of Honour or Trust, either Civil or Military. But as to Slavery, how and how far it may justly affect Children, we have elsewhere ^b shewed.

XVII. 1. What we have said with respect to making the Children Sufferers for the Parent's Crime, is applicable to the Case of a People who are really and strictly Subjects. (For, as we told you, ^a a People who are not Subjects may be punished for their own Faults, that is, on account of their own Negligence) if the Question be, Whether such a People may be punished for their Prince's or Superior's Crimes. For our Inquiry here is not ¹ Whether they gave their Consent or concurred in any Action that of itself deserves Punishment, but we are now talking of the ² Communication of Punishment which results from the Nature of that Body whereof the King is Head and the rest Members. GOD for the Sin of *David* sent a Pestilence

XV. (1) *PHILO* says, it was usual with Tyrants to put to Death, with the Persons condemned, five Families of their next Relations. See *HERODIAN*, Lib. III. and an Instance at *Milan* upon the Death of *Galeatius*. In *PET. BIZARO*, *Hist. Genu. Lib. XIV.* *GROTIUS*.

The Passage of *PHILO*, which our Author has in View, is in his second Book *De Legib. special. Decalog.* but he has very much changed the Sense of it; for the *Greek* Text says plainly, that some Legislators have ordained, that a Traitor should be put to Death with his Children; and a Tyrant with five Families of his nearest Relations, p. 802. D. Edit. Paris. There is also great Room to believe, that our Author, his Copist, or Printers have put *HERODIAN* in this Place for *HERODOTUS*. At least I can find nothing in B. III. of the first of those Historians that can relate to the Subject here; whereas I find in B. III. of the other *Intaphernes*, condemned to die by *Darius*, according to the Custom of the *Persians*, with his Children and all his Family, Cap. CXIX.

² See the Passage cited above Note 2. upon Paragraph XIV.

³ He calls it an abominable Law: *Leges apud eos* (*Persas*) &c. Lib. XXIII. (Cap. VI. p. 416. Edit. *Vales. Gron.*) See also the fourth Council of *Toledo*. *GROTIUS*.

XVI. (1) *Καὶ τοῖς περὶ τῶν προδοτῶν*, &c. [Vit. decem Rhetorum, Vol. II. p. 833. A.] *GROTIUS*

All the Editions of our Author are faulty in this Place, as to what he says after *PLUTARCH* without quoting the Place whence he took it; for *Antiphanes* is put instead of *Antiphan*. For the rest, the Word *ἄτιμος* seems here to imply something more than a bare Exclusion from Honours, because it is said of the Criminals themselves, who were put to Death, as well as of their Posterity. It was therefore a Mark of Infamy, which fell both on the Guilty and Innocent, and which consequently rendered them incapable of pretending to Honours.

² See *VELLEIUS PATERCULUS*, Lib. II. Cap. XXVIII. *PLUTARCH* in *Sylla*, p. 472. C. Vol. I. But *Julius Cæsar* abolished this: *Admisit ad honores & proscriptorum liberos*. *SUETON*. Cap. XLI.

XVII. (1) *PHILO*, *De Abraham*. p. 363. D.) speaking of the *Ægyptian* King's Subjects in *Abraham's* Days, *παρὰ πᾶν λαόν, &c.* His whole Family as well as he, had their Share in the Punishment, because not one of them blamed his Injustice, but were all, as it were, Accomplices with him, by applauding what he did. And *JOSEPHUS*, where he relates the Prophecy denounced against *Jeroboam*, *μέλει ἐκεί, &c.* The People too are to bear their Part in the Punishment, and are therefore to lose that good Land, and to be dispersed beyond *Euphrates*, because they followed the Impieties of their Prince. (*Antiq. Lib. VIII. Cap. IV. p. 280. E.*) *GROTIUS*.

² *De eo CONTACTU qui ex natura oritur ejus corporis, &c.* It must be read so according to the first Edition, and that of 1632. as I have observed in my *Latin* Edition, in which the Printers however have not followed my Correction in the Text, and have left *contractu*. The Fault was even in the Edition of 1642. which is the last before the Author's Death, and arose perhaps from the Ignorance of some Corrector, who did not understand that Word *contactus*, used for *contagio*, as we find it also in some Authors, for Instance in *SENECA* and *TACITUS*. The learned *GRONOVIVS* had thus read the Passage, as appears by his Note, tho' he takes no Notice of it. But *ZIEGLER*, without suspecting that the Text was faulty, as he must have perceived, if he had attentively considered the Connection of the Discourse, accuses our Author of giving an Explication more obscure than the Question itself; and after having racked his Wits to discover a rational Sense of the Passage, he at last confesses, there is none. From whence it appears, how necessary it was to consult the antient Editions carefully, before he undertook it, I do not say, to criticize, but to read a Work like this, in order to understand it.

on the People, (who in *David's* Judgment were entirely innocent) but it was GOD who did it, and who had an absolute Right over their Lives.

2. And besides this was properly *David's* Punishment, and not the People's; for as a Christian Author observes: ³ *The severest Punishment that wicked Princes can undergo is that which is laid on their Subjects.* For this, says the same Author, is just as if you should lash a Man upon his Back for an ill Thing his Hand had done: And *Plutarch* ⁴ on the like Subject, compares it to the Physicians applying a Caustick to the Thumb in order to cure the Thigh. But why it is unlawful for Men to take this Liberty is already declared.

XVIII. The same do we likewise pronounce of not punishing particular Persons with the Loss of what is properly and peculiarly their own for the Fault of the Publick, if they have not consented to it.

XIX. Why the Heir is bound to other Debts and Obligations ¹ and yet not subject to the Punishment of the Deceased, ² according to that of *Paulus the Civilian*, *it is provided by the Rules of a fictitious Right that the Punishment due to any one should not be transferred upon his Heirs*, the true Reason is, that the Heir does not represent the Deceased in his Deserts or Demerits, which are Qualities merely personal, ³ but only in his Effects; and in these, upon this Principle that at one and the same Time that Property was introduced, it was made an established Law that the Debts which arise ⁴ from the Inequality of Things should be attached to them. Thus *Dion Pruseensis* in his *Rhodiaca*: *ἅπαντα ἐφείλῃσι*, &c. *what was due from Predecessors is no less due from their Posterity.* For you cannot say, that we have renounced our Succession.

XX. 1. From whence it follows, that if, besides the Crime, there be some new Cause of Obligation, the Heir may be bound to stand to the Penalty, tho' not properly as a Punishment. Thus in some ¹ Places after Sentence is pronounced, and in ² others after the Commencement of Suit, which are Circumstances that give the force of a ³ Contract, the ⁴ Heir shall be liable to the Fine; the Case is the same, if the Deceased in treating about any Thing, ⁵ submitted himself to a pecuniary Forfeiture; for then, there was a new Cause of Obligation, distinct from the Punishment.

³ *Quæst. ad Orthodox* CXXXVIII. GROTIUS.

⁴ In a Treatise, which has been already cited several Times, wherein he endeavours to justify the Punishments inflicted upon the Posterity of Criminals. *De fera numinis vindicta*, p. 559. E. Vol. II.

XIX. (1) MAIMONIDES, *Tit. כדלה*. Cap. VII. § 6. GEMARA, *Baba Cama*, Cap. IX. § 2. GROTIUS.

² This Law has been cited above, § 12. Note 1.

³ See the Council of *Toledo* VIII. in *Recewinthus's* Case; and what is above in this Book, Chap. XIV. § 10. There is no Person so proper to represent the Deceased as his Heir, says CICERO, *De legibus*, Lib. II. (Cap. XIX.) GROTIUS.

⁴ That is from one Man's having more and another less than he ought to have. See above Chap. XII. § 8.

XX. (1) We find this for Instance, in the Law of *Suabia* in *Germany*; according to which a penal Action cannot lie against an Heir, till after Sentence, in the cases of Theft, Gaming or Usury; and for other Offences, the Fact must at least be proved juridically before the Death of the Delinquent. See a Dissertation of Mr. THOMASIVS, *De usu Actionum Pœnarium Juris Romani in foris Germaniæ*, Cap. II. § 16. where he cites the express Words of SPECULUM SUEVIUM, Art. CCLVII.

² *Post litem contestatam*. This is the Decision of the *Roman* Law; and the Custom in Countries which follow it: *Omnes pœnales actiones post Litem inchoatam, & ad Hæredes transeunt.* Digest. Lib. XLIV. Tit. VII. De Obligat. & Actionib. Leg. XXVI. See also Law XVIII. and Lib. I. Tit. XVII. *De diversis Reg. Juris.* Leg. CXXXIX. CLXIV.

³ This is a general Rule in the *Roman* Law, as well in this as in other Cases. As soon as Sentence

is given, the Person, in whose Favour it passed, or his Heir, has his Action against the Heir of the other Party: *Judicati actio perpetua est, & rei persecutio nem continet. Item hæredi & in hæredem competit.* Digest. Lib. XLII. Tit. I. De re judicata, & de effectu sententiarum, &c. Leg. VI. § 3.

⁴ From the Moment a Suit is commenced, the two Parties are presumed to engage thereby to pay whatsoever shall become due in Virtue of the Sentence: *Nam sicut stipulatione contrahitur cum filio, ita judicio contrahi: Proinde non originem judicii spectandam, sed ipsam judicati velut obligationem.* Digest. Lib. XV. Tit. I. De Peculio, Leg. III. § 11. So that there being an Obligation of the Deceased founded on this Presumption, which the Laws authorize; it is transferred to his Heirs, in the same Manner, as that of express Contracts and Engagements, which is, as it were, attached to the Defunct's Estate.

⁵ *Ut & ea quæ in conventionem deducta est.* But this is only a Penalty improperly so called; in Strictness, it ought to be termed a Sort of Reparation agreed upon: The following is an Example of this Kind taken from the *Roman* Law. A Man had sold some Materials, and taken the Money for them, under a certain Penalty if the whole Quantity were not delivered in a Time fixed. This Person happened to die, before he had fully performed the Contract, and his Heir did not take care to make it good, by delivering the remaining Part of the Materials. The Buyer therefore had his Action against the Heir, for the Penalty or Reparation, to which the Deceased had made himself liable by the Contract of Sale: *Lucius Titius, accepta pecunia, &c. Digest. Lib. XIX. Tit. I. De actionibus emti & venditi, Leg. XLVII.*

XVIII. Nor particular Persons for the Faults of the Whole, if they refused their Consent.

XIX. The Heir not liable to Punishment, as such; and why.

XX. But he is liable if the Punishment pass into an Obligation of another Nature.

C H A P. XXII.

Of the unjust Causes of War.

I. The Difference between the real and pretended Causes of War shew'd.
^a Chap. I. § 1. of this Book.

^b For Instance, l. 37. c. 54. n. 13.

^c Lib. 3. c. 6, 7, 8, 9.

I. 1. **I**N^a beginning to treat of the Causes of War, we divided them into ¹ justifying Reasons and Motives. *Polybius*, the first Author of the Distinction, calls the one *προφάσεις*, as being usually such as are openly assigned for the War, (*Livy*^b sometimes terms them the Title of the War) to the other he gives the general Name of *αἰτίαι*, Causes.

2. Thus in the War of *Alexander* against *Darius*, to take Vengeance of the *Persians*, for the ² Injuries they had formerly done the *Greeks*, was the justifying Reason, whilst the Motive was a strong Desire of Glory, Empire, and Riches, in Conjunction with confident Hopes of Success, conceived from the fortunate Expeditions of ³ *Xenophon* and ⁴ *Agésilas*. So in the second *Carthaginian* War, the justifying Reason was a Controversy about *Saguntum*, but the Motive was an old Grudge, entertained by the *Carthaginians* against the *Romans*, for the hard Terms they were obliged to accept of, when reduced to a low Condition, and (as *Polybius*^c takes Notice) their being animated and flushed by the Successes which had of late attended their Arms in *Spain*. So ⁵ *Thucydides* is of Opinion, that the true Cause of the *Lacedemonian* War was a Jealousy of the over-growing Power of the *Athenians*, but a Quarrel of the *Corcyreans*, *Potidians*, and some other Things, were the Pretence made use of for justifying the War; tho' in this Place he seems to confound the Terms *προφάσεις*, and *αἰτίαι*. The same Distinction do we find in the Speech of the *Campanians*⁶ to the *Romans*, where they profess that it was in

I. (1) This Distinction is made also by *PLUTARCH*, in his *Galba*; and *DION*, in the Affairs of *Cæsar* and *Pompey*; and by *POLYBIUS*, where he treats of the *Roman* War against the *Illyrians*, Excerpt. Legat. CXXVI. We may call the justifying Reasons the Pretext, and the Motives the Cause of the War, as *SUETONIUS* does, where he speaks of *Julius Cæsar*, *This was his Pretext indeed for a Civil War; but all the World are of Opinion, that the Causes were something else.* *THUCYDIDES* in some Places distinguishes between *πρόφασις*, the Pretence, and *τὸ ἀληθές*, the Truth, as in the *Athenians* Descent upon *Sicily*, where the Pretence was to assist the People of *Égesta*, but the Truth and Reality was their Desire of seizing upon *Sicily* for themselves. *HERMOCRATES*, in an Harangue of his, speaking of the *Athenians*, calls that the Colour, this the Intent. You have both these Passages in *THUCYDIDES*'s sixth Book. And *APPIAN*, in his *Mithridatic* uses the Word *προφάσεων*; and in his *Civilian*, Lib. VI. where he treats of the Peace between *Octavius* and *Sextus Pompeius* being broken, he says, that the concealed Reasons were quite different from those that were declared. *AGATHIAS*, in his fifth Book, what others term *πρόφασις* calls *σχῆψιν ἢ προσωδύμια*, Fiction and Disguise, to which he opposes *αἰτίαν*, In Hist. Hunn. Zamergan. Add to this what we said above, in Chap. I. §. I. of this Book. *PROCOPIUS*, *Perfic.* II. says, that *It is but Folly to be reserved when the Action is directed by Justice, and attended with Advantage.* *GROTIUS*.

One may perceive at first Sight, that the last Passage from *PROCOPIUS* is not to the Purpose, for the Question here is not concerning Freedom of Speech. I cannot comprehend how our Author found any Thing in it that could relate to the Subject of this Note, nor how he came to change the Sense of the Historian; for the Passage he had,

probably, in View, at least there is nothing elsewhere that has any Resemblance to the present Subject, in the two Books of the War against the *Persians*, is, at the Close of the Speech made by the Embassadors of the *Lazians*, to *Chosroez* King of *Persia*, to intreat him to receive their Nation into his Alliance and Protection against the *Romans*. After having set forth all the Reasons that were capable of shewing the Justice of their Demand, they represent the Advantages that *Chosroez* himself would have in complying with it; and conclude, that it is no more than prudent to accept offers, *Which Justice precedes, and Advantage accompanies.* Lib. II. Cap. XV.

2 See what is said in the preceding Chapter, § 8. Note 2.

3 In the famous Retreat of the ten thousand *Greeks*, of which that Philosopher and great Captain has writ the History.

4 See his Life in *CORNELIUS NEPOS*, Cap. III. and in *POLYBIUS*, Lib. III. Cap. VI.

5 Lib. I. (Cap. XXIII. See also Cap. LVI. and LXVIII. In his fifth Book, where he treats of the War between the *Argives* and the *Epidaurians*, he calls *αἰτία*, what he had a little before called *πρόφασις*. In the same Manner (as we have observed in the first Chapter of this Book) the *Greek* Word *Ἀρχαί*, and the *Latin* Word *Principia*, and such others as are made Use of to express the Origin of a War, are equivocal. The Writers of the *Constantinopolitan* History often use the Word *πατροκλῆς*, to signify what others call Pretext, *πρόφασις*, and that in Allusion to the History of *Achilles*, who took Occasion from the Death of *Patroclus* to resume his Arms, which he had before renounced. *GROTIUS*.

6 *Quaquam pugnāvimus*, &c. *LIVY*, Lib. VII. Cap. XXX. Numb. 12.

Order to aid the *Sidicines* that they took up Arms against the *Samnites*; whereas, in Reality, their own Interest induced them to it, foreseeing that if the *Sidicines* were once set on Fire, the Flames would soon reach them. *Livy* reports too, that ⁷ *Antiochus* made War upon the *Romans*, for the Murder of *Brachyllas*, and under some other Pretext, but the real Incitement was, some extraordinary Hopes he had conceived from the Remissness of the *Roman* Discipline. *Plutarch* ⁸ remarks, that *Cicero's* Charge against *Antony*, as being the Cause of the Civil War, was not true; for *Antony* only furnished *Cæsar*, who was already determined for the War, with a plausible Pretence for it.

II. But there are some who engage themselves in War, having neither of these Causes, ¹ *Coveting* (as *Tacitus* represents them) *Dangers* ² for *Danger's* Sake. This Vice so far passes the Bounds of Humanity, that by ³ *Aristotle* it is stiled *Brutishness*. *Seneca* speaking of such Wretches, says ⁴ *To take Pleasure in Massacres is not so properly Cruelty as Ferity and Savageness: One might call it Distraction; for there are several Sorts of this, but none of them more visibly so, than that which carries People to the Murders and Butcheries of their own Kind.* Consonant to this is that of *Aristotle*, *Δόξαν γὰρ, &c.* ^a *For he is superlatively barbarous, who for nothing but the Sake of Fighting, and Spilling human Blood, converts his Friends into Enemies.* And *Dion Prusæensis* ^b says, that *To be engaged without any Reason in Wars and Broils is perfect Madness, a seeking one's own Destruction.* And *Seneca*, in his fourteenth Epistle, *The Effusion of human Blood for its own Sake, and no other Reason, is what scarce any Man can be guilty of.*

II. To engage in a War without either of these Causes is brutish.

^a Eth. Nic. 1. 10. c. 7. p. 138. tom. 2. Edit. Paris.
^b Orat. 37.

III. 1. But the Generality of those who engage in Wars, are induced thereto by Motives, either in Conjunction with justifying Reasons, or without them. Some there are who do not care whether they have any justifiable Reasons at all, of whom we may pronounce, as the *Roman* Lawyers do, that such are Robbers, who being called to Account how they came by such and such Things, can shew no ¹ Right they have to them, but only that they are in their Possession: And

III. A War without a just Reason is no better than Robbery.

Aristotle

⁷ Our Author by not attending to the Construction of the Terms, attributes to King *Antiochus*, what the *Latin* Historian says of the *Bæotians*: *In Bœotiam ipse [Antiochus] — habentem — revera per multa jam secula publicè privatimque labante egregiâ quondam disciplina gentis, & multorum eo statu, qui diuturnus esse sine mutatione rerum non posset.* Lib. XXXVI. Cap. VI. Num. 1, 2. *BOECLER* has exactly copied this Error, in a Dissertation, intitled *De Clarigatione & Manifestis*, Vol. II. p. 1212. where he expresses himself in the same Manner as our Author, tho' he does not mention him.

⁸ As the Place where the Philosopher makes that Reflection is not named here, *GRONOVIVS* seems to doubt whether it be really his. But I shall give the Passage; from which it will appear also, that that learned Man was mistaken, in imagining our Author spoke of *Octavius*, or *Augustus Cæsar*, whereas the Passage relates to *Julius Cæsar*. *Διὸ καὶ Κικέρων ἐν τοῖς Φιλιππικοῖς, &c.* In *Vit. Marc. Anton.* p. 918. C. D. Vol. I. Edit. *Wech.* The Passage in the *Philippicks*, of which *PLUTARCH* speaks, and wherein it is said, that *Antony* was the Cause of the Civil, as *Hellen* had been of the *Trojan*, War, is in the II. *Philippick*. Cap. XXII. Our Author cites here, in a Note, some Verses of *LUCAN*, wherein that Poet says on the same Subject, that the ill Treatment of the Tribunes of the People, *Q. Cassius* and *Mark Antony*, finally determined *Cæsar*, who was before irresolute, Fortune supplying him thereby with Pretenses to justify the War wherein he engaged himself.

*Ecce faces belli, dubiæque in prælia menti
Urgentes addunt stimulos, cunctosque pudoris*

*Rumpunt fata moras: justos Fortuna laborat
Esse ductis motus, & causas invenit armis.*

Pharsal. Lib. I. ver. 262, & seq.

II. (1) *Periculorum propter ipsa avidi.* Our Author reports the Sense rather than the Words, in this Place; for he had probably in View the Passage concerning *Cornelius Fuscus*. *Non tam præmiis periculorum, quam ipsis periculis, lætus.* Hist. Lib. II. Cap. LXXXVI. Num. 7. But *TACITUS* says elsewhere, only *periculorum avidi*, Lib. III. Cap. XLI. Num. 4. and Lib. V. Cap. XIX. Num. 5. I find in *SENECA* an Expression implying the very same Thing, *Pereclitatur periculi causâ.* *Quæst. Nat. Lib. V. Cap. XVIII. p. 778.* Edit. *Var. Elzevir.*

² *AMMIANUS MARCELLINUS* says of the *Alani*, that they love Dangers and War, as much as pacifick Persons do Repose and Tranquillity, *Utque hominibus quietis & placidis otium est voluptabile, ita illos pericula juvant & bella.* Lib. XXXI. (Cap. II. p. 672. Edit. *Vales. Gron.*) *GROTIUS.*

³ *Θηελότης.* (Ethic. Nicomed. Lib. VII. Cap. I.) *GROTIUS.*

⁴ *Possumus dicere, non esse hanc crudelitatem, sed feritatem cui, voluptati sævitia est, &c.* De *Clementia*, Lib. II. Cap. IV. He says elsewhere, speaking of *Apollodorus* and *Phalaris*, two most inhuman Tyrants, who delighted in shedding human Blood, without any Reason for it, that they could not be said to have acted purely and simply from Passion, but that what they did was the Effect of a brutal Ferocity: *Hi qui vulgo sæviunt, & sanguine humano gaudent, &c.* De *Ira*, Lib. II. Cap. V. *GROTIUS.*

III. (1) *Sed enim & bonarum possessor, &c.* *Di. gest.*

Rhet. I. I. c. 3. Aristotle says of the common Instigators to War, that ^a They seldom consider the Injustice of enslaving their inoffensive Neighbours, and such as no Ways injure them.

2. Of this Stamp was ² Brennus, who asserted, that The strongest have always the best Title. So Hannibal, whose Motto, according to Silius, ³ was

Justice and Leagues to me my Sword points out.

And so Attila, ⁴ and all others who tell you, that

⁵ The Reason of the War they ne'er inquire,
It's Conclusion's all they care for.

And,

⁶ To be overcome is Argument of Guilt.

And,

⁷ Successful Arms are always in the Right.

Applicable to this is that of St. Austin, ⁸ To make War on our Neighbours, from thence to push our Violence farther on, and so to oppress inoffensive People, out of a Thirst after Empire, what Title does it deserve, but that of a notorious Robbery? Of these Wars Velleius says, that ^b They are not entered into on Account of any just Pro-

^b Lib. 2. c. 3.

IV. There are some Reasons which upon first Appearance seem justifiable, but will not bear the Test of Examination.

great Interest of their own, take where they ought not to take, are called wicked, impious, and unjust, such as Tyrants, and those who depopulate Cities.

IV. There are those who alledge some Sort of justifying Reasons, but such as, being weighed in the Balance of right Reason, are found to be unjust. And in

gest. Lib. V. Tit. III. De hæreditatis petitione, Leg. XI. in fin. & XII. XIII. init. Such was the War of the Heruli against the Lombards, undertaken without Pretext. Πόλεμος ἀπροφάσις, (as PROCOPIUS styles it, De bello Gotthic. Lib. II. Cap. XIV.) GROTIUS.

² Romanis quærentibus, & quid in Etruria rei Gallis esset? Quum illi se in armis jus ferre, & omnia fortium virorum esse, ferociter dicerent, &c. LIVY, Lib. V. Cap. XXXVI. Num. 5.

³ Ductoremque feram, cui nunc pro fœdere, proque Justitiâ est, Ensis —
De bello Punic. II. Lib. XI. ver. 183, 184.

⁴ Our Author had, probably, in View what the Emperor Valentinian says in a Letter to Theodorick, as JORNANDES relates, Qui [Attila] causas prælii non requirit, sed quidquid commiserit, hoc putat esse legitimum. De Goth. orig. & reb. gestis, Cap. XXXVI. Edit. Vulcan.

⁵ It is a Passage in one of SENECA's Tragedies,

— Quæritur belli exitus,
Non causa —
Hercul. Fur. v. 407, 408.

⁶ This is the Sense our Author gives to a Verse of LUCAN which he uses here, without saying whose it is. But Cæsar, whom the Poet introduces speaking in this Manner to his Soldiers, means, that the Gods would shew whose Cause was good, by making the Victory turn to that Side; so that the Application is not very just. The Original is

Hæc, fato quæ teste probet, quis justius arma

Sumserit, hæc acies victum factura nocentum est.

Pharsal. Lib. VII. ver. 259, 260.

In the same Manner a Roman Herald, declaring War against the Samnites, said, that the Gods who preside in War, would judge which of the two Nations had broken the Treaties. DIONYSIUS HALICARNASSENSIS, Excerpt. Legat. p. 705. Edit. Oxon.

⁷ These are TACITUS's Words, and are cited before, in the Preliminary Discourse, § 3. Note 2.

⁸ Inferre bella finitimis, &c. De civitat. Dei. Lib. IV. Cap. VI. in fin.

⁹ Sed ea animi elatio, &c. De Offic. Lib. I. (Cap. XIX.) AGATHIAS treats those as insolent and abandoned, who, from the Love of Gain, or unreasonable Enmity, possess themselves of other People's Land, without any just Subject of Complaint against them, Lib. II. (Cap. I.) MENANDER, Protector, gives us a remarkable Instance of this, in the Person of Bajan, Chagan (or Prince) of the Avari, who broke the Treaties he had made with the Romans, without so much as seeking any false Pretext to colour the Rupture. (Cap. XXI. Of the Embassies of Justinian, Justin, and Tiberius.) GROTIUS.

¹⁰ (Paraph. Ethic. Nicom. Lib. IV. Cap. II. p. 202.) PHILO the Jew, speaking also of Tyrants and ambitious Persons, excellently observes, that when they have the Power in their own Hands, and can assure themselves of Impunity, they plunder whole Cities, and commit the greatest Robberies, under the specious Name of Government. In Decalog. (p. 763. C. D.) This agrees perfectly well with the Passages of SENECA, QUINTUS CURTIUS, JUSTIN, and S. AUSTIN, cited above, Chap. I. § 1. of this Book, GROTIUS.

this Case, (to use *Livy's* ¹ Expression) *The Dispute is not who is in the Right, but who is the most powerful. The Generality of Princes, says* ² *Plutarch, employ the two Terms of War and Peace, as they do their Money, not for what is just and honest, but for what will serve their Turns.* The Knowledge of what Causes are unjust, may be pretty well collected from the just Causes already mentioned. For the Windings of a crooked Line presently appear upon its Application to a strait one. However, to make the Matter as plain as we can, we will insist a little upon the ³ principal of them.

V. I. First therefore, the Dread (as we before ^a observed) of our Neighbour's encreasing Strength, is not a warrantable Ground for making War upon him. To justify taking up Arms in our own Defence, there ought to be a Necessity for so doing, which there is not, unless we are sure, with a moral Certainty, that he has not only Forces sufficient, but a full Intention to injure us.

V. Such as are uncertain Fear.
^a Ch. 1. § 17.
of this Book.

2. Wherefore their Opinion is not to be assented to, who maintain that it is lawful to bring War upon a neighbouring Prince, who, in his own Territories shall erect a Castle, or other fortified Place, which may some Time or other be detrimental to us, tho' he is under no Obligation to the contrary by any previous Compact. For to remove such Apprehensions, we should apply ourselves to the raising such within our own Dominions, and look out for other Remedies, rather than immediately have Recourse to War. From whence it is deducible; that the War of the Romans against ^b Philip King of Macedon, and of ¹ Lyfmachus against Demetrius, if they had no other Cause (than this uncertain Fear) were not just. I am wonderfully pleased with that of Tacitus, about the ² Cauchi, *They are a People of the greatest Repute and Figure in all Germany, and chuse to maintain their Grandeur by their Justice, living quiet, and keeping at Home; as free from Ambition as from Envy. They give no Occasion for Wars, committing neither Outrage nor Robbery; and what is a great Proof of their Valour, and their Strength, they preserve their Superiority, without Injury and Oppression: However, they are always in a Readiness for War, and can, if their Affairs require it, raise an Army in an Instant, being well provided with Men and Horses, and in the midst of Peace are equally respected and feared.*

^b Zonar. tom.
2. ubi de bell.
Maced. 1.

VI. Nor does the ¹ Advantage from a War give us as good a Right as a Necessity for one.

VII. Nor is the Refusal of supplying us with Wives, tho' there be great Plenty of Women, a just ¹ Provocation to War, which was what moved Hercules against ²

VI. An Advantage without a Necessity.
VII. Refusal of Marriages, when there is Plenty of Women.

IV. (1) The Historian says this of Hannibal, who sought Pretexts to quarrel with the Neighbours of Saguntum, *Quibus, quum adesset idem, qui litis erat sator, nec certamen juris, sed vim quæri, adpareret, &c.* Lib. XXI. Cap. VI. Num. 2.

² In Vit. Pyrrhi, p. 389. E. Vol. I. Edit. Wech.

³ See PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VI. § 4, 5.

V. (1) PAUSANIAS, cited in the Margin by our Author, says, that Lyfmachus was for preventing Demetrius, whom he knew to be as ambitious as his Father, Lib. I. Cap. X. p. 9. Edit. Græc. Wech. But we find immediately after, that Lyfmachus took his Pretext from the Perfidy of Demetrius to Alexander, the Son of Cassander, whom he assassinated, that he might reign in his Stead in Macedonia. The Romans also alledged other Reasons in Justification of their War against Philip; which, however, were not much better. See the Specimen Jurisprud. Hist. of Mr. BUDDEUS, § 101. The Conjecture of GRONOVIVS in this Place, in accusing our Author of having taken one Thing for another, has no Foundation. For our Author does not mean, that those Wars were undertaken to hinder a Neighbour from building a Fortrefs upon the Frontiers; that was said only by Way of Instance of what gives Umbrage; and it suffices, that those Wars had, either for their End

or Pretext, the Prevention of an Evil apprehended from another. Now this is what ZONARAS, cited in the Margin, expressly says of the War of the Romans against Philip. So that our Author had not in View what LIVY says Lib. XXXII. Cap. XXXVII. Num. 3. as GRONOVIVS supposes.

² Populus [Chauci] inter Germanos nobilissimus, &c. German. Cap. XXXV. Num. 4, 5, 6.

VI. (1) The commodious Situation of a Place, and its being proper to cover a Prince's Frontiers, are not lawful Causes for seizing it by Force of Arms. This is an Instance alledged by the late Mr. VITRIARIUS, *Instit. Jur. Nat. & Gent.* Lib. II. Cap. XXII. § 3.

VII. (1) See above, Chap. II. of this Book, § 21.

2 If we follow APOLLODORUS, this Example is ill applied. For, according to him, Eurytus, King of Oechalia, had promised his Daughter Iole in Marriage to him who could outshoot him and his Sons. Hercules presented himself, and having won the Prize proposed, Eurytus refused to let him have it: So that here was a Breach of Faith, for which Hercules had a Right to do himself Justice by Arms. *Biblioth.* Lib. II. Cap. VI. § 1. But our Author has followed DIODORUS SICULUS, who does not mention the Promise, and only says, that Hercules demanded Iole in Marriage, Lib. IV. Cap. XXXI.

Eurytus, and ³ *Darius* against the *Scythians* ⁴.

VIII. *The Desire of a better Land.*

VIII. Nor is the Desire of changing our former Settlements, of removing from moorish and desert Ground to a more fertile Soil, a just Plea for making War, which *Tacitus* reports to be the ¹ Cause of most of the Wars amongst the antient *Germans*.

IX. *The Discovery of Things that belong to others.*

² *Franc. Viſtor. de Indis, Relict. l. 1. n. 31.*

X. *But what if the first Possessors are Fools.*
² *Idem, de bello, n. 5, 6, 7, 8. & l. 2. n. 18.*

⁵ Ch. 3. § 6. of this Book.

IX. Nor is it less unjust ^a to go to War, and lay Claim to a Place upon the Score of making the first Discovery of it, if already inhabited, tho' the Possessor should be a wicked Man, or have false Notions of GOD, or be of a stupid Mind; because by the Right of Discovery we can pretend to those Places only which are not appropriated.

X. 1. Nor is the being endued with Virtues, moral or divine, or an extraordinary Capacity, a Qualification absolutely requisite for Property, unless if there be a People ^a entirely destitute of the Use of Reason, that then dispossessing them may seem defensible, as having no Right of Property; and all that Charity would in that Case oblige one to, is to allow them Necessaries sufficient for Life. What has been already ^b delivered with Respect to the Provisions made by the Law of Nations, for preserving the Rights and Properties of Infants and Idiots, is to be applied to those with whom Compacts and Agreements can be made, which these People totally void of Reason, are not qualified for, if any such there be, which I very much question.

2. The *Greeks* therefore were to blame, who thought the *Barbarians* naturally ^c their Enemies, because they were different in their Manners, and of more shallow Apprehensions (in their Opinions) than themselves. But how far upon the Account of enormous Crimes, Crimes against Nature, or prejudicial to human Society, it is lawful to dispossess People, is a different Query, and already ^c discussed in our Discourse about *The Right of Punishments*.

^c Ch. 20. § 40. of this Book.

XI. *The Desire of Liberty in a People who are subject, is also an unjust Reason.*

XI. 1. Nor is the taking up Arms upon the Account of Liberty, justifiable in particular Persons, or a whole Community; ¹ as if to be in such a State, or a State of Independence, was naturally, and at all Times, every one's Right. For when Men are said to be ² by Nature in a State of Freedom, by Nature is to be understood the Right of Nature, as it is antecedent to all human Acts to the contrary; and the Freedom there meant, is an Exemption from Slavery, and not an absolute Incompatibility with Slavery, that is, no Man naturally is a Slave, but no Man has a Right never to become such, for in this Sense no Body living is free. And this is what *Albutius* ³ intends, when he says, that *No Man is born either a Freeman or Slave, but these Names Fortune gives them afterwards*. Thus *Aristotle* ⁴, νόμος τὸν μὲν δ᾿ δλον εἶναι τὸν δὲ ἐλεύθερον, *To the Law it is owing, that one is in a free, another in a servile Condition*. And therefore it is every Man's apparent Duty, who is reduced to a State of Servitude, either civil or personal, to be content with his own Condition, as the Apostle *St. Paul* teaches us, *Art thou called, says he, being a Servant, care not for it.* I Cor. vii. 21.

³ Our Author has, no Doubt, taken this from *JUSTIN*. That Epitomiser says, that *Fancyres* (a Name very differently expressed by Authors) I say, that *Fancyres*, *Idantyes*, or *Indathyses*, having refused to give his Daughter in Marriage to *Darius*, the latter declared War against him upon that Account. *Huic Darius Rex Persarum — quum filiae ejus nuptias non obtinuisset, bellum intulit.* Lib. II. Cap. V. Num. 9. I perceive however, that *ALBERICUS GENTILIS*, whose Work our Author had before him, when he composed his own; relates this Example on the Authority of *JORNANDES*, *Hist. Goth.* (Cap. X.) and of *PAULUS OROSIVS*, *Lib. II. Cap. VIII.* See the Treatise of that Civilian often cited, *De jure Belli*, Lib. I. Cap. XX. p. 158.

⁴ And *Antoninus Caracalla*, against *Artabanus*, King of the *Parthians*. See *XIPHILINUS*, (*Epit. Dion.* p. 356. Edit. H. Steph.) *GROTIUS*.

VIII. (1) *Eadem semper causa Germanis*, &c. *Hist. Lib. IV. Cap. LXXIII, Num. 6.*

X. (1) φύσει πολέμιοι. See *PLATO*, *De Republica*, (Lib. V. p. 470. C. Vol. II. Edit. Steph.) *ARISTOTLE*, *Politic.* (Lib. I. Cap. II.) *EURIPIDES*, in *Hecub.* [or rather *Iphigen. in Aulid.* ver. 1400, 1401.] *LIVY*, *Lib. XXXI. (Cap. XXIX. Num. 15.)* *ISOCRATES*, *Orat. Panathen.* (p. 267. Edit. Hen. Steph.) *GROTIUS*.

See above, Chap. XX. § 40. Note 10, and 11.

XI. (1) See the fourth Council of *Toledo*, and what we have said above in Chap. IV. § 14. of this Book. *GROTIUS*.

² See *PUFENDORF*, *B. III. Chap. II. § 8. Law of Nature and Nations*.

³ *ALBUTIUS*, & *philosophatus est; dixit, &c.* *SENECA*, *Controvers.* Lib. III. Cont. XXI.

⁴ He does not say this of his own Head, but relates it as the Opinion of others, who believed that all Slavery is contrary to Nature, and consequently unjust. *Politic.* Lib. I. Cap. III.

XII. It is unjust likewise to bring under Subjection by Force of Arms, such as we may fancy are fit for nothing else, or (as the Philosophers sometimes stile them) are Slaves by Nature; for I must not compel a Man even to what is advantageous to him. For the Choice of what is profitable or not profitable, where People enjoy their Senses and their ^a Reason, is to be left to themselves, unless some other Person has gained any Right over them. But that of Infants ¹ is a quite different Case, for as they have not the Power to manage themselves, Nature gives it to the first that will take upon him to manage them, and who is qualified for such a Charge.

XIII. 1. I should not here have observed the Vanity of the Title ^a with which some have dignified the *Roman* Emperor, as if the Right of governing the most distant, and even undiscovered Parts of the World, was his, had not *Bartolus* (who for a long Time passed for the most celebrated Civilian) presumed to declare that Man an ^b Heretick, who should dare to deny it; because, forsooth, the Emperor does sometimes ¹ stile himself ^c *Lord of the Universe*; and because that the Empire (to which modern Historians have given the Name of ² *Romania*) is in Holy Writ ³ called by the Name ^d *ὀικουμένης*, of the ^d World; which is no more than such Strains and Flights as

⁴ *The whole World to Rome's victorious Arms
Subjection already paid,*

and many such other Expressions, by Way of *Hyperbole* or Eminence; especially if we consider, that in the same Sacred Pages, ⁵ *Judea* alone has frequently the Name of the *World* given it. And in this Sense we are to apprehend that old Expression of *Jerusalem's* being situated ⁶ in the Middle of the Earth, that is, of the Land of ^e *Judea*: So *Delphos* being in the Centre of *Greece*, is called the ⁷ *Navel of the World*. Nor are the Arguments used by ⁸ *Dante* for the universal Jurisdiction of the Emperor, drawn from its Tendency to the Interests of Mankind, at all convincing; for the Advantages he proposes are counterpoised by the Inconveniences that attend them. For as a Ship may be built to so vast a Bulk, as to be unweildy, and not manageable, so an Empire may be extended over so great a Number of Men and Places so widely distant from each other, that the Government of it becomes a Task, to which ^f no one Sovereign can be equal.

2. But however, allowing what he contends for, the *Expediency of such an universal Monarchy*, yet the Right of Empire cannot be ^g thence inferred. For Consent is the Original of all Right to Government, unless where Subjection is inflicted as a Punishment. Neither can the *Roman* Emperor now lay Claim to all the Dominions of his Predecessors, many of which, as they were acquired in War, so were they lost by War. Some have been alienated by Contract, and others by

XII. (1) Mr. BARBEYRAC adds, *And Idiots, (les Insensés)* because, says he, it is highly probable, that the Printers skipt over *et amentium*, from the Resemblance of the Word *infantium* which preceded. In § 10. our Author joins together Infants and Madmen.

XIII. (1) *Digest*. Lib. XIV. Tit. II. *Ad Leg. Rhod. de jactu*, Leg. IX. Our Author might have spared himself the Trouble of refuting seriously the Opinion of BARTOLUS, if he had considered that the *Roman* Empire has been long extinct, as I have shewn in the Notes upon the ninth Chapter of this Book, § 11. See Mr. BYNKERSHOEK's Dissertation upon the Law of *Rhodes*, Cap. VI. p. 52. *et seqq.*

2 As ATHANASIUS does also, in his Letters *Ad Solitarios*, and that was scarce the sixth Part of the then known World. GROTIUS.

The same Father says, *Rome* is the capital City of *Romania*. Vol. I. p. 832. C. Edit. Colon. seu Lips. 1686.

3 PHILO the Jew says, that the Countries between the *Euphrates* and the *Rhine* may be properly called the Earth, or habitable World. *De Legat. ad Cajum*. (p. 993. D. E.) GROTIUS.

4 *Orbem jam totum victor Romanus habebat.*
PETRON. Satyr. Cap. CXIX.

5 The Word Earth, tho' the Particle all be added to it, must be restrained to that Country the Discourse is of. St. JEROM. GROTIUS.

See the late Mr. RELAND's *Palestine*, Lib. I. Cap. V.

6 Consult the *Geograph. Sac.* of the last cited Author, Lib. I. Cap. X.

7 The Authorities of the Antients upon this Head may be found in the same Part of Mr. RELAND's Work.

8 In the second Book of DANTE ALIGHIERI, *De Monarchia*, printed at Basil in the Year 1559, by John Oporin.

XII. And the Desire of ruling others against their Wills, under Pretence of its being their Interest to be governed by them.

^a *Franc. Victor. de Indis*, n. 24. *Ayala. de jure belli*, l. 1. c. 2. n. 29.

XIII. The Emperor has no Claim to universal Monarchy, tho' some give him that Title.

^a See Covar. in *Cap. peccatum*. part 2. § 9.

^b *Ad Leg. 24. Dig. De captiv. et possim.* &c.

^c See also the Council of Calcedon, *Act.* 11. and 12.

^d *Luke* ii. 1.

^e See Joseph. de *bello Jud.* l. 3. c. 4.

^f See Aristot. *Polit.* l. 7. c. 4.

^g *Sylvest. verbo Bellum*, p. 1. n. 21. Covar. *ubi supra*.

Abdication, ⁹ are become subject to other Potentates and Nations. And some States that once were entirely subject, are since become so only in Part, or made a Sort of Confederates on unequal Conditions. For all these Methods of losing, or changing a Right, hold equally good against the *Roman Emperor* as against any other Potentate.

XIV. Nor the Church as others alledge.
^a See Franc. Victor. *De Indis, Relict.* 1. n. 21, & c. *Ayala*, l. 1. c. 11. n. 29.

XIV. 1. But some there are, ^a who would confer on the Church a Power over the Inhabitants of even the undiscovered Parts of the World; ¹ whereas St. Paul openly declares, that he had no judicative Power where Christianity was not embraced. For *What* (says he) *have I to do to judge them that are without?* 1 Cor. v. 12. And this Power of the Apostle, tho', after its Manner, it belonged to earthly Things, yet was it of a celestial (if I may so say) not of a terrestrial Nature, I mean, not to be exerted by Arms and Blows; but by the Word of GOD, delivered both in general, and applied to particular Circumstances; by administering or refusing the Sacraments, which are the Seals of the divine Grace, as it was proper and most expedient; and lastly, by a Vengeance not natural, but above the Power of Nature, and therefore derived from GOD, as is manifest in the Punishment of *Ananias, Elymas, Hymenæus*, and others.

^b John xviii. 36. See Petr. Damian, l. 4. epist. 9. and Bernard. epist. 220.

2. CHRIST himself, from whom all Ecclesiastical Power is derived, who was a Pattern for the Church to walk by, declared that ^b his Kingdom was not of this World, that is, not of the same Nature with other Kingdoms; adding, that if it were, he, like other Princes, should make use of Soldiers. And had he been willing to demand any Legions, they would not have been Legions of Men, but of Angels, *Matt.* xxvi. 53. And whatever Authority he used, he did it not by a human Power, but a divine Virtue, even then when *He drove out of the Temple the Buyers and Sellers*. For the Scourge which he then used, was not the Instrument, but only the Symbol of GOD's Wrath; as at another Time the Spittle and the Oil was not the Salve, but ^c the Token of the Cure. St. Austin, upon the fore-mentioned Passage of St. John, breaks forth into these passionate Expressions: ² Give ear, O ye Jews and Gentiles, circumcised and uncircumcised, attend to what I say, all ye Kingdoms of the Earth; your Dominion here below I do not interrupt, for my Kingdom is not of this World. Disturb not yourselves with imaginary Terrors, as Herod the Great did, when he received the News of CHRIST's Birth, who was more cruel by his Fear than by his Passion, when he caused so many Infants to be destroyed, in Hopes that JESUS might be among them. My Kingdom (says he) is not of this World: What would you have more? Come to the Kingdom which is not of this World: Come to it by Faith, and let not your Fears transport you to Cruelty.

^c As Tostatus admirably explains it, on *Matt.* ix.

^d In Aët. Apost. hom. 3. In Epist. ad Tit. 1. to Theff. hom. 4.

3. St. Paul, among his other Charges, gives this for one, that *A Bishop be no Striker*, 1 Tim. iii. 3. And St. Chrysostom ^d says, that it is for Kings, and not Bishops, ἀνάσσειν καὶ βασιλεύειν, to rule imperiously, or by human Force and Compulsion. ³ And in

⁹ Spain, for Instance: Upon which see GOMEZ, in § Fuerat, Num. 5. *De Actionibus*. PARNORMITAN, in Cap. Venerabilem, Col. 9. *De Electione*. JASON, in Leg. I. Cod. *De Summa Trin.* Col. 2. MENOCHIVS, *Consil.* II. Num. 102. Cardinal TUSCHUS, *Praëtic. Concl.* CCCXLV. § *Rex Hispan.* DU MOULIN, *Conf. Paris.* Num. 20. Princ. CHASSANEUS, *De gloria Mundi*, Part. V. *Considerat.* XXVIII. AZORUS, *Institut. Moral.* Lib. II. Cap. V. p. 2. GROTIUS.

XIV. (1) Compare with this the Treatise of our Author, *De Imperio Summarum Potestatum circa Sacra*. Cap. IV.

2 *Audite erga Judæi & Gentes, &c.* In JOANN. XVIII. 36. (*Tractat.* CXV.) St. HILLARIUS *Arelatenfis* says, For CHRIST did not come to invade another's Glory, but to bestow his own: Not to seize on an earthly, but to confer an heavenly, Kingdom. Non enim ad hoc venerat CHRISTUS ut alienam invaderet gloriam, sed ut suam donaret; non ut regnum terrestræ præriperet, sed ut cœlestæ conferret. GROTIUS.

3 His Words are in his second Book, *De Sacerdotibus*, Μάλιστα μὲν ἐν τοῖς χειρισμοῖς, &c. It is by no Means allowable for Christians to reform Offenders by Force and Violence. The secular Judges indeed, when they get Malefactors under their Jurisdiction, exercise a large Power over them, and make them, whether they will or no, amend their Manners: But as for us, we are to better People by Persuasion, and not by Compulsion. The Laws give us no such Authority to restrain Criminals; nor, if they did, could we put it in Execution, because GOD does not crown those who by Necessity abstain from their Vices, but who do it out of Choice: And therefore, there is a great Deal of Art and Industry to be used by us, that they who labour under such Distempers may voluntarily apply themselves to the Clergy for a Cure. And presently after, καὶ ὅς ἐλπίσωμεν, &c. For we must not drag him by Force, nor necessitate him by Fear. And upon Ephes. iv. εἰς διδασκαλίαν, &c. Our Business is to teach and instruct; not to command and govern, but to persuade

in another Place, ⁴ *We have no Power given us to restrain Men from sinning by the Authority of a Sentence*, that is such an Authority as includes the Right of executing the Sentence like a Sovereign, or by Force, or of taking away ⁵ any human Right. And he says, that *a Bishop discharges the Duty of his Function, not by Constraint but by Persuasion*. Now from what has been said, it is evident that Bishops, ⁶ as such, can exercise no human Dominion ⁷. St. Jerome comparing a King and a Bishop together, says, that *the one presides over Men whether they will or no; but the other has none but voluntary Subjects*.

4. Whether Christian Kings can make War against those who reject the Christian Religion, by Way of Punishment, has, as far as is requisite to our Purpose, been already discussed in a former ^e Chapter concerning Punishments.

XV. I will here give another Caution, and it will be somewhat necessary too, because, by comparing Things present with Things past, I foresee a great Mischief like to ensue, if not guarded against. The Caution is this, that ¹ *the Hopes we conceive from the Explication of some Divine Prophecies, can be no just Cause for our declaring War*. For besides that ² there can no certain Interpretation be made of such Prophecies as are not yet accomplished, without Inspiration, the Times of

^e Chap. 20. § 48. & seqq. XV. Nor a Desire of accomplishing Prophecies without a Commission from GOD.

suade and advise: Now he who offers his Advice, says what he pleases, he does not compel his Hearer, but leaves him to his own Liberty and Discretion, of following his Advice or not. St. AMBROSE, Lib. I. De Cain & Abel, Cap. IV. The Priest indeed tells the Man his Duty, but he exercises no Power and Authority over him. This is cited, C. Verbum. De pœnitent. Distinct. I. GROTIUS.

Our Author has treated this Subject more at large in his Treatise De Imperio Summarum Potestatum circa Sacra. Cap. III. and IV.

4 See the Passages cited by our Author in the Margin, and in his Treatise, De Jure Summarum Potestatum circa Sacra, (Cap. IV. § 7.)

5 For it belongs to Princes and not to the Church, to determine about Fiefs. C. Novit. de Judiciis, de Feudis, de Possessionibus. C. Causam quæ inter qui Filii sint legitimi. For Kings allow no Superior in Temporals. C. per venerabilem, as before, Christ would have Christian Emperors beholden to the Clergy for what regards an eternal Life, and the Clergy to make Use of the Emperor's Laws in what concerns their temporal Affairs, that so our spiritual Proceedings might have no clashing and interfering with those that are carnal, and that he who is engaged in the Service of GOD might not be involved in secular Matters. C. quoniam distinct. x. and c. cum ad verum distinct. xcvi. Not foreign to this is what we laid down in the last Section of the second Chapter of the first Book, from the eighty second Apostolical Canon, and several other Passages there both in the Text and Notes upon that Subject. GROTIUS.

6 Our Author intimates by this that if Ecclesiasticks, have any coactive Power, as they hold it from the Laws and the Sovereign, when they exercise it, they do not act as Ministers of the Gospel; they assume, if I may say so, another Personage, and become in that Regard Seculars. See again here our Author's Treatise, De Jure Summarum Potestatum circa Sacra. Cap. VIII. and IX.

7 Ut regi, sic Episcopo, &c. Epistol. and Heliodor. De Epitaphio Nepotian. (Vol. I. p. 25. B. Edit. Froben.) In a Letter of one that was Captain of the Emperor's Life-Guard, to the Bishop, it is said, Let the Bishop instruct so as the Judge may find no Cause to punish: *Episcopus doceat, ne judex possit invenire quod puniat.* CASSIODOR. Var. XI. 3. The Emperor Frederick Barbarossa says, in a Poem, speaking of the Pope: *Let him govern his Church, and make spiritual Regulations; but let him leave Empire and Civil Authority to us:*

*Ecclesiam regat ille suam, divinaque jura,
Temperet: imperium nobis fascesque relinquat.*

GUNTHER. Ligurin. When William, Bishop of Roschild, refused Sueno, King of Denmark, who was excommunicated, entrance into his Church, by opposing his Crosier against him, and the King's Officers upon that laid their Hands on their Swords, he did as a Bishop ought to do, and offered them his Neck. See what we have said upon this, B. I. Chap. IV. § 5. GROTIUS.

XV. (1) See, concerning a Person named Theodore, in the Emperor Gratian's Time. ZOSIMUS, (Lib. IV. Cap. XIII. Edit. Cellar.) And AMMIANUS MARCELLINUS, (Lib. XXIX. Cap. I.) and in Relation to John of Cappadocia, PROCOPIUS, Persic. Lib. II. (Cap. XXX.) See also LEUNCLAVIUS, Hist. Turc. Lib. XVIII. GROTIUS.

We may add here what the celebrated Mr. SCHULTING says upon the *Receptæ Sententiæ* of PAULUS the Civilian, Lib. V. Tit. XXI. § 1. Jurisprud. Ante-Justin. p. 502.

2 For the Books of the Prophets are closed up and sealed till the Time of the End, so that they cannot be understood, Dan. xii. 4, 8, 9. St. JEROME upon DANIEL. *If the Prophet heard and did not understand, what will they do who presume to declare what is contained in that sealed Book; a Book involved in numerous Obscurities till the Time of its Consummation?* PROCOPIUS, Goth. Cap. II. τὼν ᾧ Σιβύλλης, &c. I think it impossible for any Man to find out the Meaning of the Sibyls Oracles before the Event. And presently, ταῦτα τε ἀδύνατα. &c. It is impossible for any Man living to understand the Sibylline Oracles before their Accomplishment; for it is Time alone, which upon the Arrival of the Affair itself, and the Conclusion of what is predicted, can exactly tell what the Verse intended. GREGORAS, Lib. V. ἀλλ' ὥστε, &c. But as other Predictions are very difficultly guessed at and expounded, because they have a thousand Intricacies and various Explications till their actual Expiration, so this Oracle too deceived many, and even the Emperor Andronicus himself till his Decease, as it shall be related by and by. But when he was dead and gone, the Oracle discovered itself. Have a Care then you who are Divines, that you be not too bold this Way: And do you who are Politicians have a Care, that you be not imposed on by such presumptuous Theologists. There is a Passage very well worth your viewing in THUANUS, Lib. LXXIX. at the Year 1583. about one Jacobus Brocardus. GROTIUS.

the Accomplishment of those Things that are ever so certain may be unknown to us. Nor does the Prediction at all, unless there be along with it an express Command of GOD, give any Right, since GOD often permits his Predictions to be brought to pass by wicked Men, or by wicked Actions.

XVI. *Nor a Debt not due in Strictness of Justice but by some other Way.*

XVI. This we are also to understand, that if a Man owes another any Thing, not in Strictness of Justice but by some other Virtue, suppose Liberality, Gratitude, Compassion, or Charity, he cannot be sued for it in any Court of Judicature, neither can War be made upon him on that Account; for to either of these it is not sufficient, that that which is demanded ought for some moral Reason to be performed, but besides it is requisite we should have some Right to it, such a Right as both divine¹ and human Laws do sometimes give us to those Things which are due by other Virtues; and when that is so, there arises a new Obligation which belongs to Justice. But when this is wanting, the War on that Account is unjust, as was that of the² Romans against the King of Cyprus, for his Ingratitude. For he³ who has done a Kindness, has no Right to demand a return of his Favour: For if so, it would be a Bargain and not a Kindness.

XVII. *The Distinction between a War whose Cause is unjust, and that which is faulty in some other Respects; and the different Effects of both.*

^a Franc. Victor. De Jure Belli, Num. 2.

^b Epist. Mithr. ad Arsacen, Frag. Lib. 4.

^c Hist. Lib. 4.

Cap. 74. n. 7.

^d Senec. Hipp. V. 540, 541.

^e Contra Faust. 1. 22. c. 74.

^f Covar. in C. peccatum, Part

2. § 9. n. 2.

Cajetan. 2.

2 Quæst. 40.

Art. 1. Sylvest. verb. Bellum,

n. 2. Summa Ang. verb.

Bellum, n. 5.

Summ. Ros. ib. n. 3. § 8.

Thom. Aquin. 2. 2 Qu. 66.

Art. 8.

XVII. 1. We are also to^a take Notice, that it often comes to pass, that tho' there be a just Cause for War, yet some Fault may accompany the Action from the Disposition of the Agent, as when something else, not of itself unlawful, does more powerfully incite us, than the Right we have to do it, as¹ the desire of Glory, for Instance, or some Advantage either private or publick that is expected to accrue to us from the War, considered distinctly from the justifying Reason of it, or when some unlawful Passion arises in us, as the taking a Satisfaction in another's suffering, without regard to any Good. Thus *Aristides*² tells us, that the *Phocians* were deservedly destroyed, but that King *Philip* did very ill in so doing, because he put them to the Sword, not for Religion, as he pretended, but on account of enlarging his Dominions.

2. There is one, and that a very antient Reason for making War, (says^b *Sallust*) and that is an insatiable desire of Empire, and Riches. In *Tacitus*; ^c Gold and Wealth were ever the chief Motives for War. And in the Tragedy you have:

^d Rash Anger and Gain's impious Frenzy
Have broke the Alliance off.

Whereunto we may refer that of *St. Austin*: ^e A Pleasure in doing Mischief, or in Revenge, a restless and implacable Spirit, a Spirit of Rebellion, the Lust of Dominion, and such like are justly culpable in all Wars. But tho' these Things are criminal, yet when the War is grounded on a justifiable Reason, they do not render it Unjust, and therefore there is no Obligation to make Restitution^f for Damages sustained by such a War.

XVI. (1) See PUFENDORF, B. III. Chap. III. § 4. Of the Law of Nature and Nations.

2 Our Author cites Nobody: But he has here in View, what STRABO says of *Ptolomy* the last King of Cyprus, who was deprived of his Kingdom by the Romans, for his ill Conduct and Ingratitude to his Benefactors. *Geogr. Lib. XIV. in fin. p. 1004. A. Edit. Amstel. (684. Edit. Paris.)* But this War had still more unjust Causes, as well with Regard to *P. Clodius*, who brought the Roman People into it; as to the Roman People themselves. See CICERO, *Orat. pro Sext. Cap. XXVI. FLORUS, Lib. III. Cap. IX. DION CASSIUS XXXVIII. p. 86, 87. Edit. Steph. APPIANUS ALEXANDRINUS, De Bell. Civil. Lib. II. p. 728. Edit. Amstel. (441. H. Steph.) AMMIANUS MARCELLINUS, Lib. XIV. Cap. VIII. in fin.*

Edit. Vales. Gron.

3 See PUFENDORF, *Law of Nature and Nations*, B. III. Chap. III. § 17.

XVII. (1) Which Vice insinuates itself the most, under the Appearance of Virtue. But as *St. Austin* well observe^s, it is much better to suffer as the greatest Coward, than to acquire Glory by such an use of Arms: *Satius est cujuslibet inertiae pœnas luere, quam illorum armorum gloriam quærere. De Civit. Dei. Lib. III. Cap. XIV.* See the Passage of *AGATHIAS* cited above, § 3. (Note 3.) GROTIVS.

But in the Passage referred to here, as well as in the other of *St. Austin*, the Question relates to Wars unjust in themselves.

2 *Orat. II. De Societate, Vol. II. p. 256, 257.*

C H A P. XXIII.

Of the dubious Causes of War.

I. **WHAT** *Aristotle* says, holds very true, that we cannot expect ¹ the same Degrees of Evidence, in Moral, as in Mathematical Sciences, because Mathematicians consider ² Forms abstractedly from Matter, and Forms themselves are generally such ³ as will not admit of any Mean, as between strait and crooked there is nothing of a Medium to be found; but in *Ethics* the least Circumstances alter the Matter, and the Forms or Qualities treated of in such Sciences ⁴ have commonly some Mean coming between them, and of such an Extent, that they sometimes draw nearer to this, and sometimes to that Extream. So between what we ought, and what we ought not to do, there is a Medium, *viz.* that which is permitted, but it approaches sometimes nearer to one, sometimes to the other Extream; whence we are often at a stand to know, which of the Extreams it has the nearer Alliance to, as in a Twilight, or Lukewarm Water, and this is what ⁵ *Aristotle* says, ἔστι δὲ χαλεπὸν, &c. *It is often difficult to judge which Side to take.* *Andronicus Rhodius* explains it thus, τὸ κατ' ἀλήθειαν, &c. ^a *It is hard to distinguish what is really just, from what appears to be so.*

I. From
whence Causes
of doubt in
moral Matters
proceed.

^a Lib. I. c. 3.
p. 10.

II. 1. But this we are first to take notice of, that tho' an Action be in itself lawful, yet if upon weighing all its Circumstances, he who performs it is of Opinion that it is unlawful, that Action is vicious and bad; and this is what *St. Paul* means in asserting, *Rom. xiv. 23.* that *whatsoever is not of Faith is Sin*; ¹ in which Passage Faith is taken for the Judgment which a Man passes upon a Thing; for GOD has given us a distinguishing Power, called Conscience, conformable to whose Dictates we are to square our Actions, and whenever we neglect and condemn its Suggestions, our Minds degenerate and become brutish.

II. We are to
do nothing a-
gainst our Con-
science, tho'
it be erroneous.

2. But it often comes to pass, that the Judgment can afford no Certainty, but hangs in Suspence and Doubt, ^a which if, upon thorough Consideration, we cannot be satisfied in, *Cicero's* Direction will not be amiss, ² who forbids us to *do any Thing*, ³ *whilst we are in doubt whether we shall do well or ill.* The Hebrew Rabbins give

^a See *Covar.*
Tom. 1. De
Matrimon.
Part 2. c. 7.
§ 2. n. 9. &
seqq.

I. (1) See the Passage related at large in PUFENDORF, *Law of Nature and Nations*, B. I. Chap. II. § 1. and what I have said in the Notes upon that Paragraph.

the other, to which I shall therefore keep. The Thing is indeed of little Importance.

5 ἔστι δὲ χαλεπὸν, &c. *Ethic. Nicom.* Lib. III. Cap. I.

II. (1) To the same Purpose are the following Expressions in the same Chapter of that Epistle of *St. PAUL*, ἐκαστος ἐν τῷ ἰδίῳ νοὶ πληροφροσέσθω, *Let every Man be fully persuaded in his own Mind.* And μακάριος ὁ μὴ κρινὼν ἑαυτὸν ἐν ᾧ δοκιμάζει, *Happy is he that condemneth not himself in that Thing which he alloweth.* *St. AMBROSE.* *Whatever is done contrary to the Approbation of the Judgment, is Sin.* *St. AUSTIN* is of the same Mind; they are both quoted by *GRATIAN* after Chap. XIV. *Caus. XXVIII. Quæst. I.* Not very foreign to this is that of *PLUTARCH* in his *Timoleon*, δὲ ὁ μόνον, &c. *For an Action must not only be good and just in itself, but the Persuasion upon which it is grounded must be firm and constant, that so we may do it out of Principle and Conviction.* *GROTIUS.*

To this may be added, what our Author says in his *Votum pro pace Ecclesiastica*, Ad Artic. XXI. p. 71. & seq. Edit. 1642.

2 Bene præcipiunt, qui vetant quidquam agere, quod dubites, æquum sit an iniquum. *De Offic. Lib. I. Cap. IX.* See PUFENDORF upon this, *Lib. I. Cap. III. § 8. Law of Nature and Nations.*

3 And *PLINY* the younger: Aut si tutius putas, illud cautissimi cujusque præceptum: QUOD DUBITAS NE FECERIS, id ipsum rescribe, *Lib. I. Epist. XVIII.*

2 PUFENDORF has examined this in the last cited Chapter, § 9. All that our Author says, proves only, that the Application of the Principles of Morality to particular Cases is often very difficult. See my Preface to the same Work of PUFENDORF, § 3. Num. 3.

3 In this Sort of Forms, the Change is made *Εἰς τὸ ἀντικείμενον*, from one Extremity to the other: Whereas in Moral Things, it is *εἰς τὸ μέσζον* by a Medium. *GROTIUS.*

4 See *St. CHRYSOSTOM* upon *Ephesians iv.* and *ARISTOTLE*, *Magn. Moral.* (Lib. I. Cap. IX.) *GROTIUS.*

I have supplied here the latter Citation by guess, of which the Author is omitted in the Original, where the Note stands thus: *Vide Chrysostomum ad IV. Ephesorum. II. Morali.* I imagined the Printers had skipped the Word *Aristot.* and then put II. for I. For I find in the Chapter of the Book which I have referred to, something agreeable enough to the Subject; the Philosopher there shewing, that Vices are sometimes more and sometimes less remote from the Mean, [*Medium*] in which he makes Virtue consist. In my *Latin* Edition, I conjectured, that the Name omitted was *Azorium*, the Schoolman, whose *Institutiones Morales*, cited elsewhere by our Author, are extant. But I have not the Book, to see whether that Conjecture be better founded than

^b R. Gamaliel, in *Perke Aboth*, p. 14. Ed. P. Fagii.

us this Caution, ^b *forbear what is doubtful*; but this Advice cannot take Place, when a Man is as it were forced to do one or the other, and yet doubts of the Lawfulness of either; for in that Case he is to chuse the safer Side, that which he thinks to be least unjust; ⁴ for at all Times when we are under a Necessity of chusing, then the lesser Evil puts on the Form of Good; *of two Evils we must take the least*, says *Aristotle* ⁵; and *Cicero* ⁶ advises the same; and *Quintilian* ⁷ tells us, that *if we compare Evils together, the smallest holds the Place of Good*.

III. That our Resolutions are determined by Reasons drawn from the Thing itself.

III. But in doubtful Points, generally speaking, when the Mind has made some Examination, it does not hover any longer, in a Suspence and Equilibrium, but is drawn to one Side or the other, ¹ by Arguments deduced from the Thing itself, or by the good Opinion it entertains of other Men, who have declared themselves upon that Affair. For here that true Saying of ² *Hesiod* takes Place, *It is best to see with one's own Eyes, and to be guided by one's self, and next to that, where Knowledge is wanting, to be guided by the Judgment of another*. As for the Arguments deduced from the Thing itself, they are taken from the Causes, the Effects, and other Circumstances.

IV. Or by the Authority of others.

^a *Franc. Victor. De Indis, Relict. 1. n. 12. and De Jure Belli, n. 21. and 24.*

IV. 1. But for our right Understanding of these Things, some Ingenuity and Experience are necessary, and those who want these Qualifications ^a must listen to the Directions of wiser Men in order to regulate their Judgment in Practice. For according to ¹ *Aristotle* Things are probable, when all the World agree to them, or the Generality of the World, or at least the Men of Understanding; and again, when either all these Men of Understanding, or the Majority of them, or however the most Eminent agree to them. And this way of judging is what Princes chiefly make use of, ² who can hardly afford Time enough to learn and examine by themselves the most subtle Points of Arts and Sciences.

Σοφοὶ τὺς ἐγγυνοὶ τῶν σοφῶν συγκατα.

Princes are from their Conversation wise.

³ *Aristides* in his Harangue to the *Rhodians* upon Concord tells them, that, as when

⁴ This requires to be rectified. See the Place in PUFENDORF which I have cited in the second Note of this Paragraph.

⁵ *Ethic. Nicomed. Lib. II. Cap. IX. p. 27. Vol. II. Edit. Paris.*

⁶ *Sed quia sic ab hominibus doctis, &c. De Offic. Lib. III. Cap. I.*

⁷ Nam in comparatione malorum, &c. *Instit. Orat. Lib. VII. Cap. IV. p. 626. Edit. Burman.*

III. (1) *St. AUSTIN* says, *Lib. III. De Ordine. When the Obscurity of an Affair perplexes us, here are two Ways for us to go, either to follow our own Reason, or some other's Authority. This is explained by GABRIEL VASQUEZ, Disput. LXII. Chap. III. Num. 10. See also MEDINA I. 2 Quæst. XIV. GROTIUS.*

² Οὗτος μὲν πανάρετος, &c.

The Poet adds, he who wants Understanding himself, and will not follow that of others, is a worthless Wretch:

Ὅς δὲ καὶ μὴτ' αὐτὸς νόον, &c.

(*Oper. & Dier. Ver. 293. & seqq. Edit. Cleric.*) This Thought has been copied by *LIVY*, who puts it into the Mouth of *Minutius* speaking to his Soldiers: *Sæpe ego audiui, Milites, eum, primum esse virum, qui ipse consulat quid in rem sit; secundum eum, qui bene monenti obediat: Qui nec ipse consulere, nec alteri parere sciat, eum extremi ingenii esse. Lib. XXII. (Cap. XXIX. Num. 8.) CICERO* has also borrowed it: *All the World allows him to be the wisest Man, who can himself judge what is most expedient and necessary, and that he is next to him who conforms to the good Counsels of another. Sapientissimum esse dicunt eum, cui, quod opus sit, veniat in mentem: proximè accedere illum, qui alterius bene inventis*

obtemperet. Orat. pro Cluent. (Cap. XXXI.) GROTIUS.

IV. (1) *Topic. Lib. I. Cap. I.*

² *Quibus artium momenta edificare aut expendere vix vacat.* Our Author has here imitated what *CICERO* says in regard to *Cato Major, Et primum M. Catoni vitam ad certam rationis normam dirigenti, & diligentissimè perpendenti MOMENTA OFFICIORUM omnium, de officio respondebo. Orat. pro Muren. Cap. II.* He cites here the *Greek Verse* in the Text without saying from whence he took it.

Σοφοὶ τὺς ἐγγυνοὶ, &c.

That is; *The Conversation of wise Men makes Princes wise.* This is an antient proverbial Sentence, as *AULUS GELLIUS* tells us, *Noct. Attic. Lib. XIII. Cap. XVIII.* upon which the Commentators may be consulted, who however have not observed, that *STOBÆUS, Serm. XLVIII.* cites it as from *EURIPIDES*; and others, as from *SOPHOCLES*, as appears from the *Excerpta ex Trag. & Comæd. Græcis* of our Author, p. 122. As to the Thing itself, it is but too true, that the Great in general, and especially Princes, see little with their own Eyes, and rely upon those of others. But this proceeds not from the Want of Time or Means of being instructed by themselves in the Affairs, of which they are obliged to judge. If they were well educated, and would employ as many Hours for that Purpose, as they devote to Pleasures and frivolous Occupations; they would have all the Leisure necessary to enable them to judge for themselves, in acquiring sufficient Knowledge: And they generally have all the necessary Means in their own Hands, if they would vouchsafe to use them.

³ *Vol. II. p. 378. B. C.*

a Fact is in dispute, that which has the greatest Number of, and those the most credible Witnesses to assert it, is held for Truth, so in Matters of Practice, where Opinions are different, those are the safest to be entertained and followed, which rely upon the Authority of the most numerous and judicious. Thus the old Romans first advised with the ⁴ College of certain Priests (*Feciales*) established for that Purpose before they declared War against any Nation, and the Christian Emperors seldom or never undertook one without consulting their ⁵ Bishops; to the End that if there was any Thing that could raise any Scruple, they might be warned and advertised of it.

V. 1. But it may happen in several Controversies, that the Argument on both Sides may seem probable, as well from the Reason of the Thing itself, as from the Authority of others, and when it so falls out, if the Cases in Question be inconsiderable and of indifferent Concern, either Side may be adhered to, and the Judgment be blameless. But if the Matter in Hand be of great Moment, such as the putting a Man to Death, then on account of the vast Difference between the Things to be chosen, the safest Side is preferable, according to the usual Saying,

¹ *If you must err, err as little as you can.*

V. If a Scruple arise in a Matter of Importance, on both Sides of the Question, and we are obliged to determine one way or other, we must choose the safest Resolution.

And therefore it is better to run the Hazard of acquitting a Criminal, than of condemning the Innocent.

2. The Author of those Problems that go under ² Aristotle's Name, says, *There is none of us all, who would not sooner clear the Guilty, than condemn the Innocent*; and he adds this which we have mentioned before as his Reason, *ἐστὶ γὰρ, &c. For when a Man is in a doubt, he is to chuse that Side where there is the least Fault.* Parallel to this is the Saying of Antiphan, *εἰ δέον, &c.* ³ *If we must do amiss, it is better to pardon tho' unjustly, than to condemn wrongfully; for by the former we are only guilty of a Mistake, by the latter of a horrid Crime.*

² Orat. 14. 15. p. 133. Edit. Wech.

VI. Now War is a Matter of the weightiest Importance, since it commonly brings many Calamities, even upon the Innocent, and therefore when there are Reasons on both Sides of the Question, we ought to incline to Peace. Fabius is on this Account much commended by Silius Italicus, ¹ who gives the following Character of him:

VI. Whence it follows that we are not in such a Case to declare for War.

*With Caution he proceeds and wisely weighs
Each future Hazard; thus he nor eager
Nor forward is for slight uncertain Wrongs
To rouse up bloody Mars.*

Now there are three Ways whereby Misunderstandings among Princes may be accommodated without a War.

VII. 1. The first is by a Conference: *There being two Sorts of disputing in the World*, says ¹ Cicero, *the one by Reason, the other by Force, that agreeable to the Nature of Man, and this to Brutes, we ought never to have recourse to the latter,*

VII. For this may be avoided by a Conference.

⁴ See the Dissertation of Mr. JENSIIUS, *De Fecialibus*, in his *Ferculum Literarium*, printed 1717.

⁵ But were those Bishops to know better than the Emperors, what related to so important a Part of the Power and Duty of Sovereigns? Have Ecclesiasticks, or ought they to have, a sufficient Knowledge in political Affairs to determine, when War ought, or ought not, to be made? If we consider the Temper that many amongst them have been of in all Ages, there is more Reason to fear that they would engage a Prince in unjust and rash Wars. The History of such of them as have been Ministers of State sufficiently proves this.

V. (1) *Verum in istam partem potius peccato tamen.* [TERENT. *Adelphi*. Act II. Scen. I. Ver. 20.] AMMIANUS MARCELLINUS, [or rather CICERO, *Epist. ad Quint. Fratr.* I. I. cited by that Historian] says, that a Facility to be angry and to be appeased is better than implacable Wrath, and that therefore the former Vice is preferable to the latter, as the least of

two Evils: *Interdum enim exoratus parcebat aliquibus, &c.* Lib. XXVIII. (Cap. I. p. 562. Edit. Vales. Gron.) See GABRIEL VASQUEZ, *Disput.* LXII. Cap. IV. Num. 21. GROTIUS.

2 "Εἰ δὲ ἕκαστος ἡμῶν μάλλον ἂν προέλοιτο τῷ ἀδικῆντι (it should be read so instead of *μὴ ἀδικῆντι*) ἀποψηφισαομαι ὥς ἐκ ἀδικοῦ, ἢ τῷ μὴ (it is here the *μὴ* should be added, which is wrong placed in the preceding Line) ἀδικῆντι καὶ ἀψηφισαομαι ὥς ἀδικοῦ, &c. Sect. XXIX. Num. 13. GROTIUS.

See PUFENDORF, *B. I. Chap. III. § 6. Note 3.* of the second Edition.

VI. (1) He says,

*At Fabius cauta speculator mente futuri,
Nec lætus dubiis, parcusque laceßere Martem.*

Punic. Lib. I. Ver. 679, 680. Edit. Cellar.

VII. (1) *Nam, quum sint duo genera decertandi, &c.* De Offic. Lib. I. Cap. XI.

but when we cannot redress our Grievances by the former. A Man of Prudence and Discretion, says ^a Terence, ² would try every Method rather than that of Compulsion; how do you know but that he may do it without any Force at all. Apollonius Rhodius speaks to the same Effect, μηδ' αὐτως, &c. ^b Try first with Words, before you go to Blows; and Euripides,

^a Eunuch.

Act. 4. Scen.

7. V. 19, 20.

^b Argon. 1. 3.

v. 185.

Λόγοισι πείσω· εἰ δὲ μὴ βία δόξῃ;

I'll do it by Words; if not, by Force of Arms.

And in his Suppliants he blames the States that neglected this Means of Accommodation.

What Words alone might easily decide

You to the Sword's Determination leave. Ver. 748, 749.

And Achilles in his Tragedy of Iphigenia at Aulis:

If he submits to Justice you've no need

Of my Assistance, you are then secure,

And I the Favour of my Friend preserve:

Nor can the Army blame me if I gain

My Point by Reason rather than by Force. Ver. 1017, &c.

The very same we read in Euripides's Phœnissæ.

Πᾶν γὰρ ἐξάγει λόγῳ

ὃ καὶ σιδήρεος πολεμίων δράσειεν ἄν.

For all the hostile Sword can do,

By Conference is done as well. Ver. 518, &c.

Pheneas in Livy makes this Improvement of it, ³ Men for preventing of War do allow of several Things which by force of Arms they could not be compelled to. And Mardonius in Herodotus's Polymnia taxes the Greeks upon this Score: τὰς χερσὶν, &c.

^c Lib. 7. cap. 9. n. 2. Ed. Gronov.

^c Whose Duty it was, since they were of the same Language, to have endeavoured to compose their Differences by the Mediation of Herald's and Ambassadors, rather than by the Point of their Swords.

^d Antiq. Rom. 1. 8. c. 8. p. 468. Edit. Oxon. 487. Syll.

^e Lib. 3. c. 11. in fin.

^f Annal. 1. 15.

^g 2. n. 3.

^h Cassiodor.

Var. iii. 1.

2. Coriolanus in Dionysius Halicarnassensis, says τὸ μὴ, &c. ^d If any Body without desiring what is another's Property, only sues for his own, and being not able to obtain it does thereupon declare War, all the World will acknowledge that War to be just. King Tullus in the same Author maintains, ^e that what cannot be accommodated by fair Means must be decided by foul ones. I must profess, says Vologeses in Tacitus, ^f I had rather keep the Conquests my Ancestors have left me, by Justice than by the Effusion of Blood, by a Conference than by Force of Arms. And King Theodorick takes Notice ^g that it is then only our Interest to run to Arms, when we cannot otherwise have Justice done us by our Enemies.

VIII. Or by Arbitration; whereof the Duty of Christian Kings in respect of the Parties at War.

VIII. 1. The second way to prevent War between those, who, not belonging to the same Jurisdiction, have no common Judge to appeal to, is ¹ to put the Matter to Arbitration:

2 DIONYSIUS HALICARNASSENSIS, in Excerpt. legat. μη πρότερον ἄρξαι, &c. We must not proceed to Deeds before we have tried what Words can do. And Menelaus in LIBANIUS, πρῶτον μὲν, &c. For it is more agreeable to human Nature, to attempt by Reason and Argument to have Justice done one, than immediately to fly to Arms. Not very different from this are those Reflections of the Chorus in EURIPIDES's Helena.

Τὸ Θεῶν

ἔπος ἀληθές ἐστιν,

ἄφρονες, &c.

What the Gods say I always found was Truth.
For none but Fools and Madmen e'er would seek

Or Rest or Virtue from the bloody Points

Of Sword and Spear: For if human Mis'ries

By these should be determin'd. War and Contention
Would every City, every State infest. GROTIUS.

3 (Lib. XXXV. Cap. XLV. Num. 4.) Donatus ad Eunuchum: For it is an Observation almost to a Proverb, That what a Man will stand up for, and maintain with all his Might and Main when you would force it from him, he will generously part with, when you quit your Pretensions. GROTIUS.

VIII. (1) A Method indeed generally slighted by the more potent. See CONNESTAGIUS about the Union of the two Crowns of Castile and Portugal: but this is a Way that ought to be taken by those who have any Regard to Justice and Peace. Several

ral

Arbitration : ἐπὶ τὸν δίκας, &c. says *Thucydides*, ² *It is barbarous and abominable to fall upon him as an Enemy, who is willing to put his Case to Reference.* So *Diodorus* ^a relates that *Adrastus* and *Amphiaraus* submitted the Determination of the Crown of *Argos* to the Judgment of *Eriphyle*. Five *Lacedemonian* ^b Umpires were chosen between the *Athenians* and *Megarenſes* to settle the Right of the Island of *Salamis*. The forementioned *Thucydides* ^c tells us that the *Corcyreans* notified to the *Corinthians*, that they were ready to refer the Matter in Controversy to such Cities of *Peloponnesus*, they should agree upon. And *Pericles* is extolled by ³ *Aristides*, that for the Prevention of War δίκην, &c. he offered to refer himself. And *Isocrates* in his Oration against *Ctesiphon*, reckons this amongst King ⁴ *Philip's* Commendations, *That he was ready to refer the Differences which he had with the Athenians to any disinterested and impartial State.*

^a Lib. 4. c. 67.

^b *Plutarch* in *Solon*. p. 83. *Tom. 1.* Edit. *Wech.*

^c Lib. 1. c. 28.

ral great Princes and People mentioned in the Text, have done it. Let us subjoin a few more. The Contest between *Magnus* and *Canutus*, Kings of *Norway* and *Denmark*, each of them laying Claim to both Crowns, was put to Arbitration: Just as *Julian*, the first of that Name, finding that *Severus* disputed with him the Empire, would have a Decree about the Possession. *Magnus* King of *Sweden* was chosen Umpire between the two *Ericks* Kings of *Denmark* and *Norway*. Five *Spartans*, *Critolidas*, *Anompharetus*, *Hipsechidas*, *Anaxilas*, *Cleomenes*, were elected Judges of the Controversy of the *Athenians* and *Magarenſes* about *Salamis*. In the Treaty of the *Lacedemonians* and the *Argives* in *THUCYDIDES* V. δίκας διδόντας κατὰ πάτριαν, willing, as the Custom of their Ancestors was, to compromise the Matter. And again, εἰ δὲ τις τῶν, &c. If any Dispute should happen between two States in Alliance, let them refer their Cause to some other State that is indifferent to them both. You have both these Passages in *THUCYDIDES*, Lib. V. Several Nations independent of the *Roman* Empire to avoid entering into Wars, took *Marcus Antoninus* for the Arbitrator of their Controversies. *VICTOR* and others take Notice of this. In *PROCOPIUS*, *Gothic*. III. the *Gepidæ* say to the *Lombards*, δίκην δὲ διαλύειν, &c. For we for our Parts are ready to have our Differences concluded by Arbitration; and it is by no Means reasonable to offer Violence to those who are desirous to be determined by a Reference. And in *Gothic*. IV. *Theudibaldus* King of *Austrasia*, declares himself ready to submit his Dispute with the *Romans* to Judgment. See too what the *Romans* signified to *Philip*, in *POLYBIUS*, *Excerpt. legat.* Num. 4. And what there is in *Antiochus's* Treaty out of the same *POLYBIUS*, in *Excerpt.* Num. 35. The King of *England* was Judge of the Succession to the Crown of *Scotland*, and the Count of *Holstein* between the King of *Denmark* and his Brothers, as *PONTANUS* relates it. *Hist. Dan.* Lib. VII. Add to these some Instances in *MARIANA*, Lib. XXIV. Chap. XX. Lib. XXIX. Chap. XXIII. in *PARUTA*, Lib. VII. and XI. in *BIZARRUS*, Lib. XII. *CRANTZIUS*, Lib. VI. *Saxonic.* Cap. XV. and what we say below, B. III. Chap. XX. § 46. *GROTIUS*.

In this Note our Author thro' Inadvertency ascribes to *Marcus Antoninus* the Philosopher what the Historians say of *Antoninus Pius*: For there is nothing like this related of the first of those Emperors. *AURELIUS VICTOR* or he whom our Author cites under that Name, which is generally given him, says of the other, *Adeo trementibus eum, [Antoninum Pium] atque amantibus cunctis Regibus, Nationibusque, & Populis, ut Parentem, seu Patronum, magis quam Dominum, Imperatoremve reputarent: Omnesque uno ore, in cælestium morem, propitium optantes, de controver-*

ſis inter ſe judicem poſcerent. *Epitom. Cap. XV. Num. 3.* See also *EUTROPIUS*, *Breviar. Lib. VIII. Cap. IV.* *SUIDAS*, *Lexic. in voc. Ἀἰώνιος*: *CAPITOLIN.* in *Antonin. Pio. Cap. IX.* with the Note of the learned *CASAUBON*, upon these Words: *Cauſas regales terminavit*: In which he seems to have Reason for saying, that this ought only to be understood of some petty Eastern Kings, who were in some Manner dependent on the *Romans*. The Passage itself of *AURELIUS VICTOR*, which I have just recited, insinuates it plainly enough. So that on that Foot, the Application made of it by our Author is not entirely just. As to what he says of *Didius Julian*, that he would *agere interdicto*, I do not find that Expression in any of the Historians, who have writ his Life. Our Author had probably in View the Partition of the Empire, upon which the Senate passed a Decree at that Emperor's Request, when Advice came of the Approach of *Severus's* Army: *Quare meliore consilio ad Senatum venit, petitque ut, fieret Senatus consultum de participatione Imperii, quod statim factum est.* *SPARTIAN*, in *Did. Julian.* Cap. VI. in fin. See also the Life of *Septimius Severus*, Cap. V. and the Abridgment of *DION*, by *XIPHILINUS*, in *Did. Julian.* p. 292. Edit. *Rob. Steph.* But this Step of *Julian's* was only an Effect of his want of Power to resist a Competitor more beloved than himself. His Feat was so great, according to *HERODIAN*, (*Lib. II. Cap. XII.* Edit. *Boecler.*) That he even urged for Permission to renounce the Empire entirely. So that our Author might have spared doing him the Honour of a Thing, in which there was nothing less than a Desire of terminating amicably the Dispute for the Empire.

² Lib. I. Cap. LXXXV. Edit. *Oxon.*

³ In his second Oration against *PLATO*. Vol. II. p. 248. B. Edit. *P. Steph.*

⁴ Our Author refers us in this Place, from the first Edition of his Work, to the Oration against *Ctesiphon*: But *ISOCRATES* has none upon that Subject; and I do not know that the Word *Ctesiphon* is to be found in his Writings. He meant *ÆSCHINES*: For here is the Passage in which the Orator, accusing *DEMOSTHENES* of having been the Cause of the War with *Philip* of *Macedon*, says, that when that Prince offered to be determined by the Arbitration of some natural and disinterested State, *DEMOSTHENES* maintained, there was no such Judge between *Philip* and the *Athenians*: Εἰ δὲ ἐπιτέλειεν (Φιλίππος) &c. *Orat. Advers. Ctesiphon.* p. 286. A. The Mistake of our Author arose from *ISOCRATES's* Commendation of *Philip* of *Macedon*, especially in an Oration addressed to himself; but in which there is nothing concerning these Offers of Accommodation with the *Athenians*.

^d Liv. Lib. 3.
c. 71. n. 2.

^e Xenophon.
Cyrop. l. 2.
c. 4. § 7.
Edit. Oxon.

^f Plutarch.
Pomp. p. 637.

^g Lib. 11. p.
765. Edit.
Amst.

^h Franc. Vic.
tor. De Jure
Belli, n. 28.

ⁱ B. 1. c. 2.
§ 8. n. 3.

^k Malina.
Disp. 103. §
Quando inter,
Ec. Aegid.
Reg. De Aet.
Supern. Disp.
31. Dub. 4.
n. 72.

^l Lib. 5. C.
31.
^m Geogr. l. 4.

2. Thus did the *Ardeates*^d and *Arcinians* formerly, and after them the *Neapolitans*^e and *Nolans*, who submitted all their Matters in Dispute to the Determination of the *Romans*; and the *Samnites*^f in their Variance with the *Romans* appeal to their common Friends. *Cyrus*^g refers the Point between him and the King of *Assyria* to the *Indian King*. The *Carthaginians* for avoiding War about the Controversies with *Masniſſa*, appeal to Judgment. And the *Romans* themselves, as to their Differences with the *Samnites*, (according to *Livy*) do ſo to thoſe they were both in Alliance with. *Philip* of *Macedon* would have his Diſputes with the *Grecians* ended after the ſame Manner. *Pompey* allowed *Arbiters* to the *Parthians* and *Armenians*, when they^f demanded it, for regulating their Bounds and Limits. *Plutarch* tells us, ^g That it was the principal Buſineſs of the *Roman Priests*, called *Feciales*, to prevent the coming to a War, till all Hope of Accommodation by Means of *Arbitrators* was loſt. *Strabo* ſays of the ^h *Druids* in *Gaul*: That in former Times they were the *Umpires* between Nations at War, and had often accommodated Matters upon the very Point of an Engagement. The ſame Author records, ⁱ that the *Priests* in *Spain* did uſe to do the ſame.

3. But much more are *Chriſtian Kings*^j and *States* obliged^h to take this Method for the Prevention of War and Bloodſhed; for if certain *Arbitrators* were conſtituted both by *Jews* and *Chriſtians* to prevent their going to Law in *Infidel Courts*, and the ſame was expreſſly commanded by *St. Paul*, *1 Cor. vi. Ec.* how much more ſhould we be inclined to it, for the avoiding of a much greater Inconvenience, which is War? It is from hence that *Tertullian* argues that ^k *A Chriſtian muſt not bear Arms*, ſince he is not ſo much as allowed to commence a *Law Suit*; which Expreſſions, as it was obſerved in anotherⁱ Place, are to be taken in a qualified Senſe.

4. And for this, as well as ſeveral other Reaſons, it would be not only convenient, but ſomewhat neceſſary that *Congreſſes* of *Chriſtian States* were held, where, by them who are no ways intereſted on one Side or other, the Differences of contending Parties might be made up; and^k that ſome Means were thought upon^j to oblige the Parties at Variance to accept of a Peace upon fair and reaſonable Terms: And that this very Buſineſs^l was the *Druids* Employment^l formerly among the *Gauls* is what *Diodorus*^l and *Strabo*^m inform us. And we read too that the *Kings* of *France* referred the Division of their Kingdom to their^l Nobles.

5 Our Author cited Nobody here in all the Editions before mine, except *Livy*, *Lib. VIII.* which could agree only with the Inſtance of the *Samnites* related in the following Period. This proceeded from his not underſtanding rightly, to what the marginal Citation of *ALBERICUS GENTILIS* referred, *De Jure Bell. Lib. I. Cap. III. p. m. 23.* The Fact in Queſtion is in *CICERO*, *Lib. I. Cap. X.* and in *VALERIUS MAXIMUS*, *Lib. VII. Cap. III. Num. 4.*

6 I am very much deceived, if this is not the ſame Fact which our Author relates a little lower, by changing the Parties. For *Livy* ſays of the Embaſſador, ſent by the *Romans* to the *Samnites*: *Quum Romanus Legatus ad diſceptandum eos [Samnites] ad communes ſocios atque amicos vocaret, Ec. Liv. Lib. VIII. Cap. XXIII. Num. 8.* I know no other Place, where this is ſaid of the *Samnites* in regard to the *Romans*: And it is very probable, that our Author, who uſes in both Places the expreſs Terms of the Original, as recited above, with this Difference only, that in the one he puts *amicos*, and in the other *ſocios*; it is, I ſay, very probable, that having at firſt quoted by Memory, or rather on the Credit of the ſame Author I mentioned in the preceding Note, who commits the ſame Fault, p. 23. and uſes alſo the Word *amicis*; he afterwards cited by the Original itſelf, where he imagined he had found a new Fact, thro' the Miſtake he had fallen into, in putting the *Samnites* for the *Romans* in the firſt Citation.

7 See *Livy*, *Lib. XL. Cap. XVII.*

8 See Note 6.

9 *PLUTARCH*, *Vit. Numæ. p. 68. A. Vol. I. Edit. Wech.*

10 *Geograph. Lib. IV. p. 302. A. Edit. Am-*

ſel. (197. Edit. Paris Caſaub.)

11 One of the Writers of the *Byzantine Hiſtory*, ſpeaking of *Alexander the Bulgarian* ſays, that it was very indecent for *Chriſtians* to make War with ſo much Barbarity upon one another, when they might accommodate their Differences with great Eaſe, and unite their Arms againſt the impious. *NICEPHOR. GREGORAS, Lib. X. GROTIUS.*

12 I find this Paſſage in the Treatiſe *De Coron. Milit.* where that Father ſpeaks thus: *Et prælio operabitur filius pacis, cui nec litigare conveniet?* *Cap. XI.*

13 See a Precedent in *CASSIODORE, Lib. III. 1, 2, 3, 4.* and *GAIL. De Pace publica, Lib. II. Cap. XVIII. Num. 12. GROTIUS.*

14 They diſcharged this Office becauſe of the great Reſpect they were held in by the People; as appears from the Paſſage of *STRABO* quoted above Note 10. which is the ſame our Author had here in View, and that which agrees with that of *DIODORUS SICULUS*.

15 The *Druids* were ſucceeded in this Office, and indeed with a much better Title, by the Biſhops. See the Letter of the Biſhops to King *Lewis* in the Statutes of *Charles the Bald*, and *RODERIC* of *Toledo*, *Lib. VII. Chap. III.* about the Biſhops of *Spain*. *GROTIUS.*

16 I do not know whom our Author means here; for he cites Nobody. This muſt relate to ſome of the firſt Race of the *Kings of France*, amongſt whom the Kingdom was hereditary, as Father *DANIEL* ſhews in his *Hiſtorical Preface*. And our Author muſt have known, that the Crown of *France* was elective under the ſecond Line, after what he has ſaid above, *B. I. Chap. III. § 13.*

IX. The third Way to prevent War is to determine Differences ¹ by casting Lots : Which Method *Dion Chrysostom* highly approves of in his second Oration in *Fortunam*, and before his Time ² *Solomon*, Prov. xviii. 18.

X. 1. Something like this is ¹ Duelling, a Custom which is not altogether to be rejected, if two Antagonists, ² whose Disputes would otherwise involve whole Nations in Misery and Ruin, are willing to decide the Matter themselves by the Sword, as *Hyllus* ³ and *Echemus* formerly did about *Peloponnesus* ; *Hyperochus* ⁴ and *Phemius* about a Province near *Inachus* ; *Pyræchma*, the *Ætolian*, and *Degmenus* the *Epean* about ⁵ *Elis* ; *Cerbis* and *Orfua* about ⁶ *Iba* : For the People may accept of this way of Determination (if it be not justifiable in the Champions themselves) as being the lesser Evil. *Metius* in *Livy* thus addresses himself to ⁷ *Tullus*, *Let us make use of some compendious Way of deciding which of us shall sway the Scepter*, with as little Bloodshed as possible. *Strabo* ⁸ records this as an antient Custom of the *Greeks*, and *Æneas* ⁹ in *Virgil* pronounced it justifiable, that the Matter depending between him and *Turnus* should be so determined.

2. *Agathias* in his first Book, where he describes the Manners of the antient *Gauls*, does in particular extreamly commend this Custom ; his Words, as being very remarkable, I shall set down at large : ¹⁰ *If any Difference happen between their Princes, to Arms they immediately go, as tho' they were resolved to have the Matter determined by the Sword ; on they march, but when the Armies advance near one another, laying aside all Animosity, they enter into Sentiments of Peace, and tell their Kings either to make up the Difference, or to fight it out in single Combat, and so end the Dispute at the Hazard of their own Lives : It being neither agreeable to Reason nor the Usage of their Country, that their Kings, on Account of their private Piques and Quarrels, should embroil, or overturn the State. They therefore presently disband their Armies, and enjoy a free and peaceable Commerce, being perfectly reconciled. So great a Regard for Justice and such an Affection for their Country had those Subjects, so tender and condescending was the Temper of their Kings.*

XI. But tho' in a doubtful Case both Sides are obliged to endeavour after Terms of Peace, to avoid the Mischiefs consequent upon War, yet does this concern him who makes the Demand, more than him who is in actual Possession. ¹¹ As in all Cases of equal Claim the Possessor has the better Title, ¹² not only by a Civil, but also by a natural Right : The Reason of this has been already ¹³ laid down out of the Problems ascribed to *Aristotle*. And here we must further add, ¹⁴ that he, who is satisfied in the Justice of his own Cause, but cannot produce sufficient Evidence,

IX. (1) See St. AUSTIN, *De Doctrina Christi*. Lib. I. Cap. XXVIII. and THOMAS AQUINAS, *Summ. Theol.* II. 2 *Quæst.* XCV. Art. VIII. & ibi *Cajetan*. GROTIUS.

2 See what I have said on this Head in my *Discourse upon the Nature of Lot*, § 27. and what our Author says below, B. III. Chap. XX. § 42.

X. (1) See below, B. III. Chap. XX. § 43. and PUFENDORF, B. VIII. Chap. VIII. § 5. *Law of Nature and Nations*.

2 The Author of the *Thebais* [or SENECA in the *Phœnissæ*, according to the best Manuscripts] introduces *Jocasta* saying to her Sons *Eteocles* and *Polynices* : Determine which of you shall reign, between yourselves : But let not the Kingdom be ruined.

—*Rex sit e vobis uter*
Manente regno, quærite.—

(Ver. 564, 565.) The Emperor *Otho* said, that it was much juster that one Man should perish for the Publick, than that a Multitude should perish for one Man. DION [or rather his Epitomizer XIPHILINUS] in *Othon*. (p. 204 B. Edit. H. Steph.) GROTIUS.

3 *Ineamus aliquam viam, quâ, utri utris imperent, sine magna clade, sine multo sanguine utriusque populi decerni possit.* LIV. Lib. I. Cap. XXIII. Num. 9.

4 Upon Occasion of the single Combat between

Pyræchma and *Degmenus*, of which mention is made a little above, Lib. VIII. p. 548. B. Edit. Amst. (357. Paris.)

5 *Æquius huic Turnum fuerat se opponere morti.* ÆN. XI. Ver. 115.

Turnus then should try
His Cause in Arms to conquer, or to die ;
My Right and his are in Dispute, the Slain
Fell without Fault, our Quarrel to maintain.
DRYDEN.

Upon just such an Account *Anthony* sent a Challenge to *Octavius*. PLUTARCH in his Life of *Anthony*, (p. 944. E. Vol. I. Edit. Wech. GROTIUS.)

It was not out of Compassion for the *Romans*, that *Mark Anthony* sent that Challenge to *Octavius*, but to oppose Bravado with Bravado : ἀντιπαύειν, as the cited Historian says.

6 Lib. I. (Cap. II.) See the Statute of *Charles the Bald* in S. *Arnulfus*, and the Treaty of *dix la Chapelle*. The *Lombards* were as equitable. See PAULUS WARNEFRID, Lib. I. Cap. XII. Lib. IV. Cap. XVIII. Lib. V. Cap. XL. GROTIUS.

XI. (1) *In pari causa possessor potior haberi debet.* Digest. Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. CXXXVIII.

2 See Cap. V. of this Book, § 18. Note 4.

6 I whereby

IX. Or by casting of Lots.

X. Whether Duelling may be allowed for preventing War.

^a Herodot. l. 9. c. 26.

^b Plutarch, Qu. Græc. p. 294. Tom. 2.

^c Strabo, Geogr. l. 8. p. 548. Edit. Amst.

^d Liv. l. 28. c. 21.

^e Victor. De Jure Belli, n. 27. 30. Herrera, Tom. 2. l. 1. c. 29.

^f Lessius, De Justitia, c. 29. Dub. 10.

^g Molina, Disp. 103. § In secundo vero, &c. Lorca ii.

^h Selt. 3. Disp. 53. n. 4.

XII. *If neither be in Possession where the Case is equally dubious the Thing depending may be divided.*

^a Lorca ii. 2. Sect. 40. Disp. 53. Soto. 5. De Institut. Jur. 41. Art. 7. XIII. *Whether a War may be just on both Sides, explained by several Distinctions.*

^a Covar. in Cap. peccatum. Relect. 2. § 410. n. 6. Alciat. Paradox ii. 21. Falgos. De Just. 1. 5. Piccolomino. Philos. Civil. Lib. 6. c. 21. Alb. Gent. Lib. 1. c. 6.

^b See St. Austin. De Civit. Dei. Lib. 15. c. 5. Lib. 19. c. 15. and Covar. ubi supra. ^c See Suarez. De Legibus, Lib. 3. c. 18. Alphons. de Castro, De potest. Leg. pen. Lib. 1. c. 1. and 3.

whereby to convince the present Occupant of the Injustice of his, cannot lawfully declare War, because he has no Right to force his Adversary to quit his Possession.

XII. Where the Title is doubtful and ^a neither Party in actual Possession, or both equally, there he shall be reputed the unjust Person who refuses to accept the Half of the Thing in Controversy, when it is tendered to him.

XIII. 1. From what has been premised, That *much controverted Question* may be easily solved, ^a *Whether War can be just and lawful on both Sides, with Respect to the chief and principal Authors of it.* ¹ Here we must distinguish the different

Acceptations of the Word *Just*. A Thing may be termed *just*, either from its Cause, or according to the Effects it produces. Again in respect of the Cause, either as Justice is taken in a particular Sense, or in that general Signification under which are comprehended all Sorts of Rectitude. Further, this strict and special Acceptation of the Word *Justice*, is divided into that which regards the Action, and that which regards the Agent². The first Sort of Justice may be called *positive*, and the other *negative*. For the Agent is said sometimes to act justly whilst he acts not

unjustly, tho' that which he acts be not just, as *Aristotle* ³ very judiciously distinguishes between τὸ ἀδίκειν, and τὸ ἀδίκον πράττειν, *to do unjustly, and to do that which is unjust*.

2. In the particular Acceptation of the Word, and as it regards the Action itself, War cannot be ^b just on both Sides, nor can any Law Suit be so, because the very Nature of the Thing does not permit one to have a moral Power, or true Right, to two contrary Things, as suppose *to do a Thing, and to hinder the doing of it*. But it may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of. So People may justly, that is, may honestly and fairly go to War. Because Men are very frequently unacquainted with several Things, both as to Matter of Right, and as to the Fact, from whence Right proceeds.

3. In the general Sense and Meaning of the Word, it bears the Name of *Just*, when the Agent is for his Part in no manner of Fault^c. For there are many Things done without Right, when at the same Time no Blame can be charged on the Agent, on account of an inevitable Ignorance: An Instance of this we have in those who do not conform themselves to a Law, which without any Fault of theirs they are Strangers to, tho' that Law has been published, and so long too that they had Time enough to have been acquainted with it. Thus also it may happen in Law Suits, that both Parties may be free from Injustice or any other Fault; especially if the Plaintiff and Defendant, or either of them, has a Suit depending, not in his own, but in another's Name; as suppose, he be a Guardian, whose Business it is not to abandon any Right of his Ward's, tho' never so uncertain. So *Aristotle* affirms, ⁴ that in Contests about a Right that is really disputable, neither of the Parties is to blame, which he expresses by πονηρὸς, *wicked or malicious*, *Quintilian* ⁵ is of the same Mind, when he says, that a Counsellor may honestly plead on either Side. And *Aristotle* adds, that to assert that a ⁶ *Judge pronounces a just Sentence*, is an equivocal Expression; for it may be taken either as he judges, ὡς δὲ, *intirely as he ought*, without any Ignorance, or as he judges, κατὰ τὴν ἐαυτοῦ γνώμην, *According to the best of his Capacity and his real Thoughts of the Matter*. And in another Place he says, ⁷ *If he determined it out of Ignorance, he has not acted unjustly*.

4. But in a War it is scarce possible, but that Rashness and want of Charity will be there, on account of the great Importance of the Affair, which is indeed of

XIII. (1) GRATIAN, in an Addition to a Passage of the *Canon Law*, distinguishes between a Sentence, just in its Cause, just in regard to Order, and just in Conscience, *causa, ordine, animo*, *Caus.* XI. Quæst. III. *Post.* Cap. LXV. GROTIUS.

2 [The first Sort of Justice may be called Positive, and the other Negative.] This Sentence had apparently been left out here by the Printers in all the Editions of the first. I restored it in mine published in 1720.

3 *Ethic. Nicomach.* Lib. V. Cap. XI. (p. 70. A. Vol. II. Edit. Paris.) See the foregoing Chapter, and the *Rhetorick* of the same Philosopher. Lib. I. Cap. XIII. GROTIUS.

4 He says this in Opposition to the Question of

Fact, in regard to which either one of the Parties falsely denies his having done what he is conscious he has done; or the other accuses him without Grounds of having done what he has not done. Whereas, when the Question is to know what is just or unjust, there may be Ignorance on both Sides. *Rhetoric.* Lib. III. Cap. XVII. *init.* See VICTORIUS's Notes upon that Passage.

5 The Rhetorician says, that this can scarce happen but by a Sort of Miracle; because Causes manifestly unjust, are foreign to the Art of Rhetoric: *Alioquin, ubi injusta causa, &c.* *Instit. Orat.* Lib. II. Cap. XVII. p. 196. E. Vol. I. Edit. Burman.

6 *Topic.* Lib. I. Cap. XV. p. 190. Vol. I. Ed. Paris.

7 *Ethic. Nicom.* Lib. V. Cap. XII.

such

such a Nature as to require not Reasons barely warrantable, but the clearest Evidences in the World.

5. But if we construe the Word *Just*, as it respects some Effects of Right, it is plain that War in this Sense may be on both Sides just, as it will be made out by what we shall lay down by and by concerning a publick War, in form. In the same Manner as a wrong Sentence, and an unjust Possession have some ^s Effects of Right.

8 That is to say, unjust Effects, which may give some right before Man, but none before the Tribunal of GOD.

C H A P. XXIV.

Exhortations not to engage in a War rashly, tho' for just Reasons.

I. 1. **T**HO' it be somewhat foreign to the Matter in Hand, which is designed only to treat and discourse of the Right of War, to explain what other Virtues, distinct from Justice, require or direct with respect to War; yet by the way we must obviate a certain Mistake, lest any one should imagine, that whenever he has a just Cause given him, he is thereupon immediately obliged to declare War, or that it is warrantable at any Time for him so to do. On the contrary, it happens that it is commonly a greater Piece of Goodness and much more commendable to abate somewhat of our Right, than rigorously to pursue it. For we observed above ^a in its proper Place, that we may very laudibly hazard our own Lives to secure another's, or to promote as far as in us lies his eternal Salvation. And this Duty obliges us Christians most of any, who therein follow the exact Pattern of Christ, who laid down his Life for us, *while we were yet Sinners and Enemies to him*, Rom. v. 6. which Instance should much more excite and direct us not to be so eager in pursuing our Rights to that Degree, as to bring upon others all those Inconveniences and Mischiefs which War is attended with.

I. We are often to abate of our Right for avoiding a War.

^a Chap. I. § 8. of this Book. See. Fr. Victor. De Jure Bell. n. 14. & 33.

2. It is the Advice of ^b *Aristotle* and ¹ *Polybius*, that ² we should not make War on every such Account. *Hercules* ³ was condemned by the Antients for declaring War against ⁴ *Laomedon*, and ⁵ *Augeas* for not paying him for his Labour. *Dion Prusseensis* in an Oration of his about War and Peace, says that this was not the only

^b Rhet. ad Alexandr. Cap. 3.

I. (1) Our Author cites in the Margin the fourth Book of that Historian, where I find nothing that has any Relation to the present Subject, but the Reflection he makes in blaming the *Messenians* for not entering into a War against the *Aetolians*: I agree, said he, that War is what we ought to fear, but not so far as to suffer every Thing to avoid it. Cap. XXXI. p. 416. Edit. Amst. It is plain he supposes here, that we ought to suffer something, rather than come to a War.

2 *SENECA*, *Suasor V. Gallio* said, *That we ought to engage in War for the Defence of our Liberty, our Wives and our Children; but that we ought not to do so for any trifling Matter, or for what, if it did happen, could not hurt us.* *Apollonius* said something more to the King of *Babylon*, *περὶ τοῦ βασιλέως*, &c. He added, says *PHILOSTRATUS*, *Lib. XXIII. that one should not differ with the Romans for a few small Villages, much larger than which some private Men often possess, and that one should not even for greater Matters commence a War against them.* *JOSEPHUS* in his second Book against *APRIAN*, speaking of his Countrymen, *ὁ δὲ τὴν ἀνδρίαν*, &c. Nor do we exercise our Courage, or enter into Wars out of Avarice and Ambition, but for the Security and Preservation of our Laws; and

therefore, tho' other Damages we bear with abundance of Patience, yet if once they attempt to force us to recede from our Constitutions, we then even beyond our Strength betake us to our Arms, and will maintain them to the last Extremities. (P. 1080. C.) GROTIUS.

3 But where do they condemn him? *PAUSANIAS*, whom our Author cites here in the Margin, *Lib. V.* says only, that *Hercules* had not Opportunity to signalize himself very much in the War he undertook against *Augeas*, Cap. II. p. 148. Edit. Græc. Wech. And he adds, that this was occasioned by the powerful Support of the *Aetorides*. Our Author, in reading this Passage hastily, or quoting it by Memory, might have imagined to find there that this Expedition was not glorious to *Hercules*, and explained the Word *λαμπρόν*. implied that the Occasion of the War was frivolous.

4 See an Account of this in *APOLLODORUS*, *Biblioth. Lib. II. Cap. IV. § 9.* in *DIODORUS SICULUS*, *Lib. IV. Cap. XXXII.*

5 The Authors, I have cited in the foregoing Note, speak of this: The first at § 5. of the same Chapter; and the other at Chapter XXXIII. of the same Book.

Question, εἰ συμβέβηκεν, &c. Whether any Injury was received from them we intend to make War on, but also, of what Importance the Injury offered us was.

II. Especially when that Right consists in inflicting Punishments.

^a Lib. 44. p. 290. Edit. H. Steph.

^b Lib. 4. c. 45. p. 172. Edit. H. Steph.

^c Lib. 8. c. 18. p. 569. Edit. Heinf. 1616.

II. 1. There are indeed several Reasons to dissuade us from punishing. We may observe, how many Offences Parents will connive at, and overlook in their Children : On which Topick Cicero has a Discourse in ^a *Dion Cassius*. A Father ¹ (as Seneca says) will not disinherit his Son, unless the Provocations given be so many and so intolerable as to overcome his Patience, and unless he foresees more heinous Crimes like to ensue than those which he has been already guilty of. Much to the same Purpose is Phineus's Saying, which ^b *Diodorus Siculus* records, μηδὲνα παύσει, &c. No Father willingly brings his Son to Punishment, unless the Greatness of his Fault exceeds the natural Affection of Parents to their Children, and that Saying of ^c *Andronicus Rhodius* imports as much, εἰς παῖδα, &c. No Father casts off his Son, unless he be notoriously wicked.

^d Epist. 159.

^e Orat. 2. p. 50. Edit. Spanheim.

^f Molin. De Justit. Tractat. 2. Disp. 103. Lorca, Disp. 153. n. 2. *Ægid. Reg. De Act. Supern. Disp.* 31. Dub. 7. n. 107. ^g Chap. 1. § 9. of this Book.

2. But whoever he be who goes about to punish another, ² does, as it were, personate a Magistrate, that is, a Father ; in Allusion to which St. *Austin*, ³ speaking to Count Marcellinus says, ^d Discharge and perform, Sir, you who are a Christian Judge, the Duty and Office of a kind and religious Father. Julian the Emperor was a great Admirer of Pittacus's Maxim, εἰς τὴν συγγνώμην, &c. ^e Who preferred Pardon to Punishment. And Libanius in an Oration of his *De seditione Antiochena* says, That he who would be like his Heavenly Father εἰσις, &c. Must take a greater Delight in forgiving than punishing.

3. Circumstances too may sometimes fall out so, that ^f it may not only be laudable, but an Obligation in us to forbear claiming our Right, on account of that Charity which we owe to all Men, even tho' our Enemies ; whether this Charity be considered in itself, or as it is what the sacred Rule of the Gospel requires at our Hands. And thus, as we have already ^g mentioned, there are some Persons, for whose Safety, tho' they assault us, we should wish to lay down our Lives, because we know they are either necessary or very useful for the common Good of Mankind. If Christ would have us undervalue and neglect some Things, rather than quarrel, and contend for them in Law ; without doubt he would have us neglect much greater Things for the Prevention of War which is infinitely more pernicious and destructive than a Law Suit.

4. St. *Ambrose* ⁴ says, that to remit something of what is our Right, is not only an Act of Generosity, but is commonly much to our Advantage. ⁵ *Aristides* advises

II. (1) Where he speaks of Abdicating or disinheriting : Numquid aliquis sanus filium, &c. De Clement. Lib. I. Cap. XIV. PHILO the Jew says also, that Fathers do not resolve to disinherit their Sons, till the Wickedness of the latter has overcome their paternal Tenderness and Affection. De Nobilitat. (p. 904. C. Edit. Paris.) A Father, who tried his Son for parricide [at the Time when Fathers had a Power of Life and Death over their Children] took Augustus Cæsar for one of his Counsellors, or Assessors, according to Custom ; who was of Opinion, that the Father should content himself with banishing him whither he thought fit ; and for this Reason, because a Father ought to punish his Children with as little Rigour as possible. Dixit [Cæsar Augustus] relegandum, &c. SENECA, De Clement. Lib. I. Cap. XV. The same Thought is expressed thus in a Verse of Terence,

Pro peccato magno paululum supplicii satis est patri.

Andr. (Act V. Scen. III. Ver. 32.) CICERO says, that when a Person is accused before his Father, he asks Pardon, confesses his Fault, imputes it to Ignorance, promises never to be guilty of the like again, and submits upon Breach of Word to all the Indignation his Offence deserves. Whereas, before the Judges he denies the Fact, maintains that the Crime is forged, and the Witnesses false : Ignoscite, judices : erravit, &c. Orat. pro Legario. GROTIUS.

2 SENECA in his eighty seventh Epistle says, That good Nature spares another's Blood as it would

its own, knowing that one Man must not be lavish of another's Life. DIODORUS SICULUS, in Frag. εἰ δὲ τὸς ἀμαρτήσαντας, &c. Not every one who offends must by all Means be punished, but those only who persist in their Crimes without Repentance. St. CHRYSOSTOM, De Statuis vi, μαθεύσωσαν, Let all who are Strangers to our Faith know that the fear of Christ bridles and restrains every Power. Honour your Master, and forgive your Fellow Servants that he may have the greater Regard to you, that he may at the Day of Judgment remembering this Tenderness and Humanity of yours, shew you a kind and propitious Countenance. And GRATIANUS, Caus. XXIII. Quæst. IV. cites the following Expression out of St. AUSTIN, It is not in vain that we use these two Words, a Man and a Sinner together ; for if the Sinner deserves Punishment, the Man claims our Pity. See both what follows there, and what we have said above, at Chap. XX. § 12. § 26. and 27. GROTIUS.

3 This Passage is quoted in the JUS CANONIC. Caus. XXIII. Quæst. V. Can. I.

4 Si quidem de suo jure, &c. De Offic. Lib. II. Cap. XXI.

5 I doubt whether this Passage be in ARISTIDES or not. I do not find it either in the Harangue of this Orator to the States of Greece, to exhort them to Union, or in any other Place. Our Author perhaps wrote the Name of one Greek Orator for another, as for Instance, ARISTIDES for DION Prusænsis.

States συγκατατίθεν, &c. to resign and give up Matters of indifferent Consequence; and gives this as a Reason ὡς περὶ γὰρ, &c. for you highly extol those private Men who are of so mild a Temper, as to choose rather to sustain some Losses than go to Law. ⁶ Xenophon in the sixth Book of his Grecian History tells us, that wise People will not engage in War, no, tho' there are important Reasons for it. And Apollonius in Philostratus, ⁷ that War is not to be undertaken, even where the Provocations are great.

III. 1. As for Punishments, it is a principal Duty of ours, if not as Men, yet certainly as Christians, to be ready and willing to forgive those Injuries that are committed against us, as GOD forgives us in CHRIST, Eph. iv. 32. Not to be angry at those Things, says ² Josephus, for which they who are guilty of them are liable to suffer Death, is a near Approach to the Divine Nature.

III. And particularly must an injured Prince do so.

2. Seneca says of a Prince, ^a that He should be more easily prevailed on to pardon Injuries done against himself, than those done against others; for as he is far from generous, who is only lavish of what is none of his, but he is certainly liberal who takes from his own Stock what he bestows upon another. So I cannot call him kind and good-natured, who is easy under another's Affliction, but him, who, when himself is wronged, bears it patiently, and does not fall out into Passion and Resentment; who considers, that it is the Property of a noble and elevated Spirit, to support itself under Injuries, at a Time when it has the greatest Power of returning them; and that ³ nothing is really more glorious than an injured Prince, who scorns to take any Revenge. And Quintilian, We would persuade a Prince to aim at the Reputation of Tendernefs and Humanity, rather than to seek the barbarous Pleasure of being cruel and revengeful. This was the sublimest Character that ^b Cicero could bestow upon C. Cæsar, that he was never forgetful of any Thing but Injuries. Livia, in her Discourse to Augustus, in ^c Dion, speaks thus, τὴς ἀρχῆς, &c. It is the Opinion of most Men, that Sovereigns ought to bring to condign Punishment, all Offenders against the State, but to forgive those who offend against their own Persons. ⁴ Antoninus the Philosopher, in his Oration to the Senate, says, that The Revenge of a personal Injury looks little and mean in a Prince; for tho' the Punishment be just and deserved, yet it carries along with it the Appearance of Cruelty. St. Ambrose, in his Epistle to Theodosius, You have pardoned the Antiochians your own Injury. And Themistius, in his Encomiums on the same Theodosius to the Senate, says, οὐ γὰρ, &c. that A good Prince should be above those that offend him, and not only not return their Wrong, but be forward to do them any kind Office.

^a De Clement. l. 1. c. 20.

^b Orat. pro Lig. gar. c. 12.

^c Lib. 55. p. 643. Edit. H. Steph.

3. Aristotle ⁵ denies that he can be a Man of any great Spirit, who retains in his Breast the Memory of every Ill he receives: Which Cicero expresses thus, ^d Nothing can be more worthy of a Man of Honour than Clemency and Good-nature. The Holy Scriptures afford us very remarkable Instances of this noble Virtue in Moses, Num. xi. 12. and in David, 2 Sam. xvi. 7. And this we are especially obliged to, when we are conscious to ourselves of some Offence of our own; ^e or when what is committed against us, proceeds from human Frailty, and consequently excusable, or when the Offender gives plain Demonstration of his Sorrow and Repentance. Cicero says, ⁶ There is a Measure to be observed in our Revenge, and our Punishments, and I do not know whether ⁷ the Offender's Repentance be not a sufficient Satisfaction. A wise Man (says ^f Seneca) forgives many a Crime, and will save many an ill-inclined Person, provided he finds him not incurably bad.

^d De Offic. l. 1. c. 25.

^e Dried. de Libert. Christ. l. 2. c. 6.

^f De Clement. l. 2. c. 7.

⁶ It is in the Discourse of Callias to the Lacedæmonians: Καὶ σωφρονέων μὴ δύν, &c. Hist. Græc. Lib. VI. Cap. III. § 4. Edit. Oxon.

⁷ This Passage is cited above in Note 2. upon Paragraph I.

III. (1) See Note 2. upon § 2. of this Chapter; and what has been said above, Chap. XX. § 26. at the End.

² Antiq. Jud. Lib. II. Cap. III. p. 49. C.

³ St. CHRYSOSTOM, speaking in commendation of Clemency, πάντα μὲν, &c. For this is glorious to every one, particularly to People in Power. For since Sovereignty allows a Man to do any Thing, it is prodigiously for a Prince's Reputation and Glory, to put a Restraint upon his Passions, and to make

the Law of GOD the Director of his Actions. St. AUSTIN, in his 104th Letter to Count Boniface. Remember to forgive as soon as he who has injured you asks your Pardon. GROTIUS.

⁴ In VULCATIUS GALLICANUS's Life of Avidius Cassius. (Cap. XII.) GROTIUS.

⁵ (Ethic. Nicomach. Lib. IV. Cap. VIII. p. 51. C. Vol. II. Edit. Paris.)

⁶ This Passage of CICERO is cited above, Ch. XX. § 39. Num. 2.

⁷ PROCOPIUS, Vandal. II. Μεταμελὸς γὰρ, &c. When Offenders are seized with a timely Sorrow and Concern for what they have done, the Parties injured are commonly induced to forgive them. GROTIUS.

And these are the Reasons which Charity suggests to us for abstaining from War ; a Charity we either owe to, or which we may and ought to bestow upon our Enemies.

IV. *A Prince is often to decline going to War, both for his own and his Subjects Safety.*

IV. 1. Besides it often happens, that it is ' for the Interest of us and ours to do all we can to decline a War. *Plutarch*, in the Life of *Numa*, acquaints us, that after it had been concluded by the Priests called *Feciales*, that a War might justly be undertaken, ² the Senate had a Debate whether it was convenient or no. It is said in one of *CHRIST*'s Parables, *Luke* xiv. 31, &c. that *If one King is going to make War with another King, he sitteth down first, (the Manner and Posture of such as deliberate with great Care and Attention) and considereth, whether he be able with ten thousand to meet him that cometh against him with twenty thousand; or else, whilst the other is yet a great Way off, he sendeth an Embassy, and desireth Conditions of Peace.*

^a *Plut. in Vit. Camill.*

2. Thus the *Tusculans*, ^a by suffering every Thing, and refusing nothing, merited a Peace from the *Romans*. And in *Tacitus* we have, ³ *In vain did the Romans seek an Occasion of quarrelling with the Ædui, who not only, according to the Contributions demanded of them, supplied them punctually with Money and Arms, but did, over and above, furnish them with Provisions at their own Expence.* So *Queen Amalasuntha* declared positively, to *Justinian*'s Embassadors, ^b that she would not break out into a War with him.

^b *Procop. Vandal. l. 2. c. 5. Goth. l. c. 3. Geograph. l. 7. p. 462. Ed. Amst. (301 Ed. Paris.)*

3. One may sometimes too moderate the Matter, as *Strabo* ^c mentions that *Syrmus* King of the *Triballi* did, who denied *Alexander the Great* the Liberty of Landing upon the Island *Peuce*, and yet, at the same Time, sent him some very valuable and magnificent Presents, in Order to make it appear to him, that he did it out of a just Fear, and not out of any Hatred or Disrespect to his Person. And what ^d *Euripides* spoke of the *Greek States*, may not improperly be applied to any other,

*When by the State it is decreed for War,
Not one does ever think his Ruin near,
But all of us some other's Death mark out :
In their Debates, had they but seen their Fate,
Mad Greece had never fallen by the Sword.*

Think with yourself, says ^e *Livy*, *not only of your own Strength, but of the Power of Fortune, and the common Hazards of War.* And ^f *Thucydides* gives this Caution, *Consider before you enter into it, what unexpected Incidents there are in War.*

V. *Rules of Prudence directing our Choice of what is good.*

V. 1. When People are deliberating, they lay before them not only the ¹ subordinate Ends, but the Means too which lead to those Ends. The End we have in View, is always some Good, or, at least, the declining some Evil, which is much the same Thing. The Means are not sought for in themselves, but only as they conduce to the End, either one Way or the other. And therefore, in all our Consultations, we should compare, not only the Ends with one another, but the Capacity of the Means for bringing about those Ends : For, as *Aristotle* wisely observes, in his Treatise *De Motione Animalium*, ² *What one proposes by any Action is of*

IV. (1) *PROCOPIUS*, *Goth. Lib. II. Cap. VI.* says, that the *Goths* addressed themselves to *Belisarius* in the following Manner, ὅταν ᾖ ἀνὴρ, &c. *Since Matters stand thus, the Governors on either Side should not, out of their own Vanity and Ambition, sacrifice their Subjects Safety, but prefer what is just and advantageous, not only for themselves but their Enemies.* *GROTIUS.*

2 *PLUTARCH* speaks of the King, *In Vit. Numa*, p. 68. B. Vol. I. Edit. *Wech.* Our Author cites here, in a Note, a Passage from *THUCYDIDES*, which is recited above, *Chap. XX. § 4. Num. 1.*

3 *Frustra adversus Æduos, &c.* (*Histor. Lib. I. Cap. LXIV. Num. 5.*) In the Reign of *Septimius Severus*, a King of *Armenia* prevented a War with which that Emperor threatened him, by sending him

Hostages and Presents of his own Accord. See *HERODIAN, Lib. III. (Cap. IX. Num. 3. Edit. Boeck.) GROTIUS.*

4 "Ὅταν ᾖ ἑλθόν, &c.

Supplic. ver. 481. & seq.

5 In *Hannibal*'s Harangue to *Scipio*, *Quum tuas vires, tum, &c. Lib. XXX. Cap. XXX. Num. 20.*

6 The Embassadors of *Athens* say this to the *Lacedemonians*. *Lib. I. Cap. LXXVIII. Edit. Oxon.* Our Author, from his having quoted this Passage after *STOBÆUS*, (*Florileg. Tit. L.*) expresses it a little differently from the Terms in the Original.

V. (1) These subordinate Ends may be considered as Means, with Regard to the last End.

2 *Cap. VII. p. 705. D. Vol. I. Edit. Paris.*

two Sorts, either an Advantage or a Possibility. Which Comparifon has thefe three³ following Rules for its Direction.

2. The *first* is, that if the Matter under Confideration appear, morally fpeaking, to be as much difpofed to produce Good, as to produce Evil, we may venture upon it, provided the Good includes a greater Degree of Good than the Evil includes of Evil. This is what *Aristides* means by the Expreflion, ⁴ *When the Good hoped for is lefs than the Evil apprehended, it is better to make Peace.* *Andronicus Rhodius*, in his Character of a Man of Bravery, fays, that ⁵ *He will not expofe himfelf to Danger upon every flight Occafion, but when he has Reafons of the laft Importance for it.*

³ Paraphr. in
Etbic. Nicom.
l.4. c.5. p.219.

3. The *second* is, that if the Good and the Evil which may poffibly refult from the Thing in difpute are equal, we may undertake the Affair, if there be a greater Tendency in it to the Good, than to the Evil.

4. The *third* is, that if the Good and the Evil feem difproportionable, and the Difpofition of the Affair in Hand to produce the one or the other, no lefs difproportionable, we may ftill venture upon it, ⁶ if its Difpofition to produce Good, compared with its Difpofition to produce Evil, does more confiderably exceed that, than the Evil itfelf, compared with the Good, exceeds the Good; or if the Good compared with the Evil, is more confiderable than the Difpofition of the Thing to produce Evil, compared with its ⁶ Difpofition to produce Good.

5. *Cicero* eftablifhes fome Maxims which are not indeed fo exact as the Rules we have laid down, but which exprefs the fame Thing in a more plain and familiar Way, when he advifes us to ⁷ *Take Care not to thruft ourfelves into Hazards and Difficulties, where there is no Manner of Occafion for it, there being no greater Folly upon Earth than fuch a Rafhnefs: And therefore, in Attempts of any Danger, we fhould imitate the Practice of fkilful Physicians, who to their Patients that are but a little indifpofed, adminifter very gentle Medicines; but in desperate Cafes are forced to have Recourfe to desperate Cures. It is Madnefs to wifh for a Storm when we enjoy a Calm; but it is a wife and prudent Part, when a Storm is come, to ufe all Means to remedy it, efpecially, if the Good to be obtained by diffipating it is greater than the Evil that refults from the Trouble.*

6. And in another Place, ⁸ *Where no great Advantage can accrue to us, if we meet with Succefs, and the leaft Mifcarriage may be fatal, what need we run any Rifque at all?* *Dion Prufæenfis*, in his fecond *Tarfenfis*, delivers himfelf thus, *ἔσω δεινόν, &c.* Suppose this be an unhandfome and unworthy Treatment of us: We muft not however, tho' our Ufage be unjuft, by our ftugling and contentious Humours expofe ourfelves to farther Inconveniencies. And afterwards, *ὡς πρὸς βίαν, &c.* As we endeavour to fhake off thofe Burdens, the Weight of which is fo great that we are not able to bear it; fo when we have Shoulders anfwerable to our Load, and we are loaded with fuch Things that we muft either ftand under them, or fomething more intolerable, we in this Cafe make ourfelves as eafy as we can. ⁹ *When our Fears, fays Aristides, are greater than our Hopes, we ought not to expofe ourfelves to the Danger.*

VI. 1. Let what ¹ *Tacitus* relates, that the States of *Gaul* confulted about, *Whether they fhould chufe Liberty or Peace,* be a Precedent for us in this Affair. By Liberty is meant Civil Liberty, that is, a Right of governing themfelves by their own Laws; which Right, in a popular State, is full and abfolute, but in an Aristocracy is fomething limited, efpecially in fuch a-one where no Citizen is excluded from Offices. But by Peace we are to underftand fuch a-one, as by preventing the

VI. An Example directing us in our Confultations about Liberty and Peace, when it is to fave a State from utter Ruin and Destruction.

³ See an Explanation of thefe Rules in PUFENDORF. *Law of Nature and Nations*, B. I. Chap. II. § 7.

⁴ [Orat. I. De pace, Vol. II. p.63. B. Edit. P. Steph.]

⁵ *Narfes* makes a very wife Ufe of this Rule in PROCOPIUS, *Goth. Lib. II. (Cap. XVIII.) GROTIUS.*

⁶ I have obferved, in my Notes upon PUFENDORF, at the Place referred to Note 3. that in the Original there is *comparata ad malum*, for *comparata efficacix ad malum*. This Omission had been in

the first Edition, and was fuffered to pafs, amongst other Faults of the like Nature, in all fubfequent Revifals and Editions. But I have reftored the Text, as the Author's Thought and Intention required.

⁷ *Sed fugiendum etiam illud, &c.* De Offic. Lib. I. Cap. XXIV.

⁸ *Ubi enim θῆται βία, magnum, &c.* Lib. XIII. Epift. ad Attic. XXVII.

⁹ Orat. Sic. II. Vol. II. p. 52. D.

VI. (1) The Passage is recited above B. I. Chap. IV. § 19.

War, prevents the utter Ruin of the whole State; that is, as *Cicero* illustrates this Question, in a *Greek* Passage, ἐὰν, &c. ² *If the State be in Danger of being entirely undone.* As when, suppose, having examined and considered thoroughly the Consequence of the Matter, we can find nothing but the sad Presage of a total Destruction; as was the Condition of *Jerusalem*, besieged by *Titus*. It is obvious what *Cato* would say in this Case, he *who had rather die than be subject to one Man.* And agreeable to this Resolution is that of the ³ Poet,

*How easily may
A Man's own Hand from Slavery set him free?*

And several other Expressions to the same Effect.

2. But right Reason suggests quite another Thing; she tells us, that Life is far preferable to Liberty, as being the Foundation on which all temporal Blessings are built, and the Occasion of those that are eternal, whether you consider one or the other, with Respect to a single Person or a Community. And therefore GOD himself imputes it ^a as an Act of his Favour, that he did not cut off his People with the Sword, but made them Captives. And in another Place, he ^b advises the *Hebrews*, by his Prophet, to surrender themselves into the Hands of the King of *Babylon*, lest they should die by Famine and Pestilence. Wherefore, tho' the Antients highly extolled

^a 2 Chron. xii.
7, 8.
^b Jer. xxvii. 13.

⁴ — *What brave Saguntum did
By Hannibal blocked up.*

Yet is it a Conduct very far from deserving any such Commendation, no more than the Means that lead to it.

3. For utter Destruction, ^c in such Circumstances, is to be looked on as the greatest of Evils. ⁵ *Cicero*, in his second Book of Invention, lays down this as a Case of extreme Necessity; that the *Casilinenſes* were forced to surrender themselves to *Hannibal*, tho' their Necessity had this Exception, ⁶ unless they chose rather to starve. And *Diodorus Siculus's* Judgment of the *Thebans*, who lived in *Alexander the Great's* Time, was τοῖς ἀδυσήμασιν, &c. *That with greater Courage than Prudence they had drawn upon themselves the entire Ruin of their Country.*

^c See St. Austin,
De Civit. Dei,
l. 22. c. 6.

4. And

² This Passage from *CICERO*, is quoted in the Place referred to in the foregoing Note.

³ *LUCAN* says this,

*Non tamen ignavæ, post hæc exempla virorum,
Percipient gentes, quam sit non ardua virtus
Servitium fugisse manu ———*

Pharſal. Lib. IV. v. 575, & seq.

⁴ They burnt themselves, with their Wives, Children, and all their Effects. See *LIVY*, Lib. XXI. Cap. XIV. Our Author cites here, without saying from whom he takes it, a Verse which makes a Part of the Speech that *LUCAN* puts into the Mouth of the *Marſeillian* Deputies, addressed to *Cæſar*. This is it, with that which precedes,

*Nec pavet hic populus pro libertate subire
Obſeſſum Pæno geſſit quod Marte Saguntum.*

Lib. III. ver. 349, 350.

⁵ *Atque etiam hoc mihi, &c.* De Invent. Lib. II. Cap. LVII.

⁶ *Anaxilaus*, who had surrendered the City of *Byzantium*, for Want of Provisions, justified his Conduct by saying, that Men are to fight against Men, but not against Nature. This *XENOPHON* tells us, (*Hiſt. Græc.* Lib. I. Cap. III. § 12.) *PROCOPIUS* observes, that Men do not commend those who make Death their Choice, whilst there is any Hope that appears greater than the Danger. *Gothic.* Lib. IV. (ſeu *Hiſt. Miſc.* Cap. XII. in

Bessa's Speech to persuade the Garrison of a Citadel to surrender). A German Poet makes *Guido Blandratenſis* say, in a Discourse to the People of *Milan*, no Man of Sense loves his Liberty better than his Life; and that it is not Love of Liberty but Vain Glory, to expose one's Self to certain Destruction when it may be avoided;

Omnia securi pro libertate feremus.

Sed libertatem contempta nemo salute

Sanus amat: Neque enim certæ susceptio cladis,

Quam vitare queas, nisi cum ratione Salutis,

Libertatis amor, sed gloria vana putanda est.

GUNTHER. Ligurin. (Lib. VIII. p. 397. Edit. Reuber.) *GROTIUS.*

Anaxilaus does indeed excuse himself on Account of the Famine which oppressed the City; but the Sentence our Author puts in his Mouth, is not in the Place of *XENOPHON* referred to, which speaks of that Governor of *Byzantium*. I imagine our Author has confounded this with what the same Historian makes *Cyrus* say, That there is no Man valiant and vigorous enough to contend with Hunger and Cold. *Cyrop.* Lib. VI. Cap. I. § 10.

⁷ *Lib. XVII.* (Cap. X.) The same Author, when he has given an Account of the War the *Athenians* engaged in, after *Alexander's* Death, says, that in the Opinion of the wisest Men, *They had consulted their Glory well, but had vastly mistaken their Interest;* because it was a Danger they hurried themselves into, without any Manner of Necessity

4. And *Plutarch*^d pronounces against *Cato* before mentioned, and *Scipio*, who after *Cæsar*'s Victory at *Pharsalia*, would not submit to him, Ἀΐλιαν ἔχουσι, &c. that *They were highly to blame for destroying so many brave Men in Africa, without any Occasion for it.*

5. What I have spoken in Relation to Liberty, I would have understood of other desirable Things; we ought to sacrifice them, when we have as much or more Reason to fear a greater Evil. For, as *Aristides*⁸ well observes, *The Custom is to save the Vessel, with the Loss of the Cargo, and not by throwing the Passengers over-board.*

VII. We are also particularly to take Notice, that No Prince should ever make War upon another, who is of equal Strength with himself, on the Account of inflicting Punishment: For as the^a Civil Magistrate is supposed to have greater Power than the Criminal; so should he also who attempts to revenge Injuries by Arms, be stronger than him he attacks. And indeed it is not only Prudence, or Affection for his Subjects, that requires him to forbear engaging in a dangerous War, but very often^b Justice itself, that political Justice, which from the very Nature of Government does no less oblige a Prince to take Care of his Subjects, than it does the Subjects to obey their Prince. From whence it follows, (as Divines do with Reason teach us) that *A King who undertakes a War upon frivolous Accounts, or to inflict some needless Punishments, and such as will involve his Subjects in a great Deal of Trouble, is obliged to make up the Damages they suffer thereby:* For tho' he cannot be accused with any Injury done to his Enemies, yet may there be a heavy Charge laid against him of wronging his Subjects, by plunging them in so much Misfortune and Misery for such Reasons. *Livy*^c says, that *War is justifiable in those who are under a Necessity of being engaged in it, and that Arms are warrantable, when we have no Hopes but in our Arms.* This is what *Ovid* desires when he says, *Fast.* 1.

VII. That he ought to forbear pursuing a Punishment by Force of Arms, who is not much superior in Power.
^a Cajetan, ii. 2. qu. 95. art. 8.
^b Molin. De Infit. tract. 1. c. 102.

*Let the Soldier wear
No other Arms than what defensive are.*

VIII. The¹ Case therefore very seldom happens, wherein War cannot, nor ought not to be forborn; and that is, as *Florus*² expresses it, *When all the Justice we can expect is more cruel than War itself.* One runs into Danger, says *Seneca*,³ when one apprehends the same Inconveniences if one sits still: Or perhaps greater. Which⁴ *Aristides* thus explains, Τέρε χρεῖ, &c. It is then adviseable, tho' the Event be uncertain, to prefer an Hazard, when to be at Quiet is evidently worse. It is Prudence, says⁵ *Tacitus*, to exchange a miserable Peace for a War, when, as the same Author has it, ⁶ either our Courage will procure us our Liberty, or, if we lose the Day, we are just as we were before; or, when (as⁷ *Livy* speaks) Peace with

VIII. War not to be engaged in but out of Necessity.

ity for it; no Ways warned by the Fate of the unhappy Thebans. (Lib. XVIII. Cap. X.) GROTIUS.

8 Our Author had evidently the Passage of that Orator in his Thoughts, where he says, the Master of a Ship cannot command any of the People on board to be thrown into the Sea; but only the Goods, for the People's Safety. *Orat. Platon.* II. Vol. III. p. 283. B.

VII. (1) *Justum est bellum*, Samnites, &c. Lib. IX. (Cap. I. Num. 10.) OVID's Words are

Sola gerat miles, quibus arma coerceat, arma.
(Ver. 715.)

GROTIUS.

VIII. (1) The Grammarian *SERVIVS* supposes, that there is none just enough to engage Men to enter into a War. It is where he explains a Verse of *VIRGIL*, in which the Poet says, that the Gods pitied the foolish Rage of the two Parties at War, and the great Trouble that Men give themselves,

*Dī Jovis in testis iram miserantur inanem
Amborum, & tantos mortalibus esse labores.*

[IRAM MISERANTUR INANEM.] Generaliter dicti omnem iram bellicam, &c. In *Æneid.* X. (ver. 758, 759.) GROTIUS.

2 Here is only the Expression which suits our Author's Sense, and that different from the Historians. It relates to *Quintilius Varus*, the Roman General, who administered Justice to the Germans newly conquered, in a Manner more cruel, in their Opinion, than the War itself; which obliged them to revolt, under their Leader *Arminius*, *Ut primum Togas, & sæviora armis jura viderunt, duce Arminio arma corripunt.* Lib. IV. Cap. XII. Num. 32.

3 *Incurri in pericula, ubi quiescenti paria metuuntur.* This is the Manner in which our Author quotes the Passage, which I can find no where.

4 In his first Oration concerning Peace. Vol. II. p. 67. B.

5 *Miseram pacem vel bello bene mutari.* *Annal.* Lib. III. Cap. XLIV. Num. 3.

6 *Denique ausos aut Libertas sequetur, aut victi iidem erimus.* *Hist.* Lib. IV. Cap. XXXII. Num. 6.

7 The Samnites say this, when about to throw off

with Slavery is more insupportable than War with Freedom. But not if (according to ⁸ Cicero) it be likely, that Being conquered you shall be proscribed, or being Conqueror you will be a Slave still.

IX. Or when there is an important Reason, joined with a very favourable Opportunity.

IX. Another Time for going to War is, If, upon a just Estimation, we find that we have not only Right on our Side, and such a Right as is of the greatest Importance, but likewise superior Strength. This is what Augustus meant, when he said, that ¹ War was not to be undertaken, but when there appeared a greater Prospect of Advantage, than Fear of Loss. And here may be applied that which ² Scipio Africanus and L. Æmilius Paulus ³ used to say of an Engagement, that We should never fight, ⁴ but in Cases of extream Necessity, or of some very favourable Opportunity. What I have said ought especially to be observed, when there is a Prospect of gaining our Point ⁵ by the Terror and Rumour of our Preparations, with little or no Hazard on our Side. This was Dion's ⁶ Advice for delivering Syracuse. And in ⁶ Pliny's Epistles there is this Passage, He vanquished them by the Fear of him, which is the handsomest Victory in the World.

^a Diad. Sicul. l. 16. c. 17.

X. The Miseries of War displayed.

X. War, says Plutarch, ¹ is a most cruel Thing, and brings along with it an Ocean of Calamities and Violences. And St. ² Austin very wisely expresses himself thus, If I should attempt to speak of what Mischiefs and Massacres, what Misery and Hardships are occasioned by War, I should not only want Words, but not know when to put a Period to so large a Field of Discourse; but a Prince of Prudence and Thought (say they) will engage only in a just War; as if, when he reflects upon himself to be a Man, he will not, on the contrary, heartily lament, that there could ever be a Necessity of entering into any just Wars, because, unless he were satisfied of the Justice of them, he could not have had any Hand in them, and from hence it is plain, that a Prince of Prudence and Thought would, by his good Will, have no Wars at all; for it is the Injustice of the adverse Party that thrusts him into Wars, which are not only just, but sometimes inevitable; which Injustice ³ every Man ought to bewail, as it is human Injustice, tho' it did not oblige us to Arms. Whoever therefore considers with Regret, such great, such horrid, such barbarous Ills,

off the Yoke of the Romans: *Rebellasse, quod pax servientibus gravior, quam liberis bellum esset.* Lib. X. Cap. XVI. Num. 5.

8 He speaks of the Course that was to be taken in the War between Cæsar and Pompey, *Depugna, inquis, potius quam servias. Ut quid? Si victus eris, proscribare? Si viceris, tamen servias.* Lib. VII. ad Attic. Epist. VII.

IX. (1) He speaks both in Regard to undertaking War, and giving Battle, after having had Recourse to Arms. *Prælium quidem aut bellum suscipiendum omnino negabat, nisi quum major emolumentum spes, quam damni metus ostenderetur.* SUE- TONIUS, in August. Cap. XXV.

2 Idem [Scipio Africanus] *negabat aliter cum hoste configi debere, quam si aut occasio obvenerisset, aut necessitas incidisset.* VALERIUS MAXIMUS, Lib. VII. Cap. II. Num. 2.

3 In quo de Publico Africano, Pauli filio ita scriptum est: Nam se patrem suum audisse dicere L. Æmilium Paulum, nimis bonum imperatorem signis collatis non decertare, nisi summa necessitudo, aut summa ei occasio data esset. AULUS GELLIUS, Noët. Attic. Lib. VII. Cap. II. Num. 2.

4 PLUTARCH, in his Gracchus's, *Ὁὐ γὰρ ἀνὸς τῆς, &c.* It is neither like a good Surgeon nor a good Politician, to cut and hack, unless there is the utmost Necessity for it. It is Marcian's Expression in ZONARAS, *Μὴ δὲν ἑπὶ βασιλείᾳ κινεῖν, ἕως ἐπιρηνέουσιν ἐξόν,* A Prince ought never to think of War as long as he may enjoy Peace. St. AUSTIN, in his fiftieth Epistle to Boniface: Peace should be our Choice, but War the Result of Necessity alone; that so GOD may deliver us from that Necessity, and preserve us in Peace. GROTIUS.

The last Passage is not in the fiftieth, but the

two hundred and fifth Epistle to Boniface, and there is even some Difference as to the Terms in the Editions I have seen.

5 The Lion scorning to use the Weapons Nature gives him, for a long Time defends himself by his Terror only, and does at it were shew that he is forced to engage. This Passage is in PLINY's Natural History, Lib. VIII. Cap. XVI. GROTIUS.

6 *Ostentatoque bello, ferocissimam gentem (quod est pulcherrimum victoriæ genus) terrore perdomuit* [Spurinna] Lib. II. Epist. VII. Num. 2.

X. (1) Vit. Camill. p. 134. B. Vol. I. Edit. Wech.

2 *Quorum malorum, [quæ ex bello nascuntur] &c.* De Civit. Dei, Lib. XIX. Cap. VII.

3 The Lacedemonians say, in an Harangue extant in DIODORUS SICULUS, Lib. XIII. *Θεωρῶντες τὰς ἐν τῷ πολέμῳ, &c.* Seeing so many Animosities, and so many other shocking Incidents in War, we think it our Duty to declare, both to GOD and Man, that we are not any Ways the Authors of these Things. PLUTARCH, in his Numa, *τὸ ἔν φήσιν, &c.* If any one says to me, Has not Rome improved by Wars? He asks me a Question that requires a long Answer; when we have to do with those who make Improvement to consist rather in Riches, Luxury and Empire, than in Safety and Humanity, in Justice and Contentment. Stephanus, a Physician, says in PROCOPIUS, Persic. Lib. II. to Chosroes the Persian King, *Ὁὐκ ἔν ὧ κράτιστε βασιλεῦ,* By being employed in Massacres and Battles, and enslaving of People, you may probably, great Prince, acquire some other Titles, but you can never by such Methods be reputed Good. Add to this a famous Passage in GUICCIARDIN, Lib. XVI. (§ 4. in the Speech of the Bishop of Osima.) GROTIUS.

must

must own that he is unfortunate, in being obliged to occasion them; but whoever can endure them, or make them the Objects of his Thoughts, without Grief and Emotion, that Wretch is still more miserable, because he counts himself happy in having cast off the Sentiments of Humanity. And in another Place he tells us, ⁴ That the Good never engage in War but out of Necessity, whereas the Wicked take Delight in it. ⁵ Maximus Tyrius tells us, τὸ πολεμεῖν, &c. that Tho' there were no Injustice in a War, yet the very Necessity of it is deplorable. And again, φάινει, &c. It is certain that good People make War only when compelled to it, but the Wicked do it out of Choice.

2. To which we may add that of Seneca, ⁶ that One Man should not be profuse of another's Blood. Philiscus gave Alexander this Advice, ⁷ that he should have a Desire of Glory, but not to indulge his Ambition so far as to become the common Pest and Scourge of Mankind; meaning that Massacres and Devastations of Cities were Acts that most resembled a Plague, and that nothing was more worthy of, and heroick in a King, than to have a tender Regard for the Preservation of all Men, which is the Fruit of Peace.

3. If according to the Law of the Hebrews, he who killed a Man, tho' involuntarily, ^a was obliged to fly for it. If GOD would not suffer ^b David to build him a Temple, ⁸ because he had been the Occasion of so much Bloodshed, tho' his Wars are said to be just. ⁹ If among the ancient Greeks it was a Custom, that they who had defiled their Hands with human Blood, tho' without any Fault of theirs, had need of Expiation; what Person living, and particularly if he be a Christian, does not see how unfortunate and ominous a Thing War is, and with what Endeavours we should strive to keep ourselves from it, tho' it were not unjust? And it is certain, that among the Christian Greeks, a Canon was for a long While observed, by Vertue of which, *Whosoever killed his Enemy, in what War soever, was* ^c *excommunicated for the Term of three Years.*

^a Numb. xxxv.
^b Deut. xix.
^c 1 Chron.
xxviii. 3.

⁴ Belligerare, malis videtur felicitas, bonis necessitas. De Civit. Dei. Lib. IV. Cap. XV.

⁵ (Dissert. XIV. p. 146. Edit. Davis.)

⁶ Quæ (Clementia) alieno sanguini, tanquam suo parcat, &c. Epist. LXXXVIII. p. 390. Edit. Gron. maj.

⁷ ÆLIAN. Var. Hist. Lib. IV. Cap. XI.

⁸ Οὐκ ὀφείλει, &c. He would not suffer him, a Man who had been engaged in so many Wars, and who was stained with Blood, tho' it was the Blood of his Enemies. These are JOSEPHUS's Words, Lib. VII. Cap. IV. where there follow more to the same Purpose. And PLINY, Lib. VII. Cap. XXV. after having related the Battles of Cæsar the Dicta-

tor, says, I cannot indeed think it for his Reputation, to have brought so many Miseries upon Mankind, tho' he had even been forced to it. PHILO, in his Life of MOSES, καὶ γὰρ εἰ νόμιμοι, &c. For tho' the Laws allow us to kill an Enemy, yet whoever kills any Man, tho' justly, tho' in his own Defence, tho' forced to it, seems to be guilty of Blood, on the Account of that common Relation we bear to one another, and therefore such Homicides were obliged by some Purgations to expiate the reputed Crime. GROTIUS.

⁹ See PUFENDORF, Law of Nature and Nations, B. II. Chap. V. § 15. Note 2.

^a Basil. ad Amphil. ii. 13.
Zonar. Niceph.
Phoc. vol. 3.

C H A P. XXV.

Of the Causes for which War is to be undertaken on the Account of others.

I. 1. **A**BOVE, when we ^a treated of those who make War, we laid down, and explained, that, according to the Law of Nature, every Man is authorized to maintain, not only his own Right, but also that of another Person's: And therefore those Reasons that can justify a Man in undertaking a War for himself; the very same can justify those who espouse the Cause of others.

^a War may be justly undertaken by a Prince for the Interest of his Subjects.

2. But our main and chiefest Care should be, ¹ for those ^b who are under our

^a B. i. chap. 5.
^b Navar. l. 24.
c. 18.

I. (1) See PUFENDORF, Law of Nature and Nations, B. VIII. Chap. VI. § 14.

^c Joshua x. 6. ² Direction and Management, whether in a Family or in a State. For they are, as it were, a Part of him who governs, as we shewed there. Thus the *Hebrews* took up Arms, under the Command of *Joshua*, in Behalf of the *Gibeonites* ^c, who had surrendered themselves up to them. ³ *Our Ancestors*, says *Cicero* to the *Romans*, often commenced a War, if but one of their Merchants and Mariners had been ill dealt with: And in another Passage, *How many Wars*, (says he) have our Fathers engaged in, upon their bearing that any Roman Citizens had been injured, any Master of a Vessel detained, or any Trader plundered. The same *Romans*, tho' they refused to take up Arms in behalf of their Allies, did yet, as soon as ever those Allies had thrown themselves under their Protection, and so became their Subjects, think themselves obliged to do it. The *Campanians* addressed the *Romans* thus. ⁴ *Tho' you will not guard our State against the Violence and Insults of its Enemies, yet surely you will protect your own.* And ⁵ *Florus* tells us, that the Alliance between them and the *Romans* became more strict, upon the Surrender of all they had. And *Livy* says, ⁶ *It was believed to be a Point of publick Faith, not to fail and desert such as gave themselves up to their Disposal.*

II. But it is not always to be so undertaken.

II. A Prince is not always obliged to take up Arms, whatever just Reasons of Complaint any particular Subject of his may have; unless all or most of his Subjects would be Sufferers on that Account. For it is a Sovereign's Business to have greater Regard for the Whole than the Part; and the larger the Part is, so much the more does it approach to the Nature of the Whole.

III. Whether an innocent Subject may be delivered up to an Enemy, for preventing some manifest Danger.

^a Soto, *De Just. & Jure*, l. 5. qu. 1. art. 7. ^b *Controv. illust.* l. 1. c. 13.

III. 1. And therefore, *If one* ¹ *Subject, tho' altogether innocent, be demanded by the Enemy to be put to Death,* ² *he may, no Doubt* ^a *of it, be abandoned, and left to their Discretion, if it is manifest, that the State is not able to stand the Shock of that Enemy.* *Ferdinand Vasquez* ^b argues against this Point; but if one does not so much mind his Expressions as his Meaning, one may find that what he intended was, that such a Subject should not rashly be forsaken; provided there were any Hopes of being able to protect him. For, amongst other Instances, he alledges that of the *Italian* Infantry, who deserted *Pompey*, before Matters were grown desperate, upon their Assurance of Security on *Cæsar's* Side, which Act he very justly censures.

^c Ubi supra.

2. Whether an inoffensive Subject may be surrendered up into the Hands of the Enemy, to save the State from imminent Ruin, is a Point much controverted now among the learned, as it was in former Times, when ³ *Demosthenes* proposed that remarkable Fable concerning the Dogs, whom, as an Article of Peace, the Wolves demanded the Sheep to give them up. *Vasquez* is not the only Person who is against this, but ^c *Soto* too, even he whose Opinion *Vasquez* ⁴ blames, as authorising Perfidiousness. But *Soto* would have it, that such a Subject is obliged to surrender up himself to the Enemy: And this is what *Vasquez* denies for this Reason, because it is not required by the Nature of a Civil Society, which every one enters into for his own Safety and Advantage.

3. But from hence all that can be gathered is, that no Subject is, by any Right strictly so called, obliged to this, but not that Charity permits him to do otherwise. For there are many Duties, not of strict Justice but of Charity, which are not only

² *PROCOPIUS* says, it is not sufficient, in Order to be just, that we do no Wrong to any one, but that we must also be ready to protect those who are under our Charge, from the Injuries of others. *Persic.* Lib. II. (Cap. XV. in the Speech of the Embassadors from the Prince of the *Lazians* to *Chosroez*, King of *Persia*.) *GROTIUS*.

³ *Majores vestri sæpe, mercatoribus, &c.* *Orat. pro Leg. Manil. Cap. V. Quot bella majores nostros & quanto, &c.* In *Verr. Lib. V. Cap. LVIII.*

⁴ *Quandoquidem, inquit [princeps legationis Campanorum]* *LIVY, Lib. VII. Cap. XXXI. Num. 3.*

⁵ *Erat fœdus cum utrisque, &c.* *Lib. I. Cap. XVI. Num. 2.*

⁶ *Tum jam fides agi visa, deditos non prodi.* Ubi supra. *Num. 7.*

III. (1) See *PUFENDORF, B. VIII. Chap. II. § 5.*

² See the Patriarch *Nicephorus's* Advice given to *Michael Rangaba*, about delivering up some Deserters to the *Bulgarian* General, as an Article of the Peace, where you have in *ZONARAS* the following Period, *Κρείσσον εἶναι, &c.* Judging it much better for a Few, than an immense Multitude to suffer. (Vol. II. in *Mich. Rangab.*) *GROTIUS*.

³ See his Life in *PLUTARCH, Vol. I. p. 856. E. Edit. Wech.*

⁴ As if the State broke the Engagement they had entered into with the Subject demanded by the Enemy.

very commendable, (as *Vasquez* owns) but which cannot be dispensed with without a Crime. ⁵ Such a Duty does this seem to be, which obliges every one to prefer the Lives of a vast Number of innocent Persons before his own. This is what *Praxithea*, in *Euripides's Erechtheus*, ⁶ designs by saying,

Ἐπεὶ γὰρ ἀριθμὸν οἶδα, &c.

*If I know any Thing at all of Numbers,
Any Thing of more and less, a single House
Can ne'er a publick Mis'ry exceed or equal,
However great its own Misfortunes be.*

And thus *Phocion* ^d solicited *Demosthenes*, and others, after the Example of *Leus's* Daughters and the ^e *Hyacinthides*, to be ready to suffer Death, rather than that on their Account their Country should be ruined, ⁷ *Cicero* in his Oration for *P. Sextius* says, *If sailing with my Friends it should chance that a Crew of Pyrates should attack us and threaten presently to sink our Ship unless they delivered me alone up unto them, if my Companions should refuse, and declare that they would sooner perish than surrender me, I should rather throw myself into the Sea, to save the rest, than bring those who express'd so tender a Concern for my Welfare into any great Danger of their Lives, much less to certain Death.* And in his third Book *De Finibus* he tells us that, ⁸ *A Man of Goodness and Sense, who conforms himself to the Laws, and understands the Duty of a Subject, has always a stricter Regard for the publick Advantage, than for any particular Person's; nay than for his own.* And in *Livy* we read the following Passage of certain *Molossians*. ⁹ *I have often heard indeed of People who have laid down their Lives for their Country, but these are the first that were ever known to judge it reasonable that their Country should perish for them.*

^d *Diod. Sicul.*
l. 17. c. 15.
^e See *Apollod.*
Biblioth. l. 3.
c. 14. § 8.

4. But granting all this, there still remains a Doubt, *Whether he can be forced to do that, which he is in Duty bound to.* *Soto* is against it, bringing the Instance of a rich Man who is indeed by the Laws of Charity and Compassion obliged to relieve the Poor, but yet cannot be compelled to do it. But we are to observe that the Case is not parallel between Subjects and Subjects, and between Sovereigns and their Subjects. For one equal cannot compel another, unless it be to that, which by the strictest Right he owes him. But a Sovereign can oblige a Subject ¹⁰ to other Things also which any Virtue directs, because ¹¹ that is a Power included in the Right of Sovereignty as Sovereignty. ^f Thus in Time of great Scarcity Subjects may be

^f *Lessius*, l. 2.
c. 9. Dub. 7.

5 But as there is no Obligation on a Man to make a Sacrifice of his own Life, unless when there is good Reason to believe he may save the State, or a great Number of Persons, by doing so; it is necessary to know, in the present Case, whether there be sufficient Certainty on that Head. He who demands an innocent Person, in Order to destroy him, gives Reason, by that Demand, to fear every Thing from him. If he be capable of desiring to deprive a Person of Life, who has done nothing that merits Death, he will be as capable of breaking his Engagement to leave the State in Tranquillity, when the Person demanded is delivered up. In a Word, it is my Opinion, that these Demands may generally be considered as the Measures of a Power, which seeks Pretexes for a Rupture, and designs at any Rate to oppress a Prince or State, that it perceives not to be in a Condition to oppose it.

6 (*Ver.* 82. & *seqq.* Edit. Barnes.) *PHILO*, the *Jew*, says, it is not just that the Whole should be deemed an Appendix of one of its Parts. *De vita Moysi*, Lib. I. (p. 652. B.) In the same Place are other Things well worthy of being read. *GROTIUS*.

7 *Etenim si mihi in aliqua nave, &c.* Orat. pro *Sextio*, Cap. XX.

8 *Ut enim leges omnium, &c.* De finib. bon. & mal. Lib. III. Cap. XIX.

9 *Quæ vos rabies, inquit, agitat, &c.* Lib. XLV. Cap. XXVI. Num. 8.

10 So among the *Lucani* there was a particular

Punishment for the Extravagant; among the *Macedonians* for the ungrateful, and among both the *Lucani* and *Athenians* for the idle. Add here what is said *B. I. Chap. I. § 9. Note 6.* *GROTIUS*.

As for the Law of the *Athenians* against Idleness, the Reader may see *DIOPHANTUS LAERTIUS*, Lib. I. § 55. with the Notes of *MENAGE*. That of the *Lucani* upon the same Subject may be found in a Fragment of *NICOLAUS DAMASCENUS*, in *STOBÆUS, Florileg.* Tit. XLII. See other Examples of in *ÆLIAN, Var. Hist.* II. 5. iv. 1. In regard to the Punishment of Ingratitude by the *Macedonians*, some learned Writers pretend, that this is founded upon an Error in the Editions of *SENECA, De Benefic.* Lib. III. Cap. VI. where the Word *Macedonum* is read for *Medorum*. See what I have said upon *PUFENDORF, B. III. Chap. III. § 17. Note 3. Edit. II.*

11 As Sovereigns may prescribe Things indifferent in themselves, when the Good of the Publick demands it; with much more Reason may they require those Things, which one was before bound to perform by the Rules of some Virtue; tho' he could not be compelled to it without the Authority of a lawful Sovereign. But the Question is to know, whether in the present Case, there be a plain Obligation of Charity, and which may be preferred to the Care of the Preservation of an innocent Person. See what I have said in the fifth Note upon this Paragraph.

compelled to bring out their Corn, and therefore upon the Question in Hand it seems much more likely that a Subject may be forced to do what Charity demands of him. So *Phocion*² before mentioned, declared that Things were come to such an Extremity, that if *Alexander* demanded the dearest Friend he had, as *Nicocles* for Instance, he would be the first to vote for the delivering him up.

² *Plutarch*, in ejus vita, p. 749. t. 1. Edit. Wech. IV. That we may lawfully undertake a War in behalf of our Allies, whether the Alliance be equal or unequal.

² *Liv.* 1. 34. c. 22.

IV. Next to our own Subjects, or indeed equally with them, are our Allies to be defended, when such a Defence is stipulated in the Articles of Treaty; and this, whether they have entirely given themselves up on the Account of such a Protection, and so depend upon it, or whether it be agreed on for a mutual Help and Security. He who defends not his Ally, says *St. Ambrose*,¹ from Wrong, if it is in his Power to do it, is as much to blame, as he who wrongs him. But such Articles do not reach so far, (as it was before observed)² as to involve us in an unjust War; and for this Reason the *Lacedemonians*³ before they entered into War with the *Athenians* laid before their Allies the Justice of their Cause, to be determined by their Opinion of it; and so were the *Romans* for having the *Grecians* Judgment upon their War against *Nabis*. But we may add here that an Ally is not obliged to give his Assistance, when there are no Hopes of Success, because Alliances are entered into on the Account of making some Advantage by them, and not to People's Prejudice. And we may protect one Ally against another of our Allies, unless there is a Clause in a former Treaty to the contrary. Thus might the *Athenians*⁵ have come in as Auxiliaries to the *Corcyreans* if their Cause had been good, against the *Corinthians*, tho' their more antient Allies.

V. And also for our Friends.
² *Fr. Victoria*, De Indis, Part 2. n. 17. Cajetan. 2. 2. 4. Art. 1. ¹ *Gen.* xiv.

V. ¹ A third Reason for War is the Protection of our Friends, whom tho' not under any formal Promise, yet upon the Score of Friendship we are under an Obligation of assisting, provided we bring not ourselves into any great Trouble, and Inconveniences by it. Thus *Abraham*^b took up Arms in behalf of his Kinsman *Lot*. And the *Romans* charged the People of *Antium* not to presume to meddle with the *Greeks* to plunder them, because related to the *Italians*. And the same *Romans* very often actually engaged in War, or at least threatened so to do, not only for their Allies, whom they were bound by Treaties to defend, but for their Friends too.

IV. (1) *Qui enim non repellit a Socio injuriam*, &c. *Offic. Lib. I. Cap. XXXVI.* That Father does not speak there of Allies, to whom our Author applies the Passage, as appears from the Example that follows, of what *Moses* did in killing the *Egyptian*, who insulted one of his Nation. *Socius* therefore means here all those, with whom we have any particular Tie or Relation.

² See *SIMLER*, *De Republica Helvetiorum*: If the Lord makes War upon any one, and it be known to be just, or not known to be otherwise, the Vassal is obliged to assist him. But if it be visible that he enters into it without any Grounds for so doing, he shall help him to defend himself, but not to offend the other. *Lib. II. De Feudis*, Cap. XXVIII. at the End. *GROTIUS*.

³ In the *Peloponnesian War*. See *THUCYDIDES*, *Lib. I. Cap. CXIX. CXXV.* Edit. Oxon.

⁴ See what *PUFENDORF* says upon this Head, *Law of Nature and Nations*, B. VIII. Chap. VI. § 14.

⁵ The Case, of which our Author speaks, happened a little before the *Peloponnesian War*. See *THUCYDIDES*, *Lib. I. Cap. XXXI. & seqq.* and what is said above in Chap. XVI. of this Book, § 13. Num. 4.

V. (1) A Person having formerly consulted the Oracle at *Delphos*, the God told him, he would give him no Answer, only that he should forthwith depart out of the Temple; because he had not assisted one of his Companions, who had been killed by Robbers:

Ἄνδρὶ φίλῳ Θνήσκοντι παρὼν πέλας ἐκ ἐσοῦθεις.
Οὐ σε θεμισεύσω περικαλλέῃ ἐξίθι νηϊ.

GROTIUS.

This Oracle is in *ÆLIAN*, *Var. Hist.* Lib. III.

Chap. XLIV.

² Our Author has without Doubt taken this Fact from *STRABO*, for neither *LIVY*, nor *DIONYSIUS HALICARNASSENSIS*, nor any other Author that I know of, says any Thing of it. The Geographer says, that the People of *Antium* had formerly Ships and exercised Piracy in Conjunction with the *Tyrrhenians*, even after they were subjected to the *Romans*. *Alexander* complained to the *Romans* upon this account, and *Demetrius* after him, who sent also all the Pyrates he could take to the *Romans*, telling them, that he delivered them up, upon account of the Relation that was between the *Greeks* and *Romans*; but adding, that it was unworthy of the *Romans*, who ruled *Italy*, and had a Temple dedicated to *Castor* and *Pollux*, beneficent Divinities, whom all the World honoured with the Name of *Saviours*, to send Corsairs into *Greece*. Upon which the *Romans* put a Stop to those Piracies. *Geograph. Lib. V. p. 354, 355. Edit. Amst. 232. Edit. Paris. Casaub.* This does not seem to agree entirely with what *LIVY* says; that after the Defeat of the *Antiates*, they were prohibited Navigation, and their Ships taken from them, some of which were kept at *Rome*, and others burnt, with the Beaks of which the Pulpit for Harangues was adorned, and from thence took the Name *Rostra*: *Naves inde longè*, &c. *Lib. VIII. Cap. XIV. Num. 8. 12.* Or else the *Romans* must soon after have become less rigorous, with regard to the *Antiates*, and have suffered them to fit out Ships again, and to make Use of them in exercising Piracy. However it be, the Example is ill applied to our Author's Subject; because it relates to the putting a Stop to Hostilities on the Part of a dependent People, and not the aiding of Friends against an Enemy, over whom one has no Authority.

VI. The

VI. The last and most extensive Reason of all for assisting others is that Relation that all Mankind stand in to each other; and ^a this alone is sufficient. ¹ *One Man*, says *Seneca*, is born to help and relieve another. And in another Place, *A wise Man* will, as often as it lies in his Power, turn away a Misfortune. *Euripides* in his *Supplices* ²:

VI. And indeed for any Body whatever.
^a See above, B. I. c. 5.

*The Rocks Protection to the Beasts afford,
The sacred Altars to the trembling Slaves;
And for one suffering Town a safe Retreat
Another Town provides.*

That Courage, says *St. Ambrose*, which defends the Weak, is Justice in Perfection; but of this we have already treated.

VII. 1. Here it is an Inquiry whether one Man is obliged to defend another from Injuries, or one People another. ¹ *Plato* is for having him punished, ² who does not keep off a Violence that is offered another. The same the ³ *Ægyptian* Laws provided for; but yet it is plain, that in case there appears any manifest Danger we are not bound to do it; for a Man may prefer the Preservation of his own Life and Goods before that of the Life and Goods of another. And thus do I think that Expression of *Tully* is to be construed, ⁴ *He who does not take the injured Person's Part, and oppose the Violence done him, if he can, is as much to blame as if he forsok his Parents, his Country, or his Friends*: By, if he can, we are to understand, with his own Convenience: For he himself tells us elsewhere, that ⁵ *There are some People, perhaps, whom it is no Disreputation not to protect*. *Sallust* in his History has these Words, *All who when their own Affairs are as they could wish them, are invited to a confederate War, should thoroughly consider whether they may without any Hazard still be at quiet; and then, whether what they are solicited to, be a Thing that is just, safe and honourable, or whether it would not be a Disgrace to them to comply*.

VII. Yet it may be let alone without any Crime if one's afraid for himself, or that he must kill the Aggressor.

2. Nor should we overlook this Saying ⁶ of *Seneca*, *I will run to any Man's Assistance who is just a perishing, provided I can do it without ruining myself; or if I must be ruined, that my Ruin may be the Purchase of some Person, or of some Affair of great Importance*. But he is not then bound ^a to do it, if the assaulted cannot be rescued without killing the Aggressor. ⁷ For if he who is set upon may value the Invader's Life above his own, as we elsewhere have told you he might, he who is really of Opinion that he does so, or that he ought to do so, is no ways to blame; especially, since on the Aggressor's Side there is a greater Danger of an irrecoverable and eternal Loss.

^a *Lessius*, 1. 2. c. 4. Dub. 15.

VI. (1) *Homo in adiutorium mutuum generatus est. De Ira, Lib. I. Cap. V.*

2 *Ἐχει γὰρ καὶ ἀφ' ἑαυτοῦ, &c.*

Supplic. Ver. 267. & seqq. The Passage quoted here by our Author from *St. Ambrose* has been already recited above, B. I. Chap. II. § 10. Num. 5. Note 18.

VII. (1) Our Author cites here in the Margin, *Lib. IV. De Legibus*, in which there is nothing like this. He meant to refer to the ninth Book, where however the Law is not general, as he makes it. The Philosopher speaks of those, who seeing a Son in his right Senses beat his Father or Mother, his Grandfather or Grandmother, do not aid the Person treated with so much Indignity by another, who on the contrary owed him all kind of Respect, p. 881. B. He had said the same Thing in the preceding Page, with some Modification, of those who see any one beaten by a Person twenty Years younger, or less.

2 The Rabbins are also for having such a Man punished. See *Moses, De Kotzi*, *Præcept. jubent. LXXXVII. LXXX. vetant. CLXIV. CLXV. GROTIUS.*

3 It was a capital Crime, whether they found a Man in danger of being killed upon the Highway, or treated cruelly in any other Manner. *DIOD.*

Biblioth. Histor. Lib. I. Cap. LXXVII. p. 49. Edit. H. Steph.

4 *Qui autem non defendit, nec obsistit, si potest, injuriæ, tam est in vitio, quam si parentes, aut amicos, aut patriam deserat. De Offic. Lib. I. Cap. VII.*

5 *Non defendi homines sine vituperatione fortasse possunt.* This we find in *AMMIANUS MARCELLINUS, Lib. XXX. Cap. IV. p. 643.* tho' the Passage is not amongst the Fragments, which have been collected of the last Words of *CICERO*. The other Passage from *SALLUST* is the beginning of *Mithridates's* Letter to *Arfaces*, King of *Persia*: *Omnes qui secundis rebus, &c. Frag. Lib. IV. Num. 2.*

6 *Succurram perituro, &c. De Benefic. Lib. II. Cap. XV.* The same Philosopher says in another Place, that one would defend a Person of Merit at the Expence of his own Blood, and even as to a Person of no Merit, if by crying out one could deliver him from Robbers he would willingly exert his Voice to preserve a Man's Life: *Dignum etiam impendio sanguinis, &c. Lib. I. Cap. X.* See what is said above, B. II. Chap. I. § 8. *GROTIUS.*

7 This is founded upon a Principle we have refuted elsewhere. It is certainly better to save the Life of an innocent Man, than that of a Criminal.

VIII. *Whether that War is just which is made for the Defence of another's Subjects, explained by a Distinction.*

VIII. 1. It is another Question, *Whether we have a just Cause for War with another Prince, in order to relieve his Subjects from their Oppression under him.* True it is, that since the Institution of Civil Societies, the Governors of every State have acquired some peculiar Right over their respective Subjects: As *Euripides* says in the *Heraclidæ* ¹.

Δίκαιοι δ' ἐσμεν, &c.

*We, who this City do inhabit, can
Ourselves dispense our Justice.*

Nor do the following Verses imply any Thing else:

^a Ex *Euripid.*
Frag. Phœnic.
apud *Barnes*,
v. 19, 20.

^b See *B. I. c.*
3. § 6. n. 1.

And *Thucydides* ^b amongst the Tokens of Royalty, puts the Supreme Power of Justice, as well as a Power of making Laws, and constituting Magistrates. To which alludes that of *Virgil*:

^c *Æneid. I. 1.*
v. 142.

^c *The Realms of Ocean and the Fields of Air
Are mine, not his; by fatal Lot to me
The liquid Empire fell, and Trident of the Sea.*

Dryd.

And that of *Ovid* not unlike it:

^d *Metamor.*
l. 14. v. 784,
785.

^d *Nor may the Gods the Acts of Gods rescind.*

And that also of *Euripides*,

^e *Hippolyt. coron. v.* 1328.
ἐς ἑσπερ.

^e *The Rule and Custom of the Gods is this:
That none must e'er another's Will oppose.*

^f *Fr. Victor.*
De Ind. rel.
n. 15.

The Reason of this is, as ² *St. Ambrose* very justly explains it: *Lest by intruding into each other's Provinces they should quarrel among themselves.* And the *Corinthians* in *Thucydides* reckoned it very equitable, ³ that every one should punish ⁴ his own; and *Perseus* in his Discourse to *Martius*, refuses to make any Apology for himself, for what he had acted against the *Dolopes*; For, says he, *I only put my own lawful Authority in Execution, since they were my Subjects, and under my Command*; but those Reasons may take place where Subjects are really in Fault, or, if you please, when it is ⁵ uncertain whether they are or no. ^f For to this End was the Distribution of Empires first made.

2. But if the Injustice be visible, as if a ⁶ *Busiris*, a ⁷ *Phalaris*, or a *Thracian* ⁸ *Diomedes* exercise such Tyrannies over Subjects, as no good Man living can approve

VIII. (1) The Herald *Copraeus* demanded on the Part of *Eurystheus* the *Heraclidæ* to be delivered up; who had taken Refuge at *Athens*, and had been, as he says, condemned to die in their own Country. To which he adds, that every Prince has a Right to execute Justice upon his own Subjects, *Ver. 143, 144.*

² *Qui [Poetæ] mundum in tres ferunt esse divisum, &c. Offic. Lib. I. Cap. XIII. in fin.*

³ It relates to Allies and not Subjects. The Orator of the *Corinthians* says, that every State had a Right to revenge the Injuries done it by its Allies. *Lib. I. Cap. XLIII. Edit. Oxon.*

⁴ *St. Austin* says, *Lib. II. De libero Arbitrio: It is no Argument of Justice to punish People who are under another's Jurisdiction, because it is a Proof of a Man's Goodness to do Strangers a Kindness.* *PROCOPIUS, Vandal. I. παρ' ἑαυτῶν &c. It is proper that every Man should look after his own Province, and not concern himself with Affairs of other States.* *GROTIUS.*

This last Passage is in *GELIMER's* Answer to the

Emperor *JUSTINIAN's* Letter, *Cap. IX.*

⁵ In doubtful Cases the Presumption ought to be in Favour of the Sovereign. Otherwise a Handle would be given to other Powers for intermeddling in what passes out of their own Dominions.

⁶ This *Busiris* is said to have been King of *Egypt*; and to have sacrificed the Strangers who came into his Country to *Jupiter*. Thus he is represented in fabulous History. See *APOLLODORUS, Biblioth. Lib. II. Cap. V. § 11.* But some antient Authors justify him as to this Charge; and others maintain, that there never was such a Person as *Busiris*. See *MARSHAM's Canon Chronicus*, p. 50. 79. Edit. *Lipf.*

⁷ He was a very cruel Tyrant of *Sicily*, and was said to have eaten his own Son. See *Dr. BENTLEY's* learned Dissertation upon the Letters of *Phalaris*, p. 512, 513. Edit. 1699.

⁸ This King of *Thrace* is said to have fed his Horses with human Flesh. See *DIODORUS SICULUS, Lib. IV. Cap. XV.* *APOLLODORUS, Lib. II. Cap. V. § 8.*

of, the ⁹ Right of human Society shall not be therefore excluded. Thus ^e *Constantine* made War against *Maxentius* and *Licinius*; and other *Roman* Emperors against the *Persians*, or threatned them with it at least, ^h unless they left off persecuting Christians on the account of their Religion only.

3. And indeed tho' it were granted that Subjects ought not, even in the most pressing Necessity, to take up Arms against their Prince (which is what those very Gentlemen who are such Advocates for the Power and Prerogatives of the Crown, are, as we shewed you, ⁱ in suspense about) we should not yet be able to conclude from thence, that others might not do it for them. For whenever the Obstacle to any Action arises from the Person, and not from the Thing, then what one is not allowed to do himself, another may do for him; supposing the Case be such, as one Man may be serviceable in it to another. Thus for Instance, a Guardian, or any other, may carry on a Suit of Law for a Minor, because he is not capable of doing it himself; and any one ¹⁰ may without an Order or Commission plead for a Person absent. Now what prohibits the Subject to resist, does not at all proceed from a Cause, which is the same in a Subject, as in him who is not so; but from the Quality and Circumstance of the Person, which Quality does not pass to others.

4. And therefore, according to *Seneca*, ¹¹ I may make War upon a Man, tho' he and I are of different Nations, if he disturbs and molests his own Country, as we told you in our Discourse about Punishments, which is an Affair often attended with the Defence of ¹² innocent Subjects. Antient and modern History indeed informs us, that Avarice and Ambition do frequently lay hold on such Excuses; but the Use that wicked Men make of a Thing, does not always hinder it from being just in itself. *Pirates sail on the Seas, and Thieves wear Swords, as well as others.*

IX. 1. But as we have already shewed, ^a that those Alliances which are entered into, with the Design and Promise of Assistance in any War, without regarding the Merit of the Cause, are altogether unlawful; so there is no Course of Life ^b more abominable and to be detested, than that of mercenary Soldiers, who without ever considering the Justice of what they are undertaking, fight for the Pay; who

By their Wages the Goodness of the Cause compute.

Which ¹ *Plato* proves from *Tyrtæus*. And this is the very Thing that *Philip* ² objected

^e *Vistor. De Indis. Rel. p. 2. n. 13.*
^h See another Instance in the History of Pepin, apud Fredegar. in fin.

ⁱ B. 1. c. 4. § 11.

IX. That it is very unjust for People to enter into Confederacies, or to list themselves Soldiers for Money, without any Regard to the Reasons of the War.

^a § 4. n. 2.
^b Sylvest. in verbo Bellum, Part. 1. § 10. circa fin.

⁹ Every Man, as Man, has a Right to claim the Aid of other Men, in Necessity, and every Person is obliged to give it him, if in his Power, by the Laws of Humanity. See PUFENDORF, *Law of Nature and Nations*, B. III. Chap. III. § 1. Now a Man, neither does, nor can, renounce those Laws by entering into Civil Society; tho' he may justly be supposed under an Engagement not to implore a foreign Aid for slight Injuries, or even great ones, that affect only few Persons. But when all the Subjects, or the major Part of them, groan under the Oppressions of a Tyrant; the Subjects, on the one Side, re-enter into all the Rights of natural Liberty, which authorizes them to seek Aid wherever they can find it; and on the other, those, who are in a Condition to give it them, without considerable Prejudice to themselves, not only may, but ought, to endeavour with all their Power to deliver the oppressed; for this very Reason, that they are Men, and Members of human Society, of which Civil Societies are Parts.

¹⁰ This is what the *Roman* Law terms *Defensor*; a Term which our Author uses here, in Opposition to *Procurator*. See above, *Chap. X. § 2. Num. 3.*

¹¹ This Passage has been cited above, *Chap. XX. § 41. Num. 3.*

¹² All the Editions of the Original have: *Cum defensione innocentium conjuncta est*. But it is plain the Author, or the Printers, have left out the Word *Subditorum*. For it is always supposed, that Strangers oppressed, or injured, are innocent.

IX. (1) *Quod Plato ex Tyrtæo probat*. Our

Author expresses himself thus after having cited the Verse only in *Latin* in these Words:

— *Ibi fas, ubi plurima merces.*

He does not point out the Place of *PLATO*'s Works, which he had in his Thoughts, and which I shall here set down. There is not one Verse of *TYRTÆUS* in it, nor even a Thought of that Poet, that relates to the Application our Author makes of it. The Philosopher blames the Poet, because in his lofty Praises of Military Valour, he seems to have considered only that shewn against foreign Enemies. He avers, on the contrary, that those who signalize themselves in Civil Wars, are much the bravest; and alleges this Reason for his Opinion, that to preserve Fidelity and Integrity in the midst of such a War requires every kind of Virtue; whereas in a War against a foreign Enemy, a great Number, even of those who serve for Pay, will fight to the last Moment of their Lives, tho' most of them are only stupid, insolent, profligate Fellows, and the most imprudent of Mankind: Πιστός μὲν γὰρ καὶ ὁρμητός. &c. *De Legib.* Lib. I. p. 630. B. Vol. II. *Edit. H. Steph.* In speaking of the Intrepidity of those mercenary Soldiers, the Philosopher uses the Word διαβάτες, by which, as *HENRY STEPHENS* observes, he alludes to the two following Verses of *TYRTÆUS*, which he explains in Terms not very poetical:

Ἀλλὰ τις εὖ διαβάς μὲν ἴω ποσὶν ἀμφόλοισι
Σιληυθεὶς ἐπὶ γῆς, χεῖλος ὀδῶσι δακνών.

6 N

That

² objected to the *Ætolians*; and *Dionysius Milesius* censured the *Arcadians* for in the following Terms, ³ *Wars become a Trade, the Arcadians live upon the Greeks Misfortunes, and Groundless Wars engage them on any Side.* The Case of a Soldier, as ⁴ *Antiphanes* describes it, is really a miserable one,

Ὅς ἕνεκα τῆ ζῆν ἐρχεῖ ἀποθανέμεν,

Who to support his Life to Death resorts.

And ⁵ *Dion Prusæensis* argues thus, *What is there in the World that we have more necessary, or what can be more valuable to us than Life, and yet even this do People throw away for Money.*

^c *Bellinus, De re militari, par. 2. t. 2. n. 4*

2. Did they sell only their own Lives it were no great Matter: but they sell also the Lives of many an harmless inoffensive Creature: ^c So much more odious than Hangmen, ⁶ by how much it is worse to kill without a Reason, than with

That is to say, “A Man of Courage, being well “planted, stands firm upon his Legs, and bites his “Lips with his Teeth.” So that *TYRTÆUS* says nothing of Troops, that serve for Pay: It is *PLATO*, who speaks of them, without saying however, whether he blames or approves that Trade in itself; the Defects with which he reproaches them being applicable, according to him, only to *most of them*.

2 That Prince says, the *Ætolians* were much in the wrong to complain, that he disturbed the Tranquillity of their Allies, as they themselves had at all Times, if not expressly authorized, at least connived at, their Youth's serving against their Allies; so that it was common to see *Ætolians* in both Armies at War: *An quod a sociis, &c. Liv. Lib. XXXII. Cap. XXXIV. Num. 5.* See another antient Instance cited by our Author, *Lib. III. Chap. XX. § 31. Note I.* And add here what the late Mr. *BAYLE* says of the *Swiss* in the Article *Bullinger* of his *Dictionary. Hist. & Critic. Letter E. p. 696. B. Third Edition.*

3 Ἀγορὰ πολέμου, &c. which Passage our Author cites, and translates without saying from whence he takes it. But I have found it in *PHILOSTRATUS, Vit. Sophist. Lib. I. Cap. XXII.* And I observe that our Author has omitted the following Words, which clearly express the ill Repute of the *Arcadians* in regard to the Point in Question: Τοῖς κρινόμενοις ἐπὶ τῷ μισθοφορεῖν Ἀρκάσιον ἀγορὰ πολέμου, &c. This Omission is the more remarkable, because, if we may believe the last Editor of *PHILOSTRATUS*, the Passage will not otherwise include what our Author finds in it; for he translates the last Words thus: *The War is carried on every where, and none can blame the Arcadians on that Account:* And instead of saying, *That the Arcadians made a Market of War*, *DEMOSTHENES*, whom the Sophist introduces speaking here, says, according to our learned Interpreter, that the *Greeks make a Trade of the War amongst the Arcadians, by endeavouring to list them; whereas it was their Custom to endeavour to list themselves wherever they could.* It will not be improper to add here a Passage, which I find in *THUCYDIDES*, and which confirms what is said there of the *Arcadians*. That Author observes, that the *Arcadians* were accustomed at all Times to engage in Wars against any Enemy whatsoever; and he says, that in the *Syracusan War*, there were auxiliary Troops of *Mantinea*, and other Parts of *Arcadia*, that served the *Athenians* even against those of their own Nation, who were in the Pay of the *Corinthians*, the Allies of the *Syracusans*, *Lib. VII. Cap. LVII. Edit. Oxon.*

4 *PLUTARCH* expresses this in his *Bacchides*:

Suam qui auro vitam venditant. GROTIUS.

The last Passage is not in the Comedy cited by our Author, and I doubt whether it is in any other Piece of that Poet. It is not cited in the *Lexicon Plautinum* of *PAREUS*, which is very exact in pointing out all the Passages, where there is any Expression in the least remarkable. But I remember a Thought very like it in *MANILIUS*, in regard to those who sold themselves to fight in the Shows of Gladiators:

Nunc caput in mortem vendunt & funus arenæ.

Astronomic. Lib. IV. p. 87. Edit. Scalig. 1655. The second Greek Verse of *ANTIPHANES* is in *STOBÆUS*, where there is one before it, which, joined with it, makes the whole Passage, to be, *That it is taking pay of Death, to hazard Life for the Means of living:*

τίς δ' οὐχὶ θανάτου μισθοφόρος ὧ φίλῳ,
Ὅς ἕνεκα, &c.

Florileg. Tit. LIII. Our Author cited here also a Passage from *SENECA*, which however treats of something else. The Philosopher ridicules the Passion for amassing Riches at the hazard even of Life, in order to employ them in Things, which contribute to shorten Life: *Magis ridebis, quum cogita-veris, vitā parari ea, in quibus vitā consumitur. Quæst. Natur. Lib. V. Cap. XVIII. in fine, Lib. & Cap.*

5 Καὶ τοι τί τῆ ζῆν, &c. which the ingenious *LA BRUYERE* has expressed thus in his excellent *CHARACTERS* of the Age: *There is nothing Men are more fond of preserving, and take less Care of, than their Lives, p. 362. Edit. de Brux. 1697.*

6 *SENECA* says, *What can a Man call this but Madness? To carry our Dangers about us, and to invade People we know nothing of, to be angry without any Provocations to ruin and destroy all we meet with, and like so many wild Beasts, to murder a Man we have no Manner of Hatred against. Hoc vero quid aliud, &c. Lib. V. Cap. XVIII.* A German Poet, describing those who serve thus without examining whether the War be just or unjust, says, that they seek nothing but Pay; that they change Sides according as it suits their Interest, and look upon, as Enemies, whomsoever those that pay them please.

*Ære dato conducti cohors, & bellica miles
Dona sequens, pretiosque suum mutare favorem
Suetus, & accepto pariter cum munere bello,
Hunc habuisse, dator pretii quem jufferit hostem.*

GUNTHER. Ligurin. (Lib. VII. p. 389. Edit. Raub.) GROTIUS.

one. *Antisthenes* used to say, that ⁷ a common Executioner was abundantly better than a Tyrant ; for the one puts Malefactors to Death only, but the other the Innocent. ⁸ *Philip* of Macedon said of that Sort of Men, who got their Livelibood by fighting, that War was Peace to them, and Peace War.

3. War is no proper Employment, nay, it is so horrible, that nothing but mere Necessity, or true Charity, can make it lawful, as may be gathered from what has been said in the foregoing Chapter. To bear Arms is, in St. ⁹ *Austin's* Judgment, no Crime, but to bear Arms on the account of Booty is Wickedness with a Witness.

X. 1. Nay, it is so to fight for Pay, if that be the sole and principal View ; tho' it is otherwise very justifiable to receive Pay, for who (says St. Paul) ever goes to War at his own Cost ? 1 Cor. ix. 7.

X. To bear Arms for Pay only, or for the meer sake of Booty is a Crime.

⁷ STOBÆUS has preserved this Saying in his *Florilegium*. Tit. XLIX.

X. p. 632. Edit. H. Steph.

⁹ This Passage is quoted before as St. AMBROSE's, B. I. Chap. II. § 10. Num. 5. Note 17.

⁸ DIOD. SICUL. *Bibl. Hist.* Lib. XVIII. Cap.

CHAP. XXVI.

Of the Reasons that justify those who under another's Command engage in War.

I. WE have already treated of those who are at their own Liberty and Disposal ; there are others, who are in Circumstances of Obedience and Submission, such as Sons in Families, Slaves, Subjects, and likewise every ¹ individual Member of a State, if compared with the Body of the State of which he is a Member.

I. Who are they who may be said to be under another's Jurisdiction.

II. But those ^a too, if they are consulted by their Superiors, or it be left to their own Choice, either to have War or Peace, they ought to follow the same Directions, which were prescribed for those, who according to their own Discretion have Authority to make War in behalf of themselves and others.

II. What they must do in Case they are allowed to deliberate, or to have a free Choice.

III. 1. But if ^a they have Orders given them to take up Arms, as is usual, then if it plainly appears that the War is unlawful, it is their Duty not to meddle in it. It is the Doctrine not only of the Apostles, ¹ but of *Socrates* also, that we should obey GOD rather than Man, Acts v. 29. And we have the Opinion of the ² Hebrew Rabbins for not obeying our Prince, when he enjoins any Thing repugnant to GOD's Law. It was St. Polycarp's Saying a little before his Death, *δεδιδάκημεθα*, &c. ³ We have learnt to pay to Governments, to the Powers ordained by GOD, all due Honour, provided that Honour does not obstruct or hazard our eternal Salvation. And St. Paul's Advice, *Ephes. vi. 1.* is, Children obey your Parents ^a in the LORD,

^a *Ægid. Reg. De Act. Super. Disput. 31. n. 80.*

III. They must not take up Arms, tho' commanded, if they are persuaded that the Cause is bad.

^a *Fr. Viñ. De Jure Belli, n. 22.*

I. (1) See PUFENDORF, *Law of Nature and Nations*, B. VII. Chap. V. § 5.

III. (1) PLATO, *Apolog. Socrat.* (p. 29. D. Vol. I. Edit. H. Steph.) The Philosopher, *Apollonius Tyanæus*, opposed the Edict of Nero, to prescribe Philosophy. with this Verse of SOPHOCLES, (*Antigon.* Ver. 456.

Οὐ γὰρ τι μοι Ζεὺς ἦν κηρύξας τάδε.

This was not enjoined by Jupiter, (PHILOSTRAT. *Vit. Apollon. Tyan.* Lib. IV. Cap. XXXVIII. Edit. Olear.) GROTIUS.

2 JOSEPHUS tells us, that some young People of his Nation, upon being asked by the General of Herod's Troops, why they had thrown down the golden Eagle, which that Prince had caused to be put up over the great Gate of the Temple ; replied boldly, he ought not to be surprized that they chose rather to obey the Divine Laws of MOSES, by which the consecrating such Representations was prohibited, than the Decrees of Men. *Antiq. Jud.* Lib. XVII. See the Passage of a Rabbin cited by

DRUSIUS upon Acts v. 29. GROTIUS.

3 EUSEB. *Hist. Eccles.* Lib. IV. Cap. XV. See our Author's Treatise *De Imperio Summar. Potestatis circa Sacra*, Cap. V. § 5, 10, 11.

4 St. CHRYSOSTOM explains this Passage in the LORD, thus, *τὸ ἐν αὐτῷ οὐ μὴ προσερχομεθα Θεῷ*, That is in those Things you do not offend GOD by. And in his Letter *ad Patrem infidelem*, εἰ δὲ δὴ μισῶς, &c. For it is no small Reward that is designed us if we honour our Parents, whom we are commanded to regard as our Lords and Masters, and to obey both in Words and Actions, provided they order us nothing that is prejudicial to Religion. It is thus that you must understand that of St. JEROME, *Per calcatum perge Patrem, Go on tho' over the Belly of thy Father* ; which is a rhetorical Expression, borrowed from the Rhetorician *Latro*, in SENECA ; and thus too what you have in St. AMBROSE, *De Virginitate*, and in St. AUSTIN, *Epist. XXXVIII.* *Ad Lætum*, and in the fourth Canon of the first Council of Nice, according to the Arabick Translation. GROTIUS.

for

for this is right. Upon which St. Jerome says, ⁵ it is a Sin in Children not to obey their Parents, but because Parents may command something that is ill, he added, in the LORD. And ⁶ of Servants he subjoins, When their Master, according to the Flesh, bids them do any Thing different from the Injunctions of their LORD, according to the Spirit, they are not to obey. And in another Place, they are subject to Parents and Masters only in such Things as are not against the Commandments of GOD. For that same Apostle had declared before, Ephes. vi. 8. that every Man, whether he was Bond or Free, should receive from GOD according to his Works. And Tertullian ^b tells us, that the Apostle's Precept ⁷ of obeying Magistrates, Princes, and publick Powers, is sufficient Instruction for us to Obedience, but only so far as our Religion permits. In the Martyrology Sylvanus the Martyr says, ⁸ On this Account do we condemn the Roman Laws, that we may observe the Commands of GOD. To ⁹ Creon in Euripides making this Demand,

It is not fit my Orders be obey'd?

Antigone replies,

No; if you order what's unjust and cruel.

And Musonius says, that ^c if any one does not comply with his Father, ¹⁰ the Magistrate, or his Master, in such Commands as are scandalous and unlawful, he is neither Disobedient, Injurious nor Wicked.

2. Gellius ¹¹ does not allow that we should do every Thing a Father Commands. For what, says he, if he should command me to betray my Country, to murder my Mother, or to do any other such horrid and impious Act? And therefore the middle Opinion seems the best and most secure, that in some Cases we ought to obey him, in others not. And Seneca ¹² the Father says, we are not to yield Obedience to all Sorts of Commands. And ¹³ Quintilian, There is no Necessity that Children should do all that their Parents bid them. There are several Things which cannot be lawfully done; for Instance, if a Father commands his Son to pass a Judgment against his Conscience; to witness or to vote in a Matter, which he knows nothing of. If you should order me to fire the Capitol, to seize on the Castle, I might then safely answer, this is what ought not to be done. Seneca says further, Neither is it lawful for us to command all

⁵ Peccatum filiorum est, Vol. IX. p. 237. C. Edit. Froben.

⁶ St. CHRYSOSTOM, 1 Cor. vii. 24. καὶ ὁ δὲ εἰς, &c. For the Servant too has his Limits prescribed him by GOD. And it is particularly enjoined him how far to go, beyond which he must never pass. For when his Master commands him nothing disapproved of GOD, he is to be punctually followed and obeyed, but no farther. And CLEMENS ALEXANDRINUS speaking of a good Wife, πάντα τῷ ἀνδρὶ, &c. She complies with her Husband in every Respect, nor does she do any Thing against his Inclinations, unless what she thinks may be of some Consequence in regard to Virtue and her own Salvation. GROTIUS.

The Passage of CLEMENS ALEXANDRINUS is in his Stromata, Lib. IV. Cap. XIX. p. 620. Edit. Oxon. Potter.

⁷ See some illustrious Examples, both of Punishment and Commendation, in 1 Sam. xxii. 18, 19. 1 Kings xviii. 4. 13. 2 Kings i. 10. 12. 14. And among Christians, Manuel and George refused to execute the Order for killing Augusta, NICETAS in his Life of Alexius, Manuel's Son. (Cap. XVI.) GROTIUS.

⁸ Idcirco Leges Romanos, &c. In Martyrolog.

⁹ CR. Πῶς; πάντ' ἀλλὰ μὴ δ' δίκαιον ἐκτελεῖν;

ANT. Οὐκ, ἢν πονηρὸν τ' ἢ κακῶς τ' εἰρημένον. Supplic. Ver. 1642, 1643.

¹⁰ There are two noble Instances among the Heathens, of some who would not obey their Princes in a dishonest Action, that of Papinian is sufficiently celebrated, and the other is of Helpidius in AMMIANUS XXI. And Severus would not pardon those who had killed a Senator, tho' by the Empe-

ror's Orders. See XIPHILINUS. GROTIUS.

The Emperor Caracalla having caused his Brother Geta to be put to Death, would have obliged Papinian, as some say, to compose a Discourse, to excuse that Murder before the Senate or People. But the Lawyer replied, That it was not so easy to excuse, as to commit a Parricide; and that it was a second Parricide, after having deprived an innocent Person of his Life, to accuse him of Crimes, and to endeavour to blast his Memory. SPARTIAN, in Antonin. Caracalla, Cap. VIII. IX. As to the second Instance, Constantius having commanded the Captain of the Life-Guard to put an innocent Person to the Rack, he refused it, desiring the Emperor to dismiss him from his Office, and give that Commission to another. This Helpidius was not a Pagan, as our Author supposes, but a Christian. See VALOIS upon the Passage here quoted. In regard to Severus, he decreed, that whoever killed a Senator, whether the Emperor, or any one by his Order, himself and his Children should be deemed Enemies of the State.

¹¹ Neque autem illa [sententia] &c. Noët. Attic. Lib. II. Cap. VII.

¹² Non omnibus imperiis parendum est, &c. Lib. I. Controvers. I. p. 80.

¹³ Ergo non omnia necesse est facere liberis, &c. Declam. CCLXXI.

The same Author maintains, that the Gratitude we owe a Father and Mother, does not oblige us to do every Thing they command; for at that rate, Kindnesses would be very burthensome and dangerous, since they would reduce us to the Necessity of committing even Crimes: Non omnia esse præstanda, etiam parentibus, &c. Declam. CCCXXXIII.

Things

^b De Idol. c. 15.

^c These Words are in Stobæus, and are part of a pretty long Discourse, in which the Subject is treated at large. Florileg. Tit. 72. The Original is ὧς, &c. p. 458. Edit. Gefner. 1549.

Things; nor are our Servants bound to obey us in all Things; they shall not obey us, when we command them to do any Thing against the State; they shall not assist us in our Crimes. Sopater says *ἔδει*, &c. We must obey a Father, and we do well to obey him, provided his Commands are according to the Laws; but if they are contrary to Honesty, it is by no Means proper. ¹⁴ Stratocles was formerly laughed at for aiming to constitute a Law at Athens, that whatever pleased King Demetrius should be reckoned an Act of Piety towards the Gods, and of Justice among Men. Pliny in his Epistle to Minutius says, that he had made it his Business to demonstrate, ¹⁵ that Obedience was in some Cases a Crime.

3. Those Civil Laws that readily pardon slight Offences, are favourable too to those who are under a Necessity of obeying, but not in all Cases. For they except ¹⁶ those Crimes which are of a very heinous and flagitious Nature, being apparently and in themselves wicked and detestable, as ¹⁷ Tully speaks; or as ¹⁸ Asconius explains it, such barefaced Villanies as one ought of one's self, and from the Light of Nature, without having any Occasion for the Opinion of a Lawyer in the Matter, at the first View to recoil and fly from.

4. ^d Josephus relates from Hecataeus, that the Jews who bore Arms under Alexander the Great, could neither by Scourges, ¹⁹ nor any other Abuses, be compelled, together with the other Soldiers, to bring Earth for the Reparation of the Temple of Belus at Babylon. But we have an Instance more suitable to the Affair in Hand in the Thebæan Legion, which ^e we spoke of before; and in ²⁰ Julian's Soldiers, of whom St. Ambrose writes thus; Julian the Emperor, tho' an Apostate, had Christian

^d Contr. Apion.
l. i. p. 1048,
1049.

^e B. i. c. 4.
§ 7. n. 9. &
seq.

¹⁴ PLUTARCH. Vit. Demet. Vol. I. p. 899, 900. Such was the Bond Andronicus Comnenus demanded of Basilus Camaterus, *ἐκείνα ἐν τῷ ἀρχιερατικῷ, &c.* That in his patriarchal Office he should do every Thing that Andronicus had a Mind to, however unlawful it was, and that on the other Hand he should do nothing but what Andronicus pleased. NICETAS CHONIAT. in Alex. Comnen. (Cap. XIV.) GROTIUS.

¹⁵ Horum antequam crimina, &c. Lib. III. Epist. IX. (Num. 14. Edit. Cellar.) TERTULIAN says, that he who commands an evil Action, deserves Punishment more than the Person who commits it; since the latter himself is not to be excused, tho' he acts only in Obedience to the other's Commands: *Plus ceditur, qui jubet, quando nec qui obsequitur, excusatur.* De Anima, (Cap. XL.) He observes elsewhere, that Justice is never more perfectly exercised amongst Men, than when it searches out those, who were only the Instruments in an Action, in order to their being punished or rewarded as well as the Authors of it who made use of their Service: *Quum humana Censura, &c.* De Resurrectione Carnis, (Cap. XV.) See GAILLIUS, De Pace publica, Lib. I. Cap. IV. Num. 14. GROTIUS.

¹⁶ Ad ea, quæ non habent atrocitatem, &c. Digest. Lib. L. Tit. XVII. De divers. reg. Juris. Leg. CLVII. There is another Law, which supposes, that a Master commands his Slave to kill a Man, to rob, or commit Piracy: *Servus non in omnibus rebus, sine pœna, domino dicto, &c.* Leg. XLIV. Tit. VII. De obligat. & action. Leg. XX. See Mr. NOODT, Ad Legem. Aquil. Cap. X. and Observat. Lib. II. Cap. XIV.

¹⁷ Neque in ulla [lege] præteritum tempus, &c. In Verr. Lib. I. Cap. XIV.

¹⁸ Maleficia sponte, &c. In hoc loc.

¹⁹ In the Persuasion, that the Jewish Soldiers were in, that they should violate their Law, in serving as Workmen to carry Earth for rebuilding the Temple of a false God, their Resolution was undeniably laudable. But to consider the Thing in itself, I do not know whether their Scruple was not ill founded. Indeed, if before the Babylonish Captivity, a King of Israel or Judah had designed to

erect a Temple in his Dominions to some false Divinity, his Subjects might have refused all Labour necessary for building such an Edifice; because in doing that Office, they would have contributed to the Introduction of Idolatry in a Country, from which GOD would have it entirely banished. And therefore Uriah the Priest, of whom the Scripture speaks, did wrong to execute the Order of Abaz, in building him an Altar after the Model of that he had seen at Damascus, 2 Kings xvi. 10, &c. But here the Case is different. Idolatry had reigned long at Babylon, and would no less have reigned tho' some Jewish Soldiers had refused to carry Stones or Earth; that is to say, to do a Thing indifferent in itself, by the Order of a Prince, in whose Service they were. Besides, Alexander did not require this of them, as a Token of their abjuring Judaism; he demanded it as a Duty purely civil. So that they ought to have made no more Difficulty of carrying Stones or Earth for rebuilding the Temple of Belus, than Naaman, the Syrian, did, with the Prophet Elisha's Approbation, of accompanying the King of Syria in the Temple of Rimmon, and of bowing himself down to let his Master lean upon him.

²⁰ For Julian did not altogether abstain from offering Violence to the Christians, especially when he thought he had some Colour for it. He is called in St. JEROME's Epitaph. *Nepotiani*, (p. 26. Tom. I. Edit. Froben.) *Julian, the Butcher of the Christian Army.* And St. AUSTIN, Lib. I. Cap. XXXIII. relates, that the Persecution at Antioch was begun by his Order, and that a certain Youth was put to the Rack. In the Martyrologies, there is mention made of St. Eliphius a Scot, and thirty three of his Companions beheaded by Julian's Order, between the Cities of Toul and Grand. See also JOANNES ANTIOCHENUS, in Exc. ex MS. Peiresc. St. AUSTIN, Epist. L. Ad Bonifacium, cited by GRATIAN, Caus. XI. Quæst. III. *Julian was an unbelieving Prince, was he not an Apostate and an Idolater? Christian Soldiers served an Infidel Emperor, but when they came to the Cause of Christ, they acknowledged no Sovereign but him in Heaven: When he was for having them worship and offer Incense to Idols, they preferred GOD before him.* GROTIUS.

Soldiers under him, to whom when he said ²¹ march in Defence of the State, they instantly obeyed; but when he said draw upon the Christians, then they owned no other Sovereign but the King of Heaven. So we read of some publick Executioners who being converted to Christianity, chose rather to die, than be concerned in the Execution of Christians.

¹ *Victor. De Jure Belli, n. 23.*

IV. *What they must do if they are not satisfied, whether the Cause be good or bad.*

5. It will amount to the very same Thing, if a Man is ²² persuaded ¹ that what he is commanded to do is unlawful; for to him it continues to be so, till he is convinced of the contrary, as appears by what has been said above.

IV. 1. But suppose he be not satisfied one way or other, must he forbear, or comply? The general Opinion is that he should comply; neither should that celebrated Maxim prohibit him, *Act not at all in a doubtful Case*; for he who is scrupulous in Speculation, may have no Scruple at all in Practice: Because he may believe, that in dubious Matters he is to yield Obedience to a Superior. And indeed it must be owned, that in many Cases the Distinction of the Judgment into Speculative and Practical, takes Place. The Civil Laws of other Nations, as well as of the Romans, do ¹ not only indemnify those who obey in such a Case, but will allow of no civil Action against them: *He, say they, ² does the Damage, who commands it to be done; but he is in no Fault who is obliged to obey. The Necessity of obeying him who has Power to command furnishes a lawful Excuse*: And such other Maxims.

2. And ³ Aristotle himself in the fifth of his *Nicomachia*, reckons the Slave that does what his Master commands, among those who tho' they do what is unjust, yet act not unjustly: And says, that it is the Author of the Action who is the unjust Person, because a Slave has not all the Judgment necessary ⁴ to distinguish what is just from what is unjust, according to the Proverb,

Ἡμισυ τ' ἀρετῆς ἀποαίρει δόλιον ἥμαρ

The Day a Man's a Slave he loses half his Wit.

And this other like it,

Ἡμισυ γάρ τε νῆξ, &c.

²¹ This Passage, which is not in St. AMBROSE, has been cited above, *B. I. Chap. II. § 10. Num. 9. Note 38.* where my Observation upon it may be seen. But St. AUSTIN has something very like it, which our Author cited at the End of the preceding Note: JULIANUS, *Exstitit infidelis Imperator, &c.* Which our Author quotes from *Lett. L.* of that Father to *Boniface*; and he adds, that the Passage is inserted in *Jus Canonic. Cauf. XI. Quæst. III. Can. XCVIII.* But GRATIAN gives it us, as from the Commentary on the Book of *Psalms*: And we are referred in the Margin to *Psal. cxxiv.*

²² The Word *falso*, or one of the same Signification has been omitted here in all the Editions of the Original.

IV. (1) St. CHRYSOSTOME, *De Providentia III. πολλοὶ γὰρ ἀρχόντων, &c.* Many a Magistrate being impeached of putting People unjustly to Death has been punished, but Nobody ever indicted the Executioner, who was employed in the Murder, tho' the very Person whose Hands committed it, nor ever inquired after him, because the Necessity he was under excuses him as well by the Dignity of his Principal as his own Subjection. And ULPIAN out of CELSUS says, *That a Servant is in no Manner of Fault who only obeys his Master*, *Lib. II. D. De Nox. Act.* He is supposed to do it against his Inclinations, who only complies with his Father's or his Master's Order. *D. De regulis Juris*, and C U J A C I U S there. SENECA: *There is Force upon a Person who is willing.* Add the Lombard Law, *Lib. I. Tit. IV. Chap. II.* Mithridates dismissed Attilius's freed Man unpunished, tho' guilty of an intended Murder against him, and the Friends of his Son who had revolted from him. APPIANUS, *Mithridatic.* And Tiberius Gracchus was acquitted from the Crime of the Numantian Treaty, because it was by another's Command that

he had offended. GROTIUS.

² *Is damnum dat qui jubet dare: ejus vero nulla culpa est, cui parere necesse est.* Digest, *Lib. L. Tit. XVII. De diversis Reg. Jur. Leg. CLXIX. Liber homo, si jussu alterius*, *Lib. IX. Tit. II. Ad Leg. Aquil. Leg. XXXVII. init. Qui jussu judicis, &c.* De diversis Reg. Jur. *Leg. CLXVII. § 1.* GROTIUS.

³ He puts the Slave acting by his Master's Orders in the same Class with inanimate Things used in killing, for Instance, or the Hand by which one strikes, *Cap. XII.* He expressly in another Place calls Slaves, animate Instruments, and Instruments, inanimate Slaves: *Ὁ ᾧ δόλῳ, ἐμψυχον ὄργανον τοῦ δ' ὄργανον, ἀψυχον δόλῳ*, *Lib. VIII. Cap. XIII.*

⁴ This, in my Opinion, is what our Author means by these Words: *In famulo vis deliberatrix non est*; as when he says above of Infants very young, that they have not *vis electrix*, *Chap. V.* of this Book, § 2. num. 1. And from this want of Judgment it is supposed, according to him, that Slaves have not the Liberty to deliberate upon what their Master's command, in order to know whether it be just or not. Hence, when he afterwards applies this Maxim to Children even at Years of Discretion, and to Subjects, his Thought is, that according to those whose Opinion he relates, a Son does not know, so well as his Father, what he ought, or ought not to do; and that Subjects have not a sufficient Knowledge of the Affairs of Government, to intermeddle in judging of what the Sovereign commands. For which Reason the Orator THEMISTIUS, (*Orat. IX.*) speaking of War, compares Princes to Reason, and Soldiers, who serve under him, to Anger, as our Author observes a little lower in a short Note. It is indeed often but not always so.

*Half understanding Jove allots to those
Whom he appoints to lead a servile Life.*

And that which *Philo* uses :

Δεσλος πρέφουκας ε' μέτεσι σοι λόγος.

⁵ *Thou'rt a Slave : Thou no Reason hast.*

And to the same Purpose is that of *Tacitus*, ⁶ *The Gods have given the Prince the Power to judge sovereignly, leaving Subjects the Glory to obey.* And the same Writer informs us, that *Tiberius* ⁷ cleared the Son of *Piso* from the Imputation of Sedition, because his Father had laid his Commands upon him, whose Commands he could not refuse. ⁸ *A Servant, says Seneca, is not a Judge of the Legality of his Master's Commands, it is his Business to execute them.*

3. And *St. Austin* is of the same Opinion as to what regards War in particular, which is the present Question, for he says, ⁹ *If it happens that a good Man bears Arms even under a sacrilegious King, he may safely venture to fight when he is commanded, without doing any Thing contrary to the Order established for the Tranquillity of civil Society, provided he is fully certain, that the Commands enjoined him are not repugnant to the Laws of GOD, or is not certain whether they be so or no : For in this Case the King perhaps may be guilty on the account of his commanding what is ill, but the Soldier is justified in his Obedience.* And in another Place, *When a Soldier in obeying his Officer who has a Right to command him, kills a Man, ¹⁰ the Laws of his Country acquit him of Murder ; nay, if he does not do it he is reputed a Rebel ; whereas had he done it of his own Head, he had been guilty of Murder.* So that that very Fact which would have punished him without an Order for it, would also punish him for neglecting that Order. And therefore it is an Opinion commonly received, ^a that as to Subjects a War may be just on both Sides, that is, exempt from ¹¹ Injustice ; agreeable to which is that of the Poet,

*To know in War which Side the juster is,
Is none of our Business.*

4. There is however some Absurdity in this. And ^b *Adrian*, a Dutch Man, who was the last *Cisalpine* Pope, maintained the ^c contrary, which is proved not from that particular Reason which he alledges, but by this more convincing one, that he who doubts in Speculation, ought in his Practice to make choice of the safer Side. And the safer Side is this, ¹² not to go to War at all. The Essences are mightily

⁵ This Verse is in the Treatise of *PHILO Judæus* intitled, *Every good Man is free*, p. 871. D. Edit. *Paris*. For the others, he has apparently taken the first from *LONGINUS*, who quotes it as *HOMER's*, *Ses. XLIII.* That Rhetorician had a Passage of the *Odyssey* in View, *Lib. XVII. Ver. 322, 323.*

Ἡμισυ γὰρ τ' ἀρετῆς ἀποαινύσαι εὐεγούπα Ζεὺς
Ἀνέγκ', εὐτ' ἂν μιν κατὰ δέλιον ἡμᾶρ ἔλθῃν.

These are without Doubt the two Verses our Author gives as different from the first, tho' like it, without mentioning from whence he has them. He had read them in *PLATO*, who quotes them exactly in the same Manner, *De legibus*, *Lib. VI. p. 777. A. Vol. II. Edit. H. Steph.* The Sense is indeed much the same.

⁶ He puts this into the Mouth of a Roman Knight speaking to *Tiberius* : *Tibi summum rerum judicium Dii dedere : Nobis obsequii gloria relicta est.* *Annal. Lib. VI. Cap. VIII. Num. 5.*

⁷ *Post quæ Tiberius adolescentem [Pisonem] crimine, &c. Annal. Lib. III. Cap. XVII. Num. 1.*

⁸ *Servus herilis imperii non censor est, sed minister, Lib. III. Excerpt. Controv. IX.*

⁹ *Quum ergo vir justus, &c. Contra Faust. Lib. XXII. Cap. LXXV.*

¹⁰ The same *St. AUSTIN* in his first Book *De libero Arbitrio.* *If killing a Man be Murder, Murder may sometimes be committed without a Crime ; for a Soldier who kills his Enemy, and a Judge or the Executioner who kills a Malefactor, and he who unawares and without Design lets a Weapon fall out of his Hand, do not seem to me to be any Ways to blame, when they kill a Man : Nor indeed is it usual to call such People Murderers.* *GRATIANUS* has inserted this in *Caus. XXIII. Quæst. V. GROTIUS.*

¹¹ Our Author here cites two half Verses, without saying from whence he has them.

— *Quis justius indicit arma,
Scire nefas.* —

LUCAN says this is in regard to the War between *Cæsar* and *Pompey*. *Pharſal. Lib. I. Ver. 126, 127.* The Reason he alledges for this Uncertainty is, that the Gods declared for *Cæsar*, but wise *Cato* for *Pompey* :

— *Magno se judice quisque tuetur :
Victrix causa Diis placuit, sed victa Catoni.*

A Thought which has been censured with Reason, as too bold, and injurious to the Divinity.

commended,

^a *Sylv. verb. Bellum*, part 1. n. 9. *Qu. 4. Cast. in Digest. De Just. & Jure*, Leg. 5. *Soto*, l. 5. *Q. 1. Art. 7. and Q. 3. Art. 3. Vic. De Jure Bell. n. 32. Cavar. Ad Cap. peccatum*, part 2. § 10. n. 6.
^b *Quæst. Quod. l. 2.*
^c See Instances of other Authors, who follow this Opinion, in *Lambert. Scafnaburgensis.*

commended, because, among other Things, they took an ¹³ Oath, *To hurt no Body, tho' commanded to do it.* The ¹⁴ *Pythagoreans* followed their Example, who, as *Jamblicus* records, abstain from War for this Reason, that ¹⁵ *War introduces Murders, and gives them the Sanction of Law.*

5. The Danger of Disobedience on the other Hand, ought not to be objected: For when both are uncertain, he does not contract any Guilt, who sticks to that which he knows is the least of two Evils that he fears; for if the War be unjust it is no Disobedience to decline it. ^d Disobedience in such Cases is in its own Nature ¹⁶ a less Evil than Homicide, especially than taking away the Lives of many innocent People. The Antients tell us, that when *Mercury* ¹⁷ was charged with the Death of *Argus*, his Defence was, that he had *Jupiter's* Command for the doing of it, yet that the Gods did not presume to acquit him. Nor does ¹⁸ *Martial* altogether excuse *Pothinus*, one of *Ptolemy's* Guards, in the following Lines,

*Less criminal indeed Photinus is
Than Anthony, for what he did he had
His Master's Order for, but th'other's Fact
Was by his own Instigation done.*

^a *Bald.* ii. Conf.
385. *Sotus*, de
det. Secr.
Membr. 3. q.
2. in Resp. ad
1.

Nor is that which some produce to the contrary of any great Importance; ^e that if this should be allowed, the State would soon be ruined, because it is generally not convenient to let the People into the Reasons of the Prince's Designs, for tho' this be true of the Motives, yet it is not so of the justifying Reasons of War, which should be made ¹⁹ plain and demonstrable, and consequently, such as should and ought to be laid before all the World.

6. What *Tertullian* said a little too indistinctly perhaps of Laws, may be very justly applied to Proclamations for War. ²⁰ *Nor can a Subject discharge his Obedience to the Laws as he ought, if he does not know what it is the Law punishes: No Law should itself only be conscious of its Justice, but should communicate it too to those it expects a Compliance from. For indeed a Law is very much to be suspected, which does not care to submit to an Examination. And it is a tyrannical Law that*

¹² This is Right, when Men are at Liberty either to enter, or not to enter, into a War. But here it is necessary to compare the Uncertainty in regard to the Justice of the War, with the evident Obligation to obey a legal Superior. So that the safest Course is to obey; because no one can doubt his being obliged to obey him, who commands, and that his Command may have nothing unjust in it, tho' he is not assured that it is entirely just. Upon the Whole as to those Things, concerning the Justice of which there is some Reason to be doubtful, all honest and legal Methods should be tried, to prevent the Sovereign from resolving to lay us under the Necessity of doing them. See further what *PUFENDORF* says upon this Question, *B. VIII. Chap. I. § 8. or last.*

¹³ *JOSEPHUS*, *De Bell. Jud.* Lib. II. Cap. XII. p. 786. E. *PORPHYRIUS* has exactly the same Words, *De abstin. Animal.* Lib. IV. p. 388. *Edit. Lugd.* 1620.

¹⁴ See what is said above, *Chap. II.* of this Book, § 2. *Note 4.*

¹⁵ *De Vita Pythagor.* § 186. *Edit. Kuster.*

¹⁶ But the Slaughter made in a just War, and by the Necessity of War, not being actual Homicide, and in the present Case the Subject not being assured that the War is unjust, the least Evil on the contrary, is Obedience.

¹⁷ I cannot tell in what Work of the Antients our Author has found this Circumstance, and he had done better not to have alledged it; because, as *OBRECHT* observes upon it, the Example is not to the Purpose. *Mercury* might and ought to have known, that *Jupiter's* Order was manifestly unjust;

Argus being guilty of nothing but serving *Juno*, in her Design of preventing the criminal Gallantries of her Husband.

¹⁸ *Antoni tamen est peior, quam causa Pothini:
Hic facinus domino præstitit, ille sibi.*

Epigr. Lib. III. Ep. LXVI. ver. 5, 6.

This Example is still worse applied than the former. For every Body knows it was *Pothinus* himself who inspired King *Ptolemy* with the Design of causing *Pompey* to be assassinated, solely to ingratiate himself with *Cæsar*.

¹⁹ But besides that, it may happen, as *BOECLER* observes, (*Diff. de Religione Mandati*) that it may not be proper to alledge immediately the principal justifying Reasons; those Reasons, however clear, may be such that the greatest Part of the Subjects, and those for whom there may be most Occasion, will not be capable of conceiving their whole Force, on Account of the very Subject which requires Discussions above their Reach. Hence it would be easy for them to form Scruples, or to frame Pretexts from them for their Laziness, and Inclination to disobey. In general it is dangerous to admit, that a simple Doubt may dispense with Obedience to a lawful Superior; and it suffices to grant this Dispensation in Cases where the Injustice of the Command is evident and undeniable. It is just, where that is doubtful, that the Presumption should be in Favour of the Superior.

²⁰ *Neque civis fideliter, &c.* *Apologet. Cap. IV.* See also *Ad Nationes*, Lib. I. Cap. VI.

requires absolute Obedience, tho' it cannot alledge any good Reason to prove the Justice of it. ²¹ Achilles, in Statius, to Ulysses, who is inviting him to a War, says,

*Tell me the Causes of the Grecian War,
I fain would know them to excite just Rage.*

And ²² Theseus, in the same Poet,

*March chearful on, let the Justice of your Arms
Advance your Courage.*

It was ²³ Propertius's Observation, that

*The Cause does raise or sink the Soldier's Heart,
If that be bad, his Resolution's gone.*

Parallel to this is that of the ²⁴ Panegyrist, *So great a Share in War has a good Conscience, that Victory is rather owing to the Integrity, than to the Courage, of the Soldiers.* And accordingly some Men of Learning interpreted the Word יָרֵךְ, *Jarech*, he armed, ²⁵ Gen. xiv. 14. in this Sense, that Abraham's Servants were before the Engagement thoroughly informed by him of the Justice of his Arms.

7. And therefore Declarations of War used, as we shew you by and by, to be made publick, and the Reasons for it precisely expressed, that so all Mankind, as it were, might judge of the Justice of it. Prudence, ²⁶ (according to Aristotle) is indeed a Virtue peculiar to the Prince, but Justice belongs to every Man as he is a Man.

8. But Adrian's Opinion, before-mentioned, seems ^f absolutely to be relied on, if the Subject is not only in Suspence, but is, by probable Arguments, more enclined to believe that the War is unjust; especially if he be to take up Arms offensively, and not defensively.

9. And it is probable too, that an ²⁷ Executioner who is to put a condemned Malefactor to Death, ought to be acquainted with the Merits of the Cause, either by being present at the Trial, or by the Criminal's Confession, ²⁸ in Order to satisfy himself that that Person deserved Death; and this is still usual in some Places, and is what the Hebrew Law, Deut. xvii. 7. has an Eye to, when it enjoins, that when a Malefactor is to be stoned, the Witnesses shall throw the first Stone.

^f *Ægid. Reg. de Act. supern. Disp. 31. Dub. 5. n. 85. Bannes ii. 2. qu. 40. Molina, Tract. 2. Disp. 113.*

²¹ — *Quæ Danaï tanti primordia belli,
Ede: libet justas hinc sumere protinus iras.*
Achilleid. Lib. II. ver. 332, 333.

²² *Ite, alacres, tantæque, precor, confidite caussæ.*
Thebaid. Lib. XII. ver. 648.

²³ I have already quoted the Passage, upon our Author's Preliminary Discourse, § 28. Note 2.

²⁴ That Panegyrist is NAZARIUS, in his Panegyrick on Constantine, which is the ninth in the Collection which has been made of this Kind of Pieces. The Passage is, *Tantum etiam inter arma bona conscientia sibi vindicat, ut jam cæperit non virtutis magis, quam integritatis, esse victoria*, Cap. VII. Num. 2. Edit. Cellar.

²⁵ Some strain the Word יָרֵךְ, *Trained*, to the same Sense, and interpret it, *Informed by him*. Herod, in an Harangue to the Jews, after the Defeat in Arabia, is introduced, by JOSEPHUS, saying Εὐλομαι δὲ πρῶτον, &c. *I am willing first to shew you how justly we entered into this War, being necessitated to it from the Insults of our Enemies. For if you understood this, it must needs be a very great Incitement to your Courage.* GROTIUS.

The Sense which the Interpreters our Author speaks of, give to the Words of the Book of Genesis, is not well founded. There is great Reason

to believe that the sacred Historian intended to say only, that Abraham led his People armed, or provided with Arms to Battle. See Mr. LE CLERC upon that Place.

²⁶ In his Politicks, Lib. III. Cap. III. p. 268. Edit. Heinsii.

²⁷ This indeed, if it could be, were always best. But Executioners are generally such Sort of People, that it is impossible they should judge whether a Sentence be just or not. It is sufficient therefore to say, that they ought not to lend their Arm in an Execution commanded them, when convinced, or when they may be convinced, of the Innocence of the Person condemned, either by Proofs of Fact in which they cannot be deceived, or by Reasons of Right within their Comprehension. See what I have said of Officers and Serjeants, PUFENDORF, Law of Nature and Nations, B. VIII. Chap. I. § 6. Note 4.

²⁸ And therefore Saul's Servants, who had more Honesty and Goodness in them than Doeg, would not kill the Priests of Nob, 1 Sam. xxii. 17. And Abab's third Captain refused to hurt Elijah, 2 Kings i. 13, &c. And some Executioners converted to Christianity, did, for the future, renounce that Office, as a very dangerous Employment. See the Martyrology and Bede, Lib. I. Cap. VII. GROTIUS.

V. That it is an Act of Clemency and Goodness, in such a Case, for a Prince to dispense with the Service of his scrupulous Subjects, and in the Lieu of it to impose upon them some extraordinary Taxes.

V. 1. But if sufficient Satisfaction cannot be given to the Subjects, by explaining to them the Reasons of the War; it is a good Prince's Duty to impose upon them rather some ¹ extraordinary Tax, than a personal military Service; especially when there are others who are ready to serve him, whose Intention, be it good or bad, a just King may make Use of, as GOD sometimes does of the Devil and the Wicked; and as a Man is in no Fault, if, when pressed with Poverty, and in extreme Want, he borrows Money from a gripping Usurer.

2. Nay, tho' the Justice of the War is not at all to be questioned, yet we cannot judge it ² reasonable that Christians should be forced to carry Arms against their Consent; since to abstain from War, even when it is lawful to fight, is reckoned a greater Piece of Sanctity, ³ a Sanctity which has been constantly required from the Clergy, and from Penitents, and what is to all others recommended in several Manners. ⁴ *Origen* makes this Answer to *Celsus*, upbraiding the Christians for their Refusal of going to War, *To those who, being Strangers to our Religion, would command us to take up Arms for the State, and to kill Men, we thus reply, They who are your Idols Priests, and the Ministers of your reputed Gods, do keep their Hands undefiled, on the Account of their Sacrifices, that they may offer them up to your pretended Deities with innocent Hands, Hands with Murder unpolluted: Nor in War are your Priests ever listed. Now, if there be any Reason for this, then certainly you should reckon those, when others are in the War, to be, in their Way, under Arms too, who whilst, as the Priests and Worshippers of GOD, they preserve their Hands indeed pure from Blood, do yet with earnest Prayers contend with Heaven, both for them who are engaged in a just War, and for him who governs justly. In which Passage Origen calls every Christian a Priest, according to the Language of the Holy Writers, Rev. i. 6. 1 Pet. ii. 5.*

VI. When Subjects may lawfully take up Arms in an unjust War.

VI. 1. But yet I am of Opinion that it may sometimes so fall out, that not only in a doubtful War, but even in one manifestly unjust, Subjects may lawfully take up Arms in their own Defence: For since an Enemy, tho' carrying on a just War, cannot have any Right, truly or in Conscience, to put to the Sword such

V. (1) But as HENNIGES, one of the Commentators upon this Work, observes here, if the Prince has no Right to compel his Subjects to serve when they doubt the Justice of his Arms, he will neither have a Right to impose Subsidies upon them for carrying on the War. The Subjects who, admitting this Supposition, ought not to serve him with their Arms, can neither in Conscience assist him with their Estates; as no Aid whatsoever ought to be supplied for the Execution of a bad Action.

2 It would be well indeed, not to press any one as long as a sufficient Number of Soldiers are to be had, whether Natives or Foreigners, who would list voluntarily. But, as Troops may happen to be wanting, the State would find itself without Defence, if the Sovereign were never permitted to press his Subjects, tho' his Cause for taking Arms be never so just. Mr. BUDDEUS, who believes, in other Respects, with our Author, that a Subject who doubts, ought not to take up Arms for the Service of his Prince; maintains, however, that when the Justice of the War is clear, the Prince may compel his Subjects to march. See the Dissertation, *De Officio Imperantium circa conscribendum militem*, amongst the *Selecta Juris Nat. & Gentium*. Wherein I do not know whether the Principles of this ingenious Author are sufficiently consistent with themselves. For however well founded a Prince may believe his justifying Reasons to be, and tho' they are so in effect; yet should his Subjects say, that they do not find them so, and that they doubt of their Solidity; as every Man is the sole Judge of what passes in his own Conscience, no one could ever convict them, that they were

fully satisfied with Regard to the Justice of the Cause, and consequently, they could never justly be forced to serve. The Truth is, that by a necessary Consequence of the very Nature of Civil Societies, the Sovereign has a full Right to oblige his Subjects to carry Arms, when he determines to undertake a War by justifying Reasons of the utmost Evidence, and he cannot find elsewhere a sufficient Number of People who will list voluntarily; and is not obliged to have any Regard to the Scruples of those whose Service is absolutely necessary to him. But I believe it will very seldom happen, that Subjects will be convinced a Cause is unjust, when the Justice of it is evident. The most simple can hardly more than doubt in that Case; and Doubt, in my Opinion, does not exempt from Obedience. Upon the Whole, the Conflict which might arise between some Mens Rights of Conscience, and the Rights of the Sovereign, might authorize such Men to refuse Obedience; but could not hinder the Sovereign from maintaining his Authority. The Good of the State ought not to be sacrificed to vain Scruples.

3 This is founded upon the Distinction of *Counsels* and *Precepts*, which we have refuted elsewhere, *B. I. Chap. II. § 9. Note 19.* On the contrary it may be said, that to desire to be dispensed with from the War, when it is necessary, as we always suppose it, with our Author, is not only Cowardise, but Want of Charity, or rather a Violation of the Engagements every Citizen, as such, is under, to defend his Country.

4 *Contra Celsum*, Lib. VIII. p. 427. Edit. Cantab.

Subjects as are innocent, and have no Share in stirring up the War, unless it be in his own necessary Defence, or by ^a Consequence, and contrary to his Intentions; ^a See B. iij. ch. (for such Subjects are not liable to Punishment) it follows, that if it evidently appears, that the Enemy comes upon them with that Resolution of not giving the Subjects of his Enemy any Quarter, when, if he pleases, he may, then are those Subjects allowed, by the Right of Nature, to act in their own Defence, a Right which the Law of Nations has not deprived them of.

2. Nor can we even then say, that the War is just on both Sides: For the Question here is not about the War, but a certain particular Act of Hostility, which Act, tho' his who has otherwise a Right to make a War, is yet unjust, and is therefore justly to be opposed and repelled.

The End of the second Book.

H. GROTIUS,

H. G R O T I U S,

O F T H E

Rights of W A R and P E A C E.

B O O K III.

C H A P. I.

Certain General Rules, shewing what, by the Law of Nature, is allowable in War; where also the Author treats of Deceit and Lying.

I. *The Subject and Design of this Book.*

I. **W**E have already seen, not only who may make War, but for what Reasons too they are permitted to engage in it. We are now to enquire ¹ what is allowable in War, and how far, and in what Circumstances it is so. And this we must consider, either simply in itself, or with Regard to some antecedent Promise. What is simply in itself allowable in War, shall be considered first from the Law of Nature, and then from that of Nations. To begin with what Nature allows.

II. *In War all Things necessary to the End are lawful. ^a Victor. De jure belli, n. 15.*

II. And here we must observe, *First*, That in Things of a moral Nature, as we have often said before, ¹ those ^a Means which conduce to a certain End, do assume the very Nature of that End: And therefore we are supposed to be authorized to employ those

I. (1) St. AUGUSTIN says, that in the midst of War itself, Faith is to be observed, and Peace endeavoured, *Ut in ipsis bellis, &c.* Ad Bonifac. Comit. *Epist.* LXX. *Esto ergo, etiam bellando, pacificus,* *Epist.* CCV. *Ad eundem Bonifac.* There is in PROCOPIUS, *Vandalic.* Lib. I. (Cap. XVI.) a fine Discourse of *Belisarius* to his Soldiers, wherein he shews, that those who make War, ought not to abandon Justice. PAULUS OROSIVUS says, that Civil Wars are made in this Manner, when unavoidable, by Christian Princes, in the Times of

Christianity. *Ecce, Regibus & temporibus Christianis, &c.* Lib. VII. The same Historian, speaking of *Theodosius*, defies all the World to instance, from the first founding of *Rome*, in a single War undertaken so justly and so necessarily, and so successfully terminated, through the divine Providence, that neither the Battles, during it, had been very bloody, nor Victory attended with cruel Revenge. GROTIUS.

II. (1) See B. II. Chap. V. § 24. Num. 2. and Chap. VII. § 2. Num. 3.

Things, which are (in a moral, not a physical Sense) ² necessary to the obtaining our just Rights. By Right I understand what is strictly so called, and imports that ³ Power of acting which is intirely founded on the Good of Society. Wherefore, as we have remarked elsewhere, ^b if I cannot otherwise save my Life, I may, by any Force whatever, repel him who attempts it, tho', perhaps, he who does so is not any ways to blame. Because this Right does not properly arise from the other's Crime, but from that Prerogative with which Nature has invested me, of defending myself.

2. By which also I am impowered to invade and seize upon what belongs to another, without considering whether he be in fault or no, whenever what is his threatens me ^c with any imminent Danger; but I am not to claim a Property in it, for that is not necessary to the End in Question, but only to detain it till my Security be sufficiently provided for; as we have elsewhere ^d declared. So by the Law of Nature I have a Right to take from any one what he has of mine, ^e and if this cannot easily be effected, I may take what is equivalent to it; and ^e this I may do too for the Recovery of Debt. And in those Cases I become Proprietor of what I have taken, because there is no other Way of redressing the Inequality that was to my Disadvantage.

3. So likewise where the Punishment is just, there all Manner of Violence and Force, and whatever is a Means necessary to execute that Punishment, or is a Part of it, is just too; as Devastations by Fire, or otherwise, provided that they exceed not the Bounds of Equity, but bear a Proportion to the Offence committed.

III. We must remember, *Secondly*, That this our Right is not to be accounted for only by the first Occasion of the War, but also from other subsequent Causes; as in a Suit of Law, where the contending Party does often acquire and find out a new Right, after the Process is commenced, which was not thought of before. Thus they, who join with him that invades me, whether they be Allies or Subjects, do give me a Right of defending myself against them likewise. Thus they who engage with others in an unjust War, especially in a War which they might or ought to have known to be unjust, are thereby obliged to reimburse the Charges, and to repair the Damages of it, because it is through their Fault that they are sustained. Thus too, those who come into the Measures of a War, undertaken without any warrantable Reason, are themselves culpable, and obnoxious to Punishment, in Proportion to the Injustice that accompanies their so doing; according to *Plato's* ¹ Opinion, who justifies the Continuance of a War, *Till the Guilty are compelled to undergo the Punishment which the Party offended shall inflict upon them.*

IV. 1. We must observe, *Thirdly*, ¹ That many Things sometimes fall in indirectly, and beyond our Design, to be lawful to us, to which, in the Nature of the Things, simply considered, we have no Pretence. How this holds good in the Case of Self-Defence, we have elsewhere ^a shewn. Thus, in the getting of our own, ^b if just so much as is precisely our Due, cannot be had, we have a Right to take more, but under the Obligation of restoring the Value of the Overplus. Thus a Ship full of Pirates, or a House of Thieves, may be sunk and fired, tho' within the Ship, or the House, there may be Children, or Women, or other innocent Persons, who from such an Assault must needs be exposed to manifest Dan-

2 Our Author does not mean Things essentially bad, and which, as such, cannot be lawful in any Case, or to any End whatsoever; but only those, which a Man could not do otherwise, without the necessary Connection they have with a lawful End. See what he says afterwards, at the End of Paragraph 6. Things bad in their Nature are indeed generally not necessary, with Regard to the Necessity in Question. But, admitting they were, as that is not impossible; and that a Person, for Instance, could not obtain or preserve his just Rights but by Adultery, Blasphemy, Sacrilege, Abjuration of the Religion he believes true; the Innocence of the End would neither hinder the Means from being utterly unlawful, nor discharge him from the

Obligation of renouncing the most lawful Pretensions, rather than to employ such Means.

3 *Facultatem agendi in solo Societatis respectu.* See our Author's *Preliminary Discourse*, § 7, 8. Nor that the other Kinds of Rights which impose an imperfect Obligation, do not contribute to the Good of Society. But they are not absolutely necessary to maintain it in Peace; and therefore they cannot be pursued by the Methods of Force.

4 See above, B. II. Chap. VII. § 2.

III. (1) This Passage has been cited above, B. II. Chap. XX. § 8. Num. 8. at the End.

IV. (1) See THOMAS AQUINAS, II. I. *Quæst.* LXXIII. Art. 8. and MOLINA, *Traçt.* II. *Disp.* CXXI. GROTIUS.

^c *Victor.* ubi supra, n. 18, 39, 55.
^d B. II. ch. 2. § 10.
^e *Sylv.* in verb. bellum, part. 1. n. 10. ver. prima.

III. *What is lawful and right does not arise only from the Occasion of the War, but also from incident Causes in the Course of it.*

IV. *Some Things may by Consequence be acted without any Injustice, which would be no Ways lawful had they been purposely and originally designed.*
^a B. II. ch. 1.
^b *Victor.* de jure belli, n. 27.

ger. ² Nor is he guilty of Murder, says St. Austin, who has inclosed his Estate with a Wall, if any one by the Fall of it shall be wounded and die.

2. But, as we have frequently advised before, every Thing that is conformable to Right properly so called, is not always absolutely lawful; for sometimes our Charity to our Neighbour will not suffer us to use this rigorous Right. Wherefore, in such Cases, we ought to take all possible Care to prevent all such Accidents, which may fall out beyond what we aim at; unless the Good we design be far greater than the Evil we fear, or unless, where the Good and the Evil being equal, our Hopes of obtaining the Good be greater than our Fears of the Evil, which Prudence must determine; yet so, that always in a doubtful Case we incline, as the safer Side, to that Part which provides rather for another's Advantage than our own. *Let the Tares grow up, (says our best Teacher, Matt. xiii. 29.) lest whilst you gather up them, ye root up also the Wheat with them.* ³ To destroy whole Multitudes, says Seneca, without Distinction, looks like the Rage of Fire, or the Fall of Buildings. History tells us how much Sorrow and Repentance such an immoderate Revenge cost the Emperor Theodosius, upon the Reproof of St. Ambrose.

c B. ii. ch. 21.
§ 14-

3. Nor tho' GOD does so sometimes, ought it to be an Example to us, because of that absolute Right of Dominion which he has over us, which he has not granted us to have over one another, as ^c I have observed elsewhere. And yet even GOD himself, who is the just Sovereign of Mankind, does often spare a Multitude of wicked Men, for the Sake of a Few that are good; thereby declaring his Equity, as he is a Judge; as fully appears from Abraham's interceding with GOD for Sodom. (Gen. xviii. 23.) And from these general Rules we may easily perceive, how far our Right extends against our Enemies, by the Law of Nature.

V. What we may do against them that supply our Enemies with Necessaries, explained by Distinction.

V. 1. Here also there uses to arise another Question, what we may lawfully do to those, who are not our Enemies, nor are willing to be thought so, and yet supply our Enemies with certain Things. There have been formerly, and still are, great Disputes about this Matter, some contending for the Rigour of the Laws of War, and others for a Freedom of Commerce.

^a See Paruta, l. 7.

2. But first we must distinguish between the Things themselves. For there are some Things which are of use only in War, as Arms, &c. Some that are of no Use in War, as those that serve only for Pleasure; and lastly, there are some Things that are useful both in Peace and War, as Money, Provisions, ¹ Ships, and naval Stores. Concerning the first, (*viz.* Things useful only in War) it is true what ² Amalasontha said to the Emperor Justinian, he is to be reputed as siding with the Enemy, who supplies him with Things necessary for War. As to the second Sort of Things, there is no just Cause of Complaint. Thus Seneca says, ³ I will be grateful to a Tyrant, ^a if what I present him with neither encreases, nor confirms his Power of ruining the State, for such Things a Man may give him without contributing to the common Calamity; which he thus explains, *I will not supply him with Money to*

² Unde nec reus est mortis, alienæ, qui quum suæ possessioni murorum ambitum circumduxit, aliquis ex ipsorum usu percussus interiit. Epist. ad Publicol. CLIV. Our Author cites this Passage thus in the first Edition, and in those of 1632, and 1642, the last in his Life Time. The later Editions have been changed, I know not by whom, according to the Original, in which there is *murum* instead of *murorum ambitum*, and *si aliquis — intereat* for *aliquis — interiit*. Our Author had followed the Reading in the Canon Law, Caus. XXIII. Quest. V. Cap. VIII. But the Corrector of the Edition of Rome has since inserted, upon the Authority of a Manuscript in the Vatican, *ex lapidibus murum circumduxerit*; which is better. In the Words that follow, some Editions of the Original have *ex ipsius* RUINIS, instead of *ex ipsorum usu*. The latter Reading seems to be the best, provided it be corrected, and *CASU* be put for *USU*, as it ought in my Opinion; it being easy for such an Error to have crept in. The Sense plainly requires it; and GRONOVIVS, who is for reading *prolapsus* instead of *percussus*, was not aware that it would then be

clearly and directly the Fault of him who should get upon the Wall; whereas the Question relates to certain Cases, wherein Damage seems to arise from what a Person does in Consequence of his Right; as in this Example, wherein St. AUSTIN means, that a Man has not the less Power to build a Wall, for the enclosing his Possessions, because that Wall may happen to fall down and kill somebody. Which Sense is followed in the Translation of this Passage.

³ Multos autem occidere & indiscretos, &c. De Clement. Lib. I. Cap. XXVI. in fin.

V. (1) At Athens it was prohibited to export Cordage, Casks, Timber, Wax, Pitch, &c. See the Commentator upon ARISTOPHANES's Comedy of the Frogs, (ver. 365.) and that of the Knights, (ver. 282.) GROTIUS.

² It is in that Princess's Answer to Justinian's Letter, both which PROCOPIUS recites, whom our Author quotes in the Margin. Gothic. Lib. I. Cap. III.

³ Sed quamvis hoc ita sit, &c. De Benefic. Lib. VII. Cap. XX.

pay his Guards, but if he wants Marble, or Robes of State, I shall injure nobody, by procuring him such Things, to gratify his Luxury. I will supply him with neither Soldiers, nor Arms; but if he will take it as a Kindness, I will help him to Comedians, and other Things that may contribute to the softening of his fierce Temper. I would not send him Gallies and Men of War, but I would procure him Pleasure Boats, Galliot, and other such Vessels, for Diversion and Recreation. So also Saint Ambrose, ^a It is not a commendable Liberality to assist him that conspires against his own Country.

3. As to the third Sort^b of Things that are useful at all Times, we must distinguish the present State of the War. For if I cannot defend myself without intercepting those Things that are sent to my Enemy, Necessity^c (as I said^c before) will give me a good Right to them, but upon Condition of Restitution, unless I have just Cause to the contrary. But if the Supply sent hinder the Execution of my Designs, and the Sender might have known as much; as if I have besieged a Town, or blocked up a Port, and thereupon I quickly expect a Surrender, or a Peace, that Sender is obliged to make me Satisfaction for the Damage^d that I suffer upon his Account, as much as he that shall take a Prisoner out of Custody, that was committed for a just Debt, or helps him to make his Escape, in order to cheat me; and proportionably to my Loss I may seize on his Goods, and take them as my own, for recovering what he owes me. If he did not actually do me any Damage, but only designed it, then have I a Right, by detaining those Supplies, to oblige him to give me Security for the future, by Pledges, Hostages, or the like. But further, if the Wrongs done to me by the Enemy be openly unjust, and he by those Supplies puts him in a Condition to maintain his unjust War, then shall he not only be obliged to repair my Loss, but also be treated as a Criminal, as one that rescues a notorious Convict out of the Hands of Justice; and in this Case it shall be lawful for me to deal with him agreeably to his Offence, according to those Rules which we have set down for Punishments; and for that Purpose I may deprive him even of his Goods.

4. For these Reasons, those that make War^e publish Manifesto's, and send out Declarations to other Nations, as well to signify the Justice of their Cause, as also what probable Hopes they have to obtain their Right.

5. Now

^a *Officere enim istud est, &c.* Offic. Lib. I. Cap. XXX.

^b Our Author here supposes the Case of being reduced to the last Extremity; and then his Decision is well founded, whatever Mr. Cocceius says, *Dissert. De Jure Belli in Amicos*, § 12. wherein he only criticizes our Author, in Regard to what he advances elsewhere, that, in a Case of Necessity, the Effects become common. It is true it suffices, that at such a Time the Goods of another may be used, without even the Proprietor's Consent. But as to the following Cases, that Lawyer has Reason, in my Opinion, to say, § 15, 17. that provided that in furnishing Corn, for Instance, to an Enemy besieged, and pressed by another, it is not done with Design to deliver him from that unhappy Extremity, and the Party is ready to sell the same Goods also to the other Enemy; the State of Neutrality and Liberty of Commerce, leave the Besieger no Room for Complaint. I add, that there is the more Reason for this, if the Seller had been accustomed to traffick in the same Goods with the Besieged before the War.

^c See Examples of such Declarations, in the League of Christian Princes against the Egyptians, Saracens, and others, *Can. ult. de Transact. C. signific. de Judæis*, Extrav. Copios. de Judæis, and *Can. I. Lib. V. Extravag. de Judæis*. A Book is written in Italian, entitled, *Liber Consulatatus Maris*, in which are related the Constitutions of the Emperors of Greece and Germany, of the Kings of France, Spain, Syria, Cyprus, Majorca, and Mi-

norca, and also of the Venetians and Genoeze on this Subject. In *Tit. CCLXXIV.* of that Work, such Questions are treated of; and thus it is adjudged, if both the Ship and Freight belong to the Enemy, then, without Dispute, they become lawful Prize to the Captor; but if the Ship belong to those that be at Peace with us, and the Cargo be the Enemies, they may be forced by the Persons at War, to put into any of their Ports, but yet the Master must be satisfied for the Expences of the Voyage. But on the contrary, if the Ship belongs to the Enemy, and the Goods to Neuters, we must then agree for the Ship; but if the Ship-Men will not treat, they shall be forced to carry the Ship into some Port of the Captor's Party, and to pay what they owed for the Use of the Ship. In the Year 1438, there being War between the Dutch and the City of Lubeck, and other Towns lying on the Baltic Sea, and the River Elb, it was adjudged in a full Assembly in Holland, that the Goods found in an Enemy's Ship, which appeared to belong to others, were not to be reputed as good Prize; and this was from that Time established there for a Law. So the King of Denmark was of the same Opinion, when in the Year 1597 he sent Embassadors to the Hollanders, and their Allies, challenging a Liberty for his Subjects to carry their Goods into Spain, with which the Dutch had the most cruel War. In France it has always been permitted for Nations at Peace to carry on Trade, even with the Enemies of the Kingdom; and that with so little Reserve, that the Enemies have often, under other

^b See the Decretals, l. 5. tit. 6. *De Judæis*, Can. 6. and 17. ^c B. ii. ch. 2. § 10.

^d *Sylvest. verb. Restitutio.* part 3. § 12.

5. Now the Reason why we refer this Case to the Law of Nature, is ⁷ because we find nothing in Histories decreed by the voluntary Law of Nations concerning it. The

Mens Names, concealed their own Goods, as appears by an Edict in the Year 1543, *Chap. XLII.* which was renewed in that of the Year 1584, &c. In which Edicts it is expressly provided, that their Friends might, in Time of War, exercise a free Trade, so that they did it in their own Ships, and by their own Men, and carry their Ships and Goods wheresoever they pleased; provided that those Goods were not *Belii instrumenta*, warlike Instruments, which might assist the Enemy; in which Case the *French* were then allowed to take them themselves, paying a just Price for them. Here are two Things to be observed, *First*, That warlike Ammunitions were not made Prize, much more were indifferent Merchandizes free from this Danger. I cannot deny but that the Northern Nations have sometimes acted otherwise; but the Practice there has been variable, and accommodated to the Circumstances of Times, rather than regulated by the perpetual Maxims of Equity: For when the *English*, upon Pretence of their Wars, stopt the *Danish* Traffick, there arose a War between those Nations long since, which had this Conclusion, that the *Danes* should lay a Tribute upon the *English*, called the *Danish Penny*, which, tho' the Cause was changed, retained its Name even to the Time of *William the Conqueror*, who founded the present Royal Family in *England*, as *THUANUS*, an Author of great Credit, relates in his History, on the Year 1589. Again, in the Year 1575, *Sir William Winter*, and *Mr. Robert Beal*, Secretary to the Privy Council, were sent by *Queen Elizabeth*, a very wise Princess, to remonstrate, that the *English* could not bear that the *Dutch* should, in the very Heat of the War between *Spain* and the United Provinces, detain the *English* Ships trading to the *Spanish* Ports; as *RHEDANUS*, in his *Dutch History*, on the Year 1575, and *Mr. CAMDEN*, an *Englishman*, on the Year following. But when the *English*, being themselves at War with *Spain*, disturbed the Cities of *Germany* in their Trade with *Spain*, with what a disputable Right they did it, appears from the Writings published on both Sides, worth the Reading, in Order to understand this Controversy. And it is observable, that the *English* themselves acknowledged this in their own Writings; where they chiefly alledge two Things for their Cause, *viz.* that they were Instruments of War that were transported by the *Germans* into *Spain*; and that their antient Treaties had made it unlawful to be done: As afterwards the *Dutch*, and their Confederates, agreed with the *Lubeckers*, and their Allies, in the Year 1613, that neither Party should permit the Subjects of their Enemies to traffick within their Territories, or assist the Enemy with Money, Men, Ships, or Provisions. And after that, in the Year 1627, it was agreed between the Kings of *Sweden* and *Denmark*, that the *Dane* should prevent all trading with the *Dantzickers*, then at War with the *Swede*, and that he should not permit any Merchandizes to pass through *Mare Cimbrum*, the *Sound*, (or the *Baltick*) to any of the *Swede's* Enemies, for which the King of *Denmark*, on the other Side, had Advantages allowed him; but these are particular Agreements, from whence nothing can be inferred that may be obligatory to all; for the *Germans* also alledged in their Writings, that all Merchandizes were not prohibited by Agreements, but those which had been once imported into *England*, or were procured in *England*. Neither did only the *Germans* blame the

English, for denying them to trade with their Enemies, but the *Poles* also complained by their Embassador, that the Law of Nations was violated, because, on *England's* War with *Spain*, they were denied the Liberty of trading with the *Spaniard*, as the aforesaid *CAMDEN* and *RHEDANUS* relate, on the Year 1597. But the *French*, after the Peace of *Vervins*, *Elizabeth*, Queen of *England*, still continuing the War, being importuned by the *English*, that it might be lawful to search the *French* Ships trading to *Spain*, lest any warlike Stores might be concealed, would by no Means grant it, alledging, that it was only a Pretence for Rapine, and to disturb Trade. And in that Treaty which the *English* made with the *Dutch*, and their Allies, in the Year 1525, it was agreed, that other Nations, whom it concerned to lessen the Power of the *Spaniard*, should be asked to forbid all Commerce with *Spain*; and if they did not do it freely, then that the Ships should be searched, whether they had in them any warlike Stores; but further than this, that neither the Ships nor Goods should be detained, or any Hurt done upon that Pretence, to those in Peace. And it happened in the same Year, that some *Hamburgers* were going with a Ship into *Spain*, laden, for the most Part, with warlike Provisions, all which was challenged by the *English* (as Prize) but they paid the just Value for the other Goods. But the *French*, when their Ships going into *Spain* were confiscated by the *English*, declared that they would not endure it. We had Reason therefore to say, that publick Declarations are requisite, which also the *English* themselves were sensible of; by whom there is an Instance of such a Declaration made, in *CAMDEN*, about the Year 1591, and 1598. Neither are such Notifications always regarded, but Times, Places, and Causes are distinguished: For, in the Year 1458, the City of *Lubeck* did not think itself obliged to take Notice of the Declaration the *Dantzickers* made to them, not to traffick with the *Malgenfes* and *Memelenfes*, then at Enmity with *Dantzick*. Neither did the *Dutch* observe it in the Year 1551, when the *Lubeckers* declared to them, that they should not trade with *Denmark*, with which they were then at War. But in the Year 1522, when there was War between the *Swedes* and *Danes*, when the *Danes* desired of the *Hanse Towns* to have no Commerce with *Sweden*, some Cities indeed that stood in need of his Friendship complied with him, but the others did not. The *Dutch*, when the War was hot between the *Swede* and the *Pole*, never suffered trafficking with either Nation to be interrupted, but always restored to the *French* what Ships the *Holland Vessels* had intercepted, either returning from *Spain* or going to *Spain*, with which they were then at War. See the Discourse of *LUDOVICUS SERVINUS*, formerly the King's Advocate, which he made in the Year 1592, in the Affair of the *Hamburgers*. But the same *Dutch* would not suffer the *English* to carry any Goods into *Dunkirk*, where they had then a Fleet: As the *Dantzickers* declared to the *Dutch*, in the Year 1455, that they should carry nothing into the City of *Koningsberg*, according to *GASPAR SCUTZIUS*, in his *Prussian History*. See *CABET. Decif. XLIII. Num. 2.* and *SERAPHIN. De Freitas, in Lib. de justo Imper. Lusitan. Asiat.* where he quotes several other Authors. *GROTIUS.*

⁷ The most learned *JOHANNES MEURSIUS* has many Things of this Subject, in his *Danish History*,

The *Carthaginians* sometimes took the *Romans* Prisoners, who carried Provisions to their Enemies, ^c but upon demand set them at Liberty. When *Demetrius* had entered *Attica* with an Army, and had taken the adjoining Towns of *Eleusis*, and *Rhammus*, ^c *Polyb.* 1. 1. ^c 73. ^f *Plut.* *Demetr.* ^g designing to starve *Athens*, he took a Ship, attempting to relieve it, with Provisions, ^g and hanged up the Master and Pilot of it, and by that Means deterring others from doing the like, he quickly took the City.

VI. 1. As to the manner of acting against an Enemy; Force and Terror are the proper Characteristick of War, and the Method most commonly used: The Query is, whether Deceit be lawful; for *Homer* said an Enemy might be annoyed, ^{VI.} *Whether Fraud be lawful in War.*

¹ Ἡ δόλω ἢ βίῃ, ἢ ἀμφοτέρων, ἢ κρυφῶς,

By Fraud, or Force, openly or secretly.

And *Pindar*, ²

χρὴ δὲ πάντες ἐρ—
δόντ' ἀμαυρῶσαι τ' ἐχθρόν.

*Whether by Craft or Force we overthrow,
All Means allow'd to crush the daring Foe.*

And *Virgil's* ³ Direction,

Let Fraud supply the want of Force in War. Dryd.

Is strictly followed even by *Riphaeus*,

Just of his Word, observant of the Right. Dryd.

And *Solon*, ⁴ so famous for Wisdom, also observes this Maxim; so did *Fabius Maximus*, ⁵ commended for it by *Silius*:

Who to Force join'd Artifice.

2. In *Homer*, *Ulysses*, a very wise Prince, was famous for Stratagems of War; whence ⁶ *Lucian* makes this Inference, that Deceit in War is commendable. There is nothing more profitable in War, than Fraud, said ⁷ *Xenophon*; and *Brasidas* in

ry, B. I. and XI. where you will find the *Lubec-
kers* and the Emperor for Commerce, and the
Danes against it. See also CRANTZIUS, *Vandal*.
B. XIV. THUANUS, on the aforesaid Year 1589,
B. of *Hist.* XCVI. CAMDEN, besides the above-
mentioned Places, on the Years 1589 and 1595,
where that Dispute between the *English* and the
Hanse Towns is treated of. GROTIUS.

8 Not much unlike to this is what PLUTARCH
relates of *Pompey*, in his History of the *Mithrida-
tick War*, He set Guards at the *Bosphorus*, to ob-
serve if any sailed into the *Bosphorus*, and who so-
ever were caught were put to Death. Vit. Pomp.
(p. 639.) GROTIUS.

VI. (1) Ἡ δόλω, &c. So our Author quotes
that Verse from HOMER. But all he says is:

Ἀντάρ ἐπεὶ μνηστῆρας ἐν μεγάροισι τεύσει
κλίνης, ἢ δόλω ἢ ἀμφοτέρων ὅξιν χαλκῶ, &c.

Odyss. Lib. XI. Ver. 118, 119. It is the Shade of
Tiresias who tells *Ulysses*, that when he returns
Home he will kill his Wife's Suitors, either by Fraud
or open Force. See also B. I. Ver. 295, 296.
where *Minerva* says the same Thing to *Telemachus*.
Our Author has taken the Verse he recites from the
Collections of STOBÆUS, who ascribes it to *Anti-
gonus*, as made by him in Imitation of the ancient
Poet: Ἀντιγονὶ ἐρωτήθεῖς, πῶς ἂν τις ἐπιβῆτα τοῖς
πολεμίοις, εἶπεν Ἡ δόλω, &c. *Florileg.* Tit. LIV.
(or LII.) *De Imperatoribus*, &c. p. 365. Edit.
Gefner 1549.

2 *Isthm.* Od. IV. 81, 82.

3 Upon Occasion of some *Trojans* who had put
on the Arms of the *Greeks* their Enemies:

*Mutemus clypeos, Danaumque insignia nobis
Aptemus. Dolus, an virtus, quis in hoste requirat?*
Æneid. Lib. II. Ver. 389, 390. And one of those,
who uses this Stratagem, is ranked amongst the
justest and most virtuous of the *Trojans*:

*Hoc Riphaeus, hoc ipse Dymas, omnisque juvenus
Læta facit ———
—— Cadit & Riphaeus justissimus unus,
Qui fuit in Teucris, & servantissimus æqui.*

(Ver. 394, 426, 427.)

4. Our Author no doubt speaks of the Stratagem
his by *Solon* for taking the Island of *Salamis*. See
used Life in PLUTARCH, p. 82. Vol. I. Edit. Wech.

5

—— Tacitusque quiete
Exin virtuti placuit dolus ———
De bello Punic. II. Lib. XV. Ver. 326, 327.

6 He not only speaks of War, but of all Cases,
in which Fraud is the means, or Remedy, for extri-
cating People out of Danger, as the Fallhoods made
use of by *Ulysses* for his own Preservation, and to
obtain the return of his Companions. In *Philopseud.*
circa init. p. 326, 327. Edit. Amstel. Vol. II.

7 *De Magister.* Equit. Cap. V. Num. 9. Edit.
Oxon. See also his *De Cyr. Institut.* Lib. I. Cap.
VI.

6 R

⁸ *Thucydides*

⁸ *Thucydides* gives the greatest Honour in War to cunning Stratagems. And in ⁹ *Plutarch*, *Agefilaus* said, It is both just and lawful to deceive an Enemy. And *Polybius*, ¹⁰ Military Exploits performed by open Force are less considerable than what is done by Stratagem and making good Use of Opportunity. And from him *Silius* brings in *Corvinus* speaking thus,

¹¹ *Bellandum est astu; levior laus in duce dextra.*

*Ambush in War is still by Fortune crown'd,
The Captain's most for Policy renown'd.*

So also thought the rigid *Spartans*, as ¹² *Plutarch* observes, therefore they offered greater Victims for a Victory obtained by Policy, than by plain Force. ¹³ The same Author highly commends ¹⁴ *Lyfander*, ἀπάταις τὰ πολλὰ διαποικίλλοντα τῇ πολέμῳ, *vers'd in all the Arts and Skill of War*. He also praises *Philopæmen*, ¹⁵ that being instructed in the *Cretan* Discipline, he united the plain and open Way of fighting with Sights and Stratagems. And ¹⁶ *Ammianus* was of Opinion, that *Without any Distinction of Valour, or Cunning, all prosperous Successes in War deserve Commendation*.

3. The *Roman* Lawyers ¹⁷ accounted all Fraud used against an Enemy, innocent; and that it mattered not, ¹⁸ whether a Man baffled his Enemy by Force or Fraud. *Eustathius* on the 15th of the *Iliad* observes that *Deceit is not to be blamed, as be-*

8 *Lib. V. Cap. IX.* Edit. Oxon. What *THUCYDIDES* expresses here by the Word κλέμματα, *VIRGIL* calls also *Belli furta*, *Æn. Lib. XI. (Ver. 515.)* upon which the Grammarian *SERVIVS* cites a like Passage in *SALLUST*: *Gentis ad furta belli peridoneæ.* *GROTIUS*.

The last Passage is a Fragment which I find in *NONIVS MARCELLVS* at the Word *Furtum*, p. 310. Edit. Paris. Mercer. See Mr. *WASSE'S* Note upon that Fragment, *Addend. p. 291. col. 2.* It is in *Lib. I. Cap. XX.* of the Collection.

9 *Apophthegm. Laconic. p. 209. B. Vol. II. Edit. Wech.*

10 *Lib. IX. Cap. XI. p. 766, 767.* *ISAAC CASAUBON* translates the Word ἐλάττω in this Passage, in a Manner which would render the Application of it not very just, *pauciora esse, &c.* But that learned Interpreter does not seem to have given sufficient Attention to the Connection of the Discourse, and was led into the Mistake by the Word πλείω in the following Period, which in Reality implies the Number, and not the Quality of the Actions in Question; from whence he probably believed that the Word ἐλάττω should be taken in the same Sense in the preceding Period: Whereas the Historian's Thought is, that the Conduct of a Stratagem in War is not only of greater Consequence, but more difficult; Experience proving, that People more often miscarry than succeed in it: "Οὐ γὰρ μὲν αὐτῶν &c. By all which he intends to prove, that the Use of Stratagems is very laudable. So that our Author was in the right to translate, *quæ vi fiunt in bello minoris censenda, &c.* And I find, that *JUSTVS LIPSIUS* understood this Passage in the same Sense, which he quotes in his *Politie*, *Lib. V. Cap. XVII.* where he expresses it thus: *Facinorum militarium ea esse minoris laudis ac momenti, &c.*

11 Thus our Author cites this Verse with Reason, which agrees with the best Manuscript unless it be better to read *dextræ* than *dextra*, as the last Editor Mr. *DRAKENBORG*, Professor at *Utrecht*, has done in his Text. The vulgar Editions have *indice dextræ*; of which *CELLARIUS* has made, *indice dextra*, and explains it in this Manner: *Si actiones bellicæ, prius quam fiant, quasi indice digito hostibus præmonstrantur.* But this Explication is contrary to the Design of the General, who speaks.

He intends to shew, as appears by what goes before, that the Resolution he takes to make use of Stratagem, is not only necessary with regard to the Conjunction, but that it will not be less glorious for him to succeed that Way than by mere Force. Whereas according to *CELLARIUS*, he would say on the contrary, that Exploits are more glorious, when performed by open Force. Besides, this Interpretation is somewhat forced, and is not supposed by any Example of an Expression, that seems extraordinary enough. What our Author observes with great Probability, that this is an Imitation of a Passage in *POLYBIUS*, which we have seen in *Note 10.* serves also to confirm the Manner, in which he gives the Verse. He cites here also in a Note a like Thought from the *ALCORAN*, in which *Mahomet* says, that *War makes Deceit necessary.* He remarks further that *VIRGIL* puts not only Anger, but Ambuscades in the Retinue of the God *Mars*:

—Circumque atræ Formidinis ora
Iraque insidiæque Dei comitatus aguntur.

Æneid. XII. 335, 336. Upon which *SERVIVS* the Grammarian says, that the Poet intends to signify, that Stratagem is necessary in War, as well as Valour: *Non tantum virtute, sed insidiis comitatum se ostendit.*

12 *Vit. Marcell. p. 311. A. B. Vol. I. Edit. Wech.*

13 *Vit. Lyfandr. p. 437.* The Historian does not speak there of his own Head, and those whose Opinion he gives blamed on the contrary that Conduct, as appears by what follows and goes before.

14 *PLUTARCH* compares him to *Sylla*, in whose *Mind Carbo* said, *there was the Lion and the Fox.* *Vit. Syll. p. 469. F.*

15 *Vit. Philopæm. p. 363. E.*

16 It is in *Sapores's* Letter to the Emperor *Constantius*, where that Prince says, this Maxim of the *Romans* had never been received by his People: *Illud apud nos nunquam, &c. Lib. XVII. Cap. V. p. 179. Edit. Vales. Gron.*

17 *Non fuit autem contentus, &c. Digest, Lib. IV. Tit. III. De dolo malo, Leg. I. § 3.* See Mr. *NOODT'S* Treatise, *De forma emendandi deli mali, Cap. I.*

18 *Digest, Nihil interest, &c. Lib. LXIX. Tit. XV. De Captiv. & Postlim. &c. Leg. XXVI. longing*

longing to a Soldier. And among the Divines, ¹⁹ St. Augustine, *If the War be just, it concerns not Justice, whether it be managed by Force or Craft.* And St. ²⁰ Chrysostom says that those Generals, that overcame by Subtilty, are most commended.

4. But there are Opinions which seem to maintain the contrary, of which I shall mention some hereafter. To decide this Question, it must be considered, whether Deceit be one of those Things that are always Evil, and in which the Maxim takes Place, that we must not do Evil, that Good may come of it; or whether Deceit be to be reckoned among such as are not Evil in their own Nature, but that it may sometimes happen, that they may be good.

VII. We must then observe, that some Fraud consists in a negative Act, ¹ and some in a Positive; and here I enlarge the Word even to include those Things which consist in a negative Act, according to Labeo, ² who referred it to that Fraud which is not Evil, when a Man by Disimulation preserves either his own, or another's. ³ Cicero overstretched the Point, when he said, *Disguise and Disimulation should be banished out of human Life.* For since we are not obliged to discover to others all we know, or desire; it follows, that it is lawful to dissemble some Things before some Men, that is, to hide and conceal them. *We may sometimes wisely conceal the Truth* (said ⁴ St. Austin) *under some Disguise.* And that this ⁵ is sometimes a necessary and unavoidable especially in Governors, Cicero confesses in many Places. We have a remarkable Instance of this in the Prophet Jeremy, Chap. xxxviii. 27. where the Prophet being asked of the King concerning the Event of the Siege, by the King's Advice, wisely concealed it from the Princes, alledging another Cause of their talking together, which yet was not false. So Abraham told Abimelech true, when he said Sarah was his Sister, according to the Custom of speaking in those Days, being his near Kinswoman, wisely concealing that ⁶ she was his Wife.

VII. *Fraud in its negative Act is not of its self unlawful.*

^f See St. Chrysostom, De Sacerdot. l. 1.

Gen. xx. 2.

VIII. But

¹⁹ *Quum autem justum bellum suscipitur, &c.* Quæst. X. super Joshua. Our Author has changed some Terms in this Place, from having followed the Summary of a Canon, in which this Passage is recited. *Caus. XXIII. Quæst. II. Can. II.*

²⁰ The Passage will be cited below, § 17. Note 2.

VII. (1) That is to say, when by not saying or doing a Thing, we designedly give room to others to believe, what we know is false. From whence may easily be discerned wherein deceiving by a positive Act consists.

² LABEO autem posse & sine dissimulatione, &c. Digest, Lib. IV. Tit. III. De Dolo malo, Leg. I. § 2.

³ *Quod si Aquiliana definitio vera est, &c.* De Offic. Lib. III. Cap. XV. I have already observed upon Law of Nature and Nations, B. IV. Chap. I. § 9. Note 5. that CICERO speaks only of a Feint and Disimulation attended with Injustice and Breach of Faith. Our Author himself cites that great Orator below, § 9. amongst those who believed some Lies innocent.

⁴ *Licet veritatem occultare, &c.* Lib. contra Mendacium, Cap. X. The same Father says in another Place, that there is a Difference between lying and concealing the Truth. *Quoniam aliud est, &c.* In Psalm v. vers. *Perdes omnes.* The Passage is cited in the CANON LAW, *Caus. XXII. Quæst. II. Cap. XIV.* See THOMAS AQUINAS II. 2 *Quæst. LXXI. Art. III. in Resp. ad tertium:* As also SYLVEST. in verb. *Bellum, Part I. Num. 9. GROTIUS*

The first Passage of St. AUSTIN, cited here by our Author, is not *totidem verbis* in the two Treatises of that Father *contra Mendacium:* But I find the Sense of it in the Chapter of the second Treatise, to which he refers, where the Example of our Saviour JESUS CHRIST is alledged; who did not lie in telling his Disciples that he had many Things to say to them, but that they could not yet bear them: *non autem hoc est occultare veritatem, &c.* Lib. contra Mendac. Cap. X.

⁵ Our Author refers us here in the Margin to *Orat. pro Milon.* and that *pro Plancio, & Lib. VII. Epist. IX.* The last Citation is false as well as many others, which I correct without taking Notice, for the Passage is in *Letter VIII. of B. X.* and moreover the Letter is not CICERO's but PLANCIVS's, who in giving an account of the Conduct he had observed during the Troubles of the Republick, says, that he had been obliged against his Will to feign and dissemble many Things to attain his Ends: *Ita nunquam diffitebor, multa me, ut ad effectum horum consiliorum, &c.* The Passage of the Oration for Milo, relates to a different Thing. The Orator endeavours to excuse Pompey, for having given Credit, upon too slight Grounds, to the false Reports, which had been spread concerning Milo: He says for that Purpose, that those who have the Government of the State in their Hands are obliged to hear too many Things, and that they cannot avoid doing so: *Laudabam equidem incredibilem, &c.* Cap. XXIV. I am deceived if this Mistake of our Author did not arise from his having the Politicks of JUSTUS LIPSIUS before him, when he quoted this Passage; which Author, in this, as he does in many other Places, applies the last Words to a Subject different from that upon which they were writ. For he also quotes the two other Passages; of which the last, that remains to be examined, is more to the Purpose. CICERO says, that the People are pleased to give their Suffrages in such a manner, as will leave them at Liberty to carry fair with every Body, and to conceal their Inclination to favour some Competitors more than others: *Etenim si populo grata est tabella, &c.* *Orat. pro Plancio, Cap. VI.*

⁶ St. AUSTIN says, that the Patriarch did not lie, and that he only concealed the Truth: *Sed veritatem voluit celari, non mendacium dici.* In GENES. *Quæst. XXVI.* This Passage is quoted in the Canon Law, *Caus. XXII. Quæst. II. Can. XXII. GROTIUS.*

See PUFENDORF, *Law of Nature and Nations, B. IV. Chap. I. § 11.* That Chapter with the Notes should be always compared with this Place,

VIII. *Fraud in its positive Act distinguished either into such outward Acts as admit of several Constructions, or such as always signify the same by Agreement. Fraud in the former Sense lawful.*

VIII. 1. But Fraud, which consists in a positive Act, if in Actions is called a Feint ; if in Words, a Lye. Some make this Difference between these two, that Words naturally signify the Intent of our Minds, but Actions do not. But on the contrary it is true, that Words of their own Nature, and independently of the Will of Men, signify nothing, unless it be such a confused and inarticulate Noise as is caused by Pain, which comes rather under the Denomination of an Action than a Speech. But if it be objected, that it is peculiar to the Nature of Man, above all other Creatures, that he can discover the Conceptions of his Mind to others, to which End Words were invented ; which is certainly true ; yet this also should be added, that such a Discovery is not made by Words only, ¹ but by Gestures, &c. as among Persons that are dumb. Whether those Gestures have naturally something common with the Thing signified, or have only a Signification by human Institution. Like to which are those Characters which (as *Paulus* ² the Lawyer says) signify not Words formed by the Tongue, but the Things themselves, either from some Likeness, as the *Egyptian* Hieroglyphicks, or from mere Fancy, as among the *Chinese*.

2. There is therefore another Distinction to be observed in this Place, which we made Use of to take away all Doubtfulness and Obscurity, concerning the Term of *the Law of Nations*. For we then said, that *the Law of Nations* signified, either what was allowed of by every Nation without mutual Obligation, or that which implied a mutual Obligation. ³ In like manner, Words, Gestures and Characters (as

we

as it treats the same Subject with more Extent and Exactness. As to the Words of St. AUSTIN, which our Author cites, they are indeed so conceived in the Canon referred to ; but they are not to be found in *Question XXVI.* upon *Genesis*. Which proceeds, as is remarked upon that Canon, from its being composed of different Passages of St. AUSTIN, which GRATIAN has joined together. That Father expresses himself in this manner upon the same Subject in his second Treatise *cont. Mendac.* *Aliquid ergo veri tacuit, non falsi aliquid dixit, quando tacuit uxorem, dixit sororem.* Ad CONSTANTIUM, Cap. X. CLEMENS ALEXANDRINUS observes, that *Abraham* intimates that it was not lawful in those Times to marry a Sister by the same Mother ; by which he evidently supposes, that *Sarah* was actually the Sister of that Patriarch by the Father, and not merely a Relation in some more remote Degree. *Strom.* Lib. II. Cap. XXIII. p. 502. *Edit. Oxon.* I find the Passage has been already cited by Mr. LE CLERC, upon the twentieth Chapter of *Genesis*, where the Story is related. The late Mr. BAYLE relates it also in the Article *Sarah* of his *Historical and Critical Dictionary*, (p. 2536. col. 2. of the third Edition) but he explains the Word *ἀδελφή*, as only signifying an Uterine Sister. And indeed that is the proper Sense of the Term. But I do not know whether CLEMENS ALEXANDRINUS has not improperly taken it for a Sister both by Father and Mother. Thus he understands by the Word *Polygamy*, the Condition both of those who have Wives at the same Time, and of those who have several one after another, as appears from the Passage recited below, *Chap. IV.* of this *B. III.* § 2. *Note 3.*

VIII. (1) There was a People of *Ethiopia* according to PLINY, who had not the Use of Speech, and conveyed their Meaning to each other by nodding their Heads, and by various Motions of the other Parts of the Body : *Quibusdam pro sermone nutus motusque membrorum est.* *Hist. Natural.* Lib. VI. Cap. XX. The Roman Lawyers have decided, that if those who cannot speak express their Thoughts by the Efforts, which they make to be understood in some other Manner, and by an inarticulate Voice, such Endeavours ought to be deemed a sufficient Declaration of their Will, which otherwise ought to be declared in Words : *Nam etsi prior atque poten-*

tior est, quam vox, mens dicentis, &c. Digest, Lib. XXXIII. Tit. X. *De Supelleetile legata*, Leg. VII. § 2. *in fin.* In the *Decretals*, it is said that a deaf, and a dumb Person may enter into a Contract of Marriage, by making known their Consent by Signs : *Nam Surdi & Muti possunt, &c.* Lib. IV. Tit. I. *De Sponsalib. & Matrim.* Cap. XXV. GROTIUS.

2 It is in a Law, where he says ; It is not by the Figure of the Letters used in writing, but by the Words they represent, that an Obligation is contracted ; inasmuch as it has been thought fit, that the Writing should have the same Force, as what is signified by Word of Mouth : *Non figura literarum, sed oratione, quam exprimunt literæ obligamur, &c.* Digest, Lib. XLIV. Tit. VII. *De obligat. & action.* Leg. XXXVIII. The Lawyer expresses himself in a very philosophical Manner in saying *placuit, ita been thought fit, &c.* for he thereby insinuates that the Use of Signs is the Effect of a Convention, *ἐκ συνθήκης.* GROTIUS.

3 This Distinction is scarce better founded than that of *the Law of Nations*, with which our Author compares it, and in which we have elsewhere shewn the want of Solidity. All the Obligation that is here consists in this ; that when a Person is bound to declare his Thoughts, as that cannot be done but by Signs capable of making them known to those he is concerned with, it is commonly necessary for him to employ such as are most used, because there are none more known by all the World, nor consequently more suitable to that Purpose. See what I have said in the Chapter of PUFENDORF, which answers to this, § 5. So that the Difference between Words, Characters, Gestures and other Signs, consists in this, that the Use of the latter being less common ; or rather, Use not having given them a determinate Signification, they are not of themselves proper to convey clearly the Sense of the Person that employs them : So that whilst they have no fixed and determinate Meaning either one way or other, they cannot be considered as Signs, upon which there is room to rely. And if it be incumbent on Persons not to use them, when they foresee that others will explain them in a certain Sense, contrary to their Intent, it is not upon account of the Error considered in itself, but of the accidental Consequence, of which our Author speaks, and which we

are

we have said) were invented to signify by mutual Obligation, which ⁴ *Aristotle* calls *καὶ συνθήκη*, according to common Agreement, but other Things are not so. Hence it follows that it is lawful for me to use other Things as I please, tho' ^a I foresee that another may place a wrong Construction upon it; I speak of the Use of those Things in itself, and not of the accidental Consequences that it may have. Therefore we must here suppose Cases, ⁵ where no Harm can ensue, or where the Harm itself, setting aside the Consideration of the Deceit, is lawful.

Of the first we have an Example in our Saviour, who to the two Disciples at *Emaus*, (*Luke* xxiv. 28.) *προσπειρίτο*, made as tho' he would have gone farther, unless we had rather believe he really intended so, if they had not importuned him to stay: As GOD himself is said to will many Things conditionally, which yet come not to pass, the Condition being not performed. And in another Place, (*Mark* vi. 48.) CHRIST himself made as tho' he would have passed by his Apostles sailing on the Sea, that is, unless they entreated him to come up into the Ship. Another Example may be given in St. Paul, (*Acts* xvi. 3.) who circumcised *Timothy*, ⁶ tho' he well knew what Sense the *Jews* would put upon it, viz. that the Law of Circumcision (tho' it was now really abolished) did still oblige the Children of *Israel*, in the Opinion of St. Paul and *Timothy*; whereas St. Paul had something else in View, that he and *Timothy* might obtain a greater Opportunity of a familiar Conversation with the *Jews*. For neither did Circumcision, the ceremonial Law being abolished, by its Institution any longer signify such a Necessity, neither was the Evil, which followed upon the Error, in which the *Jews* would continue for a while, (tho' afterwards to be laid aside) so great, as that Good which St. Paul designed, which was a more easy Propagation of the Doctrine of the Gospel. The Greek Fathers often call this dissembling *οικονομία*, ⁷ good Management, of which we have an excellent Sentence of *Clemens Alexandrinus*, who discoursing of a good Man, says, ἐπὶ τῶν πλησίων ὀφελεία μόνη ποιήσει τινα ἂν ἐν αὐτῷ προηγεμένως αὐτῷ περὶ ἑαυτοῦ, &c. ⁸ He will do some Things for the Benefit of his Neighbour, which otherwise he would not of his own free Will, and first Intention. Such was the Act of the Romans, ^b who when they were besieged, threw Loaves of Bread from the Capitol, into the Enemies Camp, that they might not be thought to have any want of it.

An Example of the other Case, is the pretended Flight of *Joshua* ^c before the Inhabitants of *Ai*, which is often practised by other Generals. For we suppose here the consequent Harm to be lawful, from the Justice of the War. But such a pretended Flight signifies nothing by Institution, tho' the Enemy may take it as a Sign of Fear, which the other is not bound to guard against, using his own Liberty of going this way or that way, faster or slower, and with such or such a Countenance, as he pleases. The same Thing may be said of those, who use the Enemies Arms or Habits, or set up his Standards or Flag, as we read in many Histories.

For all these Things every Man may make use of, as he pleases, tho' contrary to the general Custom; because that very Custom is established by the Pleasure of particular Persons, not as by common Consent, and therefore obliges none.

are otherwise obliged to prevent by Virtue of a Law of Nature, whereby we are to avoid all Things that may occasion Evil, directly or indirectly, to those who have not deserved it. Now this would also take Place, admitting that the same Effect should result from the Use of Speech; if, for Instance, we had Reason to believe, that a Person, either thro' Ignorance, Distraction, or otherwise, should take in a wrong Sense what we say to him in the most common and clear Terms.

⁴ *De Interpret.* Cap. IV.

⁵ As *Michal* did to save *David* her Husband.
² *Samuel* xix. 16. GROTIVS.

⁶ CLEMENS ALEXANDRINUS reasons almost in the same Manner upon this Example; and I am surprized that our Author has not made Use of that Authority. That Father says that St. Paul thus became all Things to all Men out of Condescension; and that without departing from the fundamental Principles of the Christian Religion, he gained all the World by such Management, which cannot be

treated as Falshood, properly so called. *Stromat.* Lib. VI. Cap. XV. p. 802. Edit. Oxon.

⁷ Thus St. CHRYSOSTOM says it ought to be called, and not *ἀπώλει* Deceit, in his first Book *De Sacerdot.* And again, the same Author upon 1 Cor. iv. 6. This was no Cheat but a certain Compliance and Condescension. And again, on ix. 20. That he might convert those that are really so, he became such in Appearance only, and did the same Things as they, but not with the same Intention. To this we may refer the counterfeit Madness of *David*, (1 Sam. xxi. 13.) GROTIVS.

See a Passage of St. CYRIL, which will be cited below, § 13. Note 2. and that of CLEMENS ALEXANDRINUS quoted in Note 6.

⁸ These Words that our Author quotes without mentioning the Place from which he takes them, are in *Stromat.* Lib. VII. Cap. IX. p. 863. Edit. Oxon. a little after the Passage, which he cites below, § 14. Note 10. in as loose a Manner. The Father speaks in both of his *Gnostick*.

IX. Of that
in the latter
Sense, the
Question is
difficult.

IX. There is a greater Dispute concerning those Signs which enter, if I may say so, into the Commerce of Men, and in the wrong Use of which a Lye does properly consist; much is found in Holy Writ against Lying, *A righteous Man hateth Lying*, Prov. xiii. 5. *Remove far from me Falshood and Lyes*, Prov. xxx. 8. *Thou shalt destroy all those that speak Lies*, Psal. v. 7. *Lie not one to another*, Colos. iii. 9. And this St. *Austin* stiffly defends; with him agree many Poets and Philosophers. Remarkable is that of *Homer*,

¹ *Hated to Death may that grand Villain be,
Whose Heart and Tongue do ever disagree.*

And *Sophocles*,

² *'Tis never handsome to report a Lye;
But if on Truth a certain Mischief wait,
You may dissemble.*

And *Cleobulus*,

³ *The truly wise abhor a shameful Lie.*

⁴ *Aristotle* said, καὶ αὐτὸ τὸ μὲν ψεῦδος, φαῦλον καὶ ψεκτὸν, τὸ δὲ ἀληθὲς καλὸν καὶ ἐπαινεῖον, *Lying in itself is vile and base, but Truth is beautiful and commendable.* Neither does the other Side want its Defenders: As first in Holy Writ, ⁵ it has the Precedents of Men, whose Probity is commended, who nevertheless have sometimes lied, without being any where blamed for it: As also the formal Decision of many antient ⁶ Doctors of the Christian Church, as *Origen*, *Clemens*, *Tertullian*, *Lactantius*, *Chrysostom*, St. *Jerome* and *Cassianus*; and indeed almost of all the primitive Christian Writers, as St. *Austin* ⁷ himself confesses, herein dissenting from them, but owning ⁸ it to be a very difficult and intricate Question, and by the Learned variously disputed, for these are his very Words.

Among the Philosophers, the open Maintainers of this Opinion are *Socrates*, ⁹ and

IX. (1) Ἐχθρὸς γὰρ μοι κείνος, &c.
Iliad. Lib. IX. Ver. 312, 313.

2 Καλὸν μὲν ἔν, &c.

This is a Fragment of a Tragedy that is lost, intitled *Creusa*, preserved by STOBÆUS, *Florileg.* Tit. XII.

3 Ψεῦδος δὲ μισεῖ πᾶς ὁ φρόνιμος καὶ σοφός.

STOBÆUS has also preserved us this Verse in the same Place, Tit. XII. where is also another very like it, which immediately follows, attributed by the common Editions to MENANDER; but in that of our Author, which he revised upon the Manuscript it is called anonymous,

Ψεῦδες δὲ μισεῖ πᾶς σοφὸς καὶ χρησίμους

⁴ *Ethic. Nicomach.* Lib. IV. Cap. XIII. p. 55. C. Vol. II. Edit. Paris.

⁵ St. IRENÆUS tells us, he was taught this Maxim by an old Priest; that we ought not to condemn those Things which the holy Scriptures relate simply, without censure: *De quibus Scripturæ non increpant, sed simpliciter sunt positæ, nos non debere fieri accusatores*, Lib. IV. Cap. L. GROTIUS.

The Maxim laid down by this good Priest so generally, is undoubtedly false. But it is certain that of all those Things, on which the Scripture decides nothing clearly and incontestably in regard to their Nature, there is not one, whereof we find so many Examples in holy Writ, as of those innocent Lies, practised by virtuous Persons without scruple of Conscience. Besides, as MOSES AMYRAUT observes in his *Christian Morals*, "There

"are many Places where the Faults of the faithful
"are related without blame in the Word of GOD;
"but it is only in the History of these officious
"Lies, that the Holy Spirit has commended them,
"in regard to *Rahab* and the Midwives of *Egypt*,
"who were praised and rewarded." Vol. III. p. 283.

⁶ Some of those Passages will be cited below.

⁷ He confesses this in his Questions upon LEVITICUS: *Sed utrum hæc aliqua compensatione, &c.* Quæst. LXVIII.

⁸ *Magna quæstio, latebrosa tractatio, dispensatio inter doctos alternans.* De Mendacio, Cap. I. Our Author himself, after the first Edition of his Book, in a Letter wherein he asks the Advice of the celebrated GERARD JOHN VOSSIUS, concerning a new Edition he was preparing, confesses that the Question about Lying was one of those that puzzled him most: *Æstuo enim in nonnullis quæstionibus, maxime illa de Mendacio, &c.* Part I. Epist. CCXVIII. But this Difficulty arose from his not knowing perfectly the Topick of the Question, because he had not sufficiently dived into the Nature of the Thing, and the simple Principles of natural Right.

⁹ It is XENOPHON who has preserved the Thoughts of that great Philosopher, in his *Memoirs of his remarkable Actions and Sayings*. He makes *Euthydemus*, with whom he discourses, agree, that there is no Injustice either in deceiving an Enemy or even a Friend for his good: And he proposes, by way of Example, a General of an Army, who to raise the drooping Courage of his Soldiers, tells them, that Aid will soon arrive; tho' he knows that it is not true; and a Father, who seeing his Son's Aversion for a Remedy necessary to his Health, makes him take it by way of Food, Lib. IV. Cap. II. § 16, 17.

his Disciples ¹⁰ *Plato* and ¹¹ *Xenophon* ; as also ¹² *Cicero* ; and, if we believe *Plutarch* ¹³ and ¹⁴ *Quintilian*, the *Stoicks*, who reckon this among the Accomplishments of a wise Man, to lie in a proper Place and Manner. Neither does ¹⁵ *Aristotle* himself seem to differ from them in some Places, whose καθ' αὐτὸ, in itself, which we have cited, may be interpreted commonly speaking, or the Thing considered in itself, without respect to Circumstances. His Expofitor, *Andronicus Rhodius*, said thus of a Physician that told a Lye to his Patient, ¹⁶ ἀπαλᾶ μὲν, ἀπαλειὼν δὲ ἐκ ἐστίν, *He deceives indeed, but yet he is not a Deceiver.* And he gives the Reason, εἰ γὰρ τέλος ἔχει τὴν ἀπάτην τῷ νοσῶντι, ἀλλὰ τὴν σωτηρίαν, *Because he has no Design to deceive his Patient, but to cure him.* ¹⁷ *Quintilian* beforementioned defending this Opinion said, Many Things are honest, or dishonest, not simply from the Fact, but from the Motives of it. So ¹⁸ *Diphilus*,

*If a kind Lye the Life of Man can save,
Where is the Crime to rescue from the Grave?*

When *Neoptolemus* in ¹⁹ *Sophocles* asked *Ulysses*,

What ! not asham'd by Falshood to offend?

Ulysses answered,

No, if our Safety thereupon depend.

The like may be brought out of ²⁰ *Pisander* and *Euripides* ²¹ ; so in *Quintilian* also we find, it is allowable in a wise Man sometimes to tell a Lye. And ²² *Eustathius* upon the second of the *Odysses*, said ψεύσει κατὰ καιρὸν ὁ σοφός, *A wise Man will tell a Lye upon Occasion.* He also produces Testimonies out of ²³ *Herodotus* and *Isocrates*.

¹⁰ Some Passages of this Philosopher will be cited below, upon Paragraph XV. Note 2, 4.

¹¹ The Passage cited in Note 9. suffices to shew the Opinion of this Philosopher, who, as the Disciple of *SOCRATES*, approved without doubt all the Sentiments of his Master which he has given us. See also those cited above, upon § 6. Note 6.

¹² *Alicubi* *CICERO*, says our Author. See the Passage, which he cites below, Note 15. and those recited in *PUFENDORF*, B. IV. Chap. I. § 21. with what I say there in Note 1.

¹³ *De Stoicorum repugnant.* p. 1055, 1056. Vol. II. Edit. *Wech.* The Opinion of these Philosophers may be seen explained at large in *STOBÆUS*, *Eclg. Ethic.* Cap. IV.

¹⁴ This Orator gives by way of Example the small Lies told to a sick Child ; those invented to preserve the Life of a Person fallen into the Hands of Robbers, or to deceive an Enemy, when the Safety of a Man's Country requires it : *Ac primum concedant mihi, &c.* Instit. Orat. Lib. XII. Cap. I. p. 1054. Edit. *Burman.*

¹⁵ I shall give the Passages quoted by our Author in the Margin, where the Figures are a little faulty in the Editions before mine. The Philosopher speaking of the Vices opposite to *Veracity*, gives as one of the Extremes, the pretending to have advantageous Qualities which we have not, or not to have what we have. *Ethic. Nicomach.* Lib. II. Cap. VII. p. 25. Vol. II. Edit. *Paris.* By which he gives us to understand, that Feigning and Dissimulation are not always vicious, but only from the Excess or Defect in the Things feigned or disguised. And he says in so many Words in the other Passage upon this Head, that those who dissemble with Moderation, and in Things that are not obvious, pass for polite People, Lib. IV. Cap. XIII. in fin. p. 56. B.

¹⁶ *Paraph.* in Lib. V. Cap. VIII. *Ethic. Nicomach.* p. 297. Edit. *Heinf.*

¹⁷ *Sic judicet, pleraque esse, &c.* Instit. Ora-

tor. (Lib. XII. Cap. I. p. 1054. Edit. *Burm.*) He says in another Place, *Nam & Mendacium dicere, &c.* (Lib. II. Cap. XVII. p. 127.) *GROTIUS.*

¹⁸ Ὑπολαμβάνω τὸ ψεύδῃ, &c.

These Verses have been preserved by *STOBÆUS*, *Florileg.* Tit. XII.

¹⁹ NE. Οὐκ αἰσχρὸν ἡγῆσθαι τὰ ψευδῇ λέγειν ;
ΟΔ. Οὐκ, εἰ τὸ σωθῆναι γε τὸ ψεύδῃ φέρει.
Philodet. Ver. 107, 108.

²⁰ Οὐ νέμεσις καὶ ψεύδῃ, &c.

This Verse is also in *STOBÆUS*, Tit. XII.

²¹ This perhaps is what he makes *Ulysses* say, that, when he was discovered as a Spy in *Troy*, he invented a thousand Things to avoid Death :

EK. Τί δ' ἦτ' ἔλεξας, δῖλ' ὦν ἔμος τότε ;
ΟΔ. Πολλῶν λόγων εὐρήμαθ' ὡς μὴ θανεῖν.

Hecub. Ver. 249, 250. In Mr. *BARNES*'s Collection of Fragments there is one which might be applied here, *Incert.* Ver. 73. But it is *MENANDER*'s, and is in p. 208. Ver. 57. *Collect. Cleric.*

²² What he calls there κατὰ καιρὸν, the Grammarian *DONATUS* expresses by *in tempore*, adding, that some Moralists approve of Deceit when reasonable : *Quamquam & ipsum fallere in tempore, quidam de Officiis scribentes, rectum putant.* In *Adelph. Act* IV. Scen. III. (Ver. 18.) *CICERO* insinuates, that there are honest and charitable Lies, as those by which we endeavour to save the Life of an unfortunate Citizen : *Si honesto & misericordie salutis civi calamitoso esse vellemus, &c.* Orat. pro *Ligar.* (Cap. V.) *GROTIUS.*

²³ The Historian makes *Otanes* say ; it is necessary to lie when some Reason requires it : Ἐνθα γὰρ τι δεῖ ψεύδῃ λέγεσθαι, λεγέσθω, Lib. III. Cap. LXXXII.

X. These

X. *The Use of Words in another Sense, than that wherein we know they are understood, not always unlawful.*
 a Thom. ii. 2. Quæst. 110. Art. 1. in Resp.

X. These so different Opinions may perhaps be reconciled by the common Distinction of Lies, taken either in a stricter or a looser Sense. For we do not here take the Word *Lye* so largely, as ^a comprehending every Untruth that one says, without knowing it to be such, as *Gellius* ¹ distinguished between *mendacium dicere*, and *mentiri*, to tell an Untruth, and to Lye. But here we take it to signify a Falseness spoken knowingly, in a Sense contrary either to what we think or design. For what is first, *ἡ ἀμέσως*, and immediately declared by Words, or any other Signs, are the Conceptions of the Mind: Therefore he does not lie, who tells a Thing that is false, yet supposing it to be true; but he that tells Truth, at the same Time thinking it to be false, does certainly lye. It is the Falseness therefore of the Expression which is requisite to the common Nature of a Lye. Whence it follows, when any Word or Sentence is *πολύσημα*, of divers Significations, either by common Use, or by the Custom of Art, or by any Figure that is intelligible, then if our inward Meaning agree with any of these Significations, it is not to be reputed a Lye, ² tho' the Person to whom we speak may take it in a different Sense.

But these ambiguous Expressions are not rashly to be allowed, but yet may upon Occasions be justified. As if it relates to the instructing of one committed to our Charge, or to avoid some captious Questions ³. Of the former CHRIST gave us an Example in himself, when he said *our Friend Lazarus sleepeth*, John xi. 11. which his Disciples understood of his taking rest in Sleep. And when he said, *John ii. 20, 21. Destroy this Temple, and in three Days I will raise it up*, meaning that of his Body, he knew very well that the *Jews* understood it of the real Fabrick of the Temple. So again, when he promised his Disciples, *Luke xxii. 30. That they should sit on twelve Thrones, judging the twelve Tribes of Israel*; and *Mat. xxvi. 25. That they should drink new Wine with him in his Father's Kingdom*, he knew very well, that they understood it of a Temporal Kingdom, whereof they were full of Hopes even to the very Moment of his Ascension, *Acts i. 6. Thus he speaks to the People in Parables, that bearing they might not understand*, *Mat. xiii. 3.* that is, unless they came with such Attention and Docility (or Willingness to be

X. (1) He cites upon it the Words of P. NIGIDIUS, cotemporary with *Julius Cæsar*, and CICCERO: *Verba sunt hæc ipsa P. NIGIDI, &c. Lib. XI. Cap. XI.* St. AUSTIN observes also, that Nobody is guilty of Lying, when he believes what he says to be true: *Ream linguam non facit, nisi mens rea. De verbis Apostoli, Serm. XXVIII. Nemo mentiens judicandus est, &c. Enchirid. Cap. XVIII.* These two Passages are quoted in the CANON LAW, *Caus. XXII. Quæst. II. (Can. III. IV.) GROTIVS.*

2 Thus *Abraham* when he was going to sacrifice his Son upon the Mountain *Morijah*, said to his Servants: *Abide you here with the Ass; and I and the Lad will go yonder and worship, and come again to you.* In which he spoke ambiguously according to St. AMBROSE, left, if those People had known his Design, they should have endeavoured to hinder him from executing it, or importuned him against it with Cries and Tears. *Captiosè autem loquebatur, &c. Lib. I. De Abrahamo, (Cap. VIII.)* That Father of the Church approves the Patriarch's Conduct, and GRATIAN after him, *Caus. XXII. Quæst. II. post Can. XX. GROTIVS.*

This Example includes more than a simple Ambiguity. "Every one sees that if *Abraham* did not speak contrary to his Desire, he spoke at least contrary to his Hope, and by his Words put other Ideas into the Minds of his Servants, than he had in his own, as AMYRAUT says very well, "*Morale Chretienne.*" Vol. IV. p. 523. It does not suffice in order to say there is no Lie, that the Words we use are susceptible of a Sense which answers to what we think; it is moreover necessary, that in the present State of Things, and the manner the Persons to whom we speak, are disposed, they have room to take our Words in that Sense; other-

wife a Door would be opened for Deceit in Relation to Affairs, wherein all the World agrees, that we ought to speak sincerely what we think. This our Author was well aware of, since he observes immediately after, *talem locutionem usurpatam temere non probandam.* See PUFENDORF, § 13. of the Chapter which answers to this. Now could *Abraham's* Servants, ignorant as they were of the Order of Heaven to that Patriarch, ever imagine, that the Words *we will come again to you*, could mean only the Father, and not the Father and Son, whom *Abraham* mentioned just before? I go farther to maintain, that tho' the Words are conceived in such a manner, that those to whom they are spoke could with good Attention, see thro' the Ambiguity, and know the Sense that the Speaker has in his Mind; if however the latter has Reason to believe, that they will take them in a Sense quite different from his Thoughts, it is then, with regard to them, a downright Lie, since it produces the same Effect as if he had used Terms, that were susceptible only of one Sense, contrary to the Thought of him that employs them. So that not only *Abraham*, and many other holy Persons, but also our Saviour JESUS CHRIST, having used, as our Author observes a little lower, Expressions, which they well knew, would be understood in a different Sense from what they had in their Minds; hence results, I conceive, an invincible Argument against those of the contrary rigid Opinion, who assert, that we are always guilty of a criminal Lie, when we speak, or act, in a manner, whereby we would make others understand something different from our own Thoughts. It signifies nothing to say, that it was for a good End our Saviour spoke in this manner; for the End does not make the Use of a Means, bad in itself, innocent.

3 See my Reflection upon the preceding Note 2.

taught) as was requisite. An Instance of the latter Case we meet with from prophane History in the Person of *L. Vitellius*, who being importuned by *Narcissus* to explain himself, and to speak freely (in regard to the loose Life of *Messalina*) would not be prevailed upon, but still gave such doubtful and uncertain Answers, ⁴ as would admit of various Senses. Hither we shall refer the Hebrew Saying, ⁵ עתה דברגו לא ושתוק אם יודע אדם להחמיר, *If a Man can speak ambiguously let him, if not, let him say nothing.*

3. On the contrary it may happen, that to use this kind of speaking may not only be discommendable, but wicked, ⁶ as when either the Honour of G O D, ⁷ or our Charity to our Neighbour, or Reverence to our Superiors, or the Nature of the Thing in Question requires, that we should plainly declare the Truth; so in Contracts (as we have said ^b already) whatsoever the Nature of the Contract requires to be understood, should be declared. In which Sense we may very well understand that of *Cicero*, ⁸ *That a Lye should be banished from all human Commerce*, borrowed from the old Attick Law, ⁹ *No lying in a Market.* In which Places the Word *Mendacium* is to be taken so largely, as to include even obscure Expressions, which we, properly speaking, do not comprehend under the Notion of *Lying*.

XI. 1. It is then required to the common Notion of a Lye, that what is either spoken, written, intimated by Characters, or declared by any Gesture, cannot be otherwise understood than in such a Sense ¹ as differs from the Mind of the Person who expresses it; but to a Lye strictly taken, as it is naturally unlawful, there is necessarily required some peculiar Difference; which if rightly considered, at least according to the common Opinion of Nations, can be nothing else than the Violation of a real Right, and that subsisting without any Diminution, belonging to him, to whom we make a Sign, or direct our Discourse. For it is certain, that in Respect of himself, let him speak ever so falsely, no Man can lye. I do not here mean every Right, and what is foreign to the present Affair; but that Right which is proper and essential to the Matter in Hand, which is nothing else, ² but the Freedom of him, with whom we discourse to judge of the Conceptions of our Minds, a Freedom which, as by a silent Contract, we are supposed to owe him ³. For this, and no other, is that

XI. *The form of a Lye, as it is unlawful, consists in a Repugnancy to another's Right. This explained.*

⁴ *Inflabat quidem Narcissus, &c. TACIT. Annal. Lib. XI. (Cap. XXXIV. Num. 2.)* The same Historian says, that there are many People, who express their meaning in ambiguous Terms, that they may afterwards have it in their Power to explain them according to their Interest. *Non, ut plerique incerta differuit, &c. Histor. Lib. III. (Cap. III. Num. 2.)* He gives elsewhere an Example of it in the Person of *Mucianus*, Governor of Syria, who writing to the Generals *Antonius Primus* and *Arrius Varus* sometimes talked to them of the Necessity of hastening the Execution of the concerted Projects, and sometimes of the Advantage, that would arise from delaying it; composing his Discourses in such a Manner, that he might according to the Event either condemn the Generals, if unsuccessful; or arrogate Honour to himself, if otherwise: *Namque Mucianus tam celeri, &c. Ibid. (Cap. LII. Num. 3.)* GROTIUS.

&c. (p. 39. Edit. H. Steph).

*I'll shew you plainly what you want to learn,
Nor will I wrap in dark Disguise the Truth;
But tell it with a Frankness that the talk of Friends
Does always justly claim.*

GROTIUS.

⁸ *Tollendum est igitur ex rebus contrahendis omne mendacium. De Offic. Lib. III. Cap. XV.*

⁹ DEMOSTHENES speaks of this Law. *Orat. adversus Leptin. p. 363. A. Edit Basil 1572.*

XI. (1) See what I have said upon Note 2. of the preceding Paragraph.

² Wherefore he that deprives a Man of the Means of knowing certain Things, is said in the Hebrew Tongue, *Furari cor, to steal away his Heart.* See GENES. Chap. XXXI. Ver. 26, 27. with the Chaldaick Paraphrase of ONKELOS, and the Version of the LXX. See also the Rabbi DAVID in his Book *De Radicib.* The Rabbi SOLOMON in his Commentary, and ABEN EZRA another Rabbi. GROTIUS.

³ Our Author said a little lower in his first Edition, *That the Obligation Men are under to discover to each other by their Words what they have in their Thoughts, arises from a tacit, tho' not particular Convention; and which is made only when they begin to speak, as in the Case of Promises: But from a Kind of general and antient Convention; like that, which we have said above, took place in the Establishment of Property, with regard to the Restitution of Things belonging to another, which we have in our Hands: A Convention however, which is of such a Nature, that the Compensation of a Debt, and other such Things hinder it from having its Effects.* These

6 T

Words,

⁵ And also this ציחור, לפני תשליח, *One may speak ambiguously for Advantage, quoted by MANASSES BEN-ISRAEL, In suo Conciliat. Quest. 27. and St. CHRYSOSTOM, he is also called a Deceiver, that uses such a Thing to injure one, not he that does it to a good End. De Sacerdot. Lib. I. GROTIUS.*

⁶ PHILO of the Life of MOSES, *I speak of Facts that relate to the Honour of GOD, in which only we ought to speak Truth, even if a Man were otherwise given to Lying; for Truth is the Attendant of GOD; and St. AUSTIN, Epist. VIII. It is one Thing to know, Whether a good Man may sometimes lye; and another, Whether a Writer of the Holy Scriptures should lye. See hereafter, § 15. (Num. 2.) GROTIUS.*

⁷ ÆSCHYLUS in his *Prometheus*, λέξω τοξῶς,

that mutual Obligation, which Men intended to introduce by establishing the Use of Speech, and such other Signs; for without that such an Establishment had been to no Purpose.

2. It is also requisite, that this Right to judge should subsist without any Diminution, while we discourse ⁴. For it may happen, that tho' there were such a Right, it ceases or may be taken away, by some other supervening Right, as a Debt may cease by an Acquittance, or Non-Performance of some Condition. It is moreover required, that the Right that is violated be his; with whom we discourse, and not any other's; as in Contracts there arises no Injustice, but by the violating the Right of the Contracters. Hence perhaps it is, that after *Simonides*, *Plato* ⁵ refers the speaking of Truth to Justice; and that the Lying which is forbidden, Holy Writ often describes by bearing ⁶ false Witness against our Neighbour, and what ⁷ *St. Austin* himself puts into the Definition of a Lye, ⁸ *A Purpose to deceive*; and *Cicero* ⁹ will have the speaking of Truth referred to the Fundamentals of Justice.

3. But as this Right may be taken away by the express Consent of him, with whom we deal; as if any one shall declare before hand that he will speak false, and the other allows it, so also by a tacit Consent, or a Presumption founded upon just Reason, or by the Opposition of another's Right, which by the Judgment of all Men is far more considerable; from these Principles rightly understood many Inferences may be drawn, which may be of Use to reconcile those different Opinions formerly mentioned.

Words, which are retrenched in the later Editions, serve for our better comprehending the Ideas of our Author. He founds the Obligation we are under to speak Truth, upon the tacit Agreement Men entered into amongst themselves, in introducing the Use of Speech, that this, and other such Signs, should be used, so as to make known reciprocally what they thought. But this Agreement is no better founded than the other with which he compares it, and of which we have shewn the Uselessness in the Notes upon PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. XIII. § 3. Note 1. The Establishment itself of the Signification of Words, tho' it is made by a kind of Consent of Mankind, is not made by a Convention properly so called, and of an obligatory Force, as we have proved in the same Notes, B. IV. Chap. I. § 1. Note 1. And it is not at all necessary to suppose, that Men have agreed amongst themselves to manifest their Thoughts to each other by the Use of Words, and that in a manner proper for making them known. Men being often obliged to communicate their Thoughts reciprocally, in order to discharge what they owe to each other; and having no other Means to do that, than Words used in a certain Sense, which is generally the most common; it follows from that alone, that they ought to make such an Use of them, by Virtue of the known and incontestable Rule, that whoever is bound to procure an End, is also bound to employ the Means necessary to obtain that End. Neither, in my Opinion, is there any need to suppose, that when we begin to speak to another, we make a particular Agreement, by which we profess our Consent to enter into the general Agreement. Which however is pretended by the ingenious Author of a Piece, published in the JOURNAL LITERAIRE of the *Hague*, Vol. V. Part II. p. 256. & seqq. which the Reader will do well to peruse, and wherein the vicious Extremes are avoided. But it seems to me more simple to say, without so many turnings and windings, that the Question about Lying is reduced to this, whether there be always some Reason, which obliges us to make known our Thoughts to those with whom we discourse: For suppose there are Cases, in which there is no such Obligation, we may then make what Use we please of Speech. Now the greatest Partisans of the rigid Opinion, confess, that we may sometimes conceal what we think from others;

and thence it is, that they would have us get off either by saying nothing, or by declaring we will not speak what we think. Now what does it signify to others in those Cases, whether they are left in their Ignorance, or made to believe Things which are not? When the Question is about any Thing, which we are not obliged to tell them, it is the worse for them if they rely upon our Words; and much more when there is good Reason to hinder their knowing what we think. So that there being many Cases, wherein neither the Laws of Justice, nor those of Humanity or Charity, lay us under any Obligation to discover our real Thoughts to others, it is often allowable to disguise them, without the Inconveniences I have spoken of in my great Note upon PUFENDORF, B. IV. Chap. I. § 7. Note 1. on account of which we ought not to indulge ourselves in it, but for some considerable Reason; yet those Inconveniences do not hinder, but that there may be certain Cases wherein we not only may, but ought to use some innocent Falshood either to procure ourselves or others some great Good, or to avoid some great Evil. The Advantage of human Society makes both the one and the other equally requisite.

4 All this is manifestly superfluous according to the System laid down in the foregoing Note.

5 The Passage has been cited before, B. II. Chap. XI. § 1. Num. 8.

6 In all the Editions without excepting the first, the Text here has only, *Describunt testimonio sive elocutione adversus proximum*. But it is plain, that either the Copist, or the Printers, have left out the Word *falso*, which is absolutely necessary to denote the Idea of Lying in the Expression of the Scripture, of which the Decalogue gives us an Instance in the ninth Commandment. I have therefore ventured to correct this evident Omission in my Edition of the Original.

7 The Passage is: *Omnis autem, qui mentitur contra id quod animo sentit, loquitur voluntate fallendi*. *Enchirid. Cap. XXII. This is recited in the Canon Law, Caus. XXII. Quæst. II. Can. IV.*

8 *A Christian should never tell a Lye, with a Design to deceive or hurt: Ut non mentiatur unquam, &c. LACTANT. Institut. Lib. VI. Cap. XVIII. (num. 4. Edit. Cellar.) GROTIUS.*

9 *Ut reddere depositum, &c. De Offic. Lib. I. Cap. X.*

XII. First,

XII. *First*, when we talk to Children or Madmen, if what we say be false, yet it cannot be reputed a criminal Lye. Because it is generally allowed,

¹ *Ut puerorum ætas improvida ludificetur.*

That imprudent Youth may be thus deceived.

And ² *Quintilian* says, speaking of Children, *We make them believe many Things for their Advantage.* But the immediate Reason is, because Children and Madmen not having a freedom of Judgment, they cannot be injured in that Liberty which they have not.

XIII. *Secondly*, whilst we discourse with one Man that is not deceived, if a third Person be thereby deceived, it is no Lye; no Lye in Respect of him to whom it was spoken, because his Judgment continues unperverted, as does his who hearing a Fable, takes it as such, or his who hears a figurative Speech, whether καὶ εἰρωνεύων by way of Irony, or καθ' ὑπερβολὴν, by an Hyperbole, which Figure brings us to the Truth ¹ by something which is not true; as *Seneca* speaks, and *Quintilian* calls it, *A lying Exaggeration.* Neither is it a Lye in respect of him, that hears it by the by; because he is not concerned in the Discourse, and therefore we are not any ways obliged to inform him right; but if that Person mistake our Meaning, he may thank himself, and not any Body else, for his being deceived. For (if we consider it rightly) the Discourse between ourselves is no Discourse at all in respect to a Stander by, but a meer Sound that may indifferently signify any Thing. Therefore neither was *Cato* the Censor to be blamed for ^a promising Assistance to his Confederates, tho' falsely, nor *Flaccus* ^b in reporting to others, that *Æmilius* had taken the Enemies City by Storm; tho' the Enemies were deceived by it. *Plutarch* relates the like of *Agésilas*. For nothing was here said to the Enemy, and the consequent Damage was an accidental Thing, and not in itself unlawful to wish, or cause to an Enemy. And to this Kind do ² *St. Chrysostom* and *St. Hierom* refer that Saying ^c of *St. Paul*, wherein he reproved *St. Peter* at *Antioch* for too much judaizing, supposing that *St. Peter* well understood, that he did it not seriously, but to accommodate himself to the Weakness of those who heard him.

XIV. *1. Thirdly*, When we are certain that he with whom we discourse will not only not be offended, tho' his Judgment be for that Time imposed upon, but on the contrary will be thankful for it, on account of the Advantage, that he shall get by it, there is no Lye properly so called, or unjust Deceit, committed, no more than he can be charged with Theft, who presuming the Owner's Consent spends something of his of small Value to obtain him a great Profit. For in such Cases, where we have so much Reason to be assured of what we think, a Presumption of another's Will has the same Force as an express Consent. And it is an incontestable Maxim that *no Wrong is done to him that is willing.* Wherefore a Person seems

XII. *That it is lawful to speak what is false to Children and Madmen.*

XIII. *Also when he is deceived, to whom our Speech is not directed, and whom without Speech we may lawfully deceive.*

^a *Liv.* 1. 32. c. 12.

^b *Appian.* Bell. Hispan. p. 513. Edit. Amst. (301. H. Steph.)

^c *Galat.* ii. 14.

XIV. *And when our Speech is directed to him, that is willing to be deceived.*

XII. (1) *LUCRET. Lib. I. Ver. 939.*

² The Passage in which this is has been cited above, § 9. Note 13.

XIII. (1) *In hoc omnis hyperbole extenditur, ut ad verum mendacio veniat—incredibilia adfirmat, ut ad credibilia perveniat.* De Benefic. Lib. VII. Cap. XXIII.

The Passage of *QUINTILIAN*, is in *Institut. Orator.* Lib. VIII. Cap. VI. towards the End. But in *OBRECHT's* Edition, in which he follows that of *Oxford*, and has corrected it exactly after several Manuscripts, it is read, (p. 500.) in a manner that conveys a quite different Sense. *Est hæc DECENS sermonis superjectio.* That is to say, the Hyperbole is a reasonable Exaggeration, or which is not carried too far. The last Editor, Mr. *BURMAN*, only recites the various Readings, most of them evidently faulty, of the Manuscripts and Editions. Had *OBRECHT* found his in some Manuscript, it ought certainly to be preferred to all others. But, to consider it only as a Conjecture, it may be easily drawn from the Vestiges of those corrupt Readings, and is confirmed by what *QUINTILIAN* says afterwards: *Sed hujus quoque rei*

servatur mensura quædam. Quamvis enim est omnis Hyperbole ultra fidem, non tamen esse debet ULTRA MODUM—nec ita ut mendacio fallere velit. Quo magis intuentum est, quousque DECEAT extollere, quod nobis non creditur, p. 753. Edit. Burman.

² Add also *St. CYRIL* in his Work against the Emperor *Julian*, Lib. IX. in fin. [*St. PETER* did not differ in Opinion with *St. PAUL*: “But by adapting his Conduct to Occasions, he endeavoured to obtain by all Sorts of Methods the Advantage of those, who were desirous of being his Disciples. Whereas *St. PAUL* acting in a uniform Manner, thought himself obliged to give *St. PETER* Advice upon that Head; lest the Intention of the latter should not be understood, and some should take Offence at his Behaviour.” P. 325. C. D. Edit. Spanheim.] *TERTULLIAN* is almost in the same Opinion, Lib. I. contra *Marcion*. (Cap. XX.) and Lib. IV. (Cap. III.) Lib. V. Cap. III. [Add also, *De præscript. advers. Hæreticos*, Cap. XXIII.] *GROTIUS*.

³ See his Letter to *St. AUSTIN*, Vol. II. p. 336. & seqq. Edit. Froben.

not to be culpable, when he comforts his sick Friend, by making him believe what is false, as *Arria* did *Pæteus* upon the Death of their Son, which Story is in ^a *Pliny's* Epistles; or he that in a Danger encourages the Soldiers with false News, whereby he occasions their Safety and Victory; and so the deceived is not caught, as *Lucretius* speaks.

2. And ¹ *Democritus*, ἀληθομυθεύειν χρεὼν, ὅπερ λῶϊον *We must speak Truth, when it is for our Interest*; and *Xenophon*, ² φίλους δίκαιον ἐξαπαλᾶν, ὅτι ὃ ἀγαθὸν, *It is lawful to deceive our Friends, for their Advantage*; and ³ *Clemens Alexandrinus* allows, ψεύδεσθαι ἐν θεραπείας μέρεσιν, *To use a Lye for a Remedy*: ⁴ So *Maximus Tyrius*, καὶ ἰατρὸς νοσῶντα ἐξαπαλᾶ, καὶ στρατηγὸς στρατιώτην, καὶ κυβερνήτης ναύτας, καὶ δεινὸν εἶδεν *The Physician deceives his Patient, the General his Soldiers, and the Pilot his Mariners, and yet no Injury*. And *Proclus* ⁵ on *Plato* gives this Reason, τὸ γὰρ ἀγαθὸν κρείττον ἐστὶ τῆ ἀληθείας, *Goodness is preferable to Truth*. The like we have in *Xenophon*, ⁶ that their Confederates were coming to their Assistance; and of *Tullus Hostilius*, that ^b he ordered the *Alban* Army to withdraw, in order to surround the Enemy; (tho' he knew it was an Effect of the *Alban* General's Treachery) and that *Salubre Mendacium*, ⁷ that wholesome Lye of *Quinctius* the Consul (as Historians call it) to encourage his Army, gave out, that his left Wing had routed their Enemies; and of many others. But we must observe, that the Injury done to the Judgment in this Case, is of less Concern, because it is but as for a Moment, and the Truth immediately appears.

XV. 1. *Fourthly*, Another Consequence which has an Affinity with the former is this, that it is not a criminal Lye, when he who ¹ has an absolute Right over all the Rights of another, makes use of that Right, in telling something false, either for his particular Advantage, or for the publick Good. And *Plato* seems to have respect to this, ² when he allows Princes the Liberty to speak false. And yet ³ when he sometimes grants, and sometimes takes away this Privilege to, and from Physicians, he seems to make this Difference, that he gave it to the publicly authorized ones, and took it away from such as assumed it to themselves. Yet the same *Plato* does justly acknowledge, ⁴ that it is not suitable to the Nature of GOD to lye, notwithstanding the Sovereign Power that he has over Men, because it is an ⁵ Argument of Weakness to fly to such Shifts.

2. An

XIV. (1) This Saying is preserved by *STOBÆUS*, *Florileg.* Serm. XII.

² I do not know from whence our Author took these Words. The Passage cited above, § 9. Note 9. includes the Sense, but not in the same Terms.

³ He maintains, that in this Case it is rather telling a Lie than Lying, and alledges the Example of a Physician who deceives his Patient in order to cure him. *Stromat.* Lib. VII. Cap. IX. p. 873. Edit. Oxon. See a like Passage of *ORIGEN* which *GRONOVIVS* relates upon § 9. and what *PHILO* says, *De Cherubim*, p. 110. D. Edit. Paris. a Passage which I find also quoted by the Bishop of Oxford.

⁴ *Differt.* III. p. 30. Edit. Cantab. Davis. *St. CHRYSOSTOM*, Lib. I. alledges also the Example of Physicians. *GROTIUS*.

⁵ There is the same Thought in this Verse of *MENANDER'S*:

Κρεῖττον δ' ἐλέσθαι ψεῦδος, ἢ ἀληθὲς κακόν
Ex incert. Comœd. apud *STOB.* Tit. XII.

⁶ And when *Agefilas* came into *Bœotia*, and there understood that *Pisander* was vanquished in a Sea fight by *Pharnabazus* and *Conon*, he published the contrary in his Army, and putting on a Crown, offered Sacrifices for the Victory. *PLUTARCH* in the Life of *Agefilas*, p. 605. C. *GROTIUS*.

⁷ Et Romani, quia paucitas, &c. Liv. Lib. II. Cap. LXIV. Num. 6.

XV. (1) *HOMER* tells us, that *Agamemnon*, General of the *Greeks*, in order to sound his Army,

pretended that he would have them return Home, and he speaks of this Feint as of an innocent Artifice, allowable for him to use:

Πρῶτα δ' ἐγὼν ἔπεισιν, &c.

Iliad. (Lib. II. Ver. 73, 74. *GROTIUS*:

But it is another Question, whether the Feint of that General was seasonable or not; on which Point, as well as many others, the Abbé *TERRASSON* has cut out Work enough for the excessive Admirers of *HOMER*, in his judicious *Critical Dissertation upon the Iliad*, Vol. I. p. 357. & seqq.

² *De Repub.* Lib. III. p. 389. B.

³ But see what I have said upon *PUFENDORF*, *Law of Nature and Nations*, B. IV. Chap. I. § 17. Note 1. Second Edition.

⁴ That Philosopher thus proves, that it is not consistent with the Divine Nature to lie. *GOD*, says he, has no Occasion to lie, either to represent like the Poets, antient Things under ingenious Fictions, as if he was ignorant how all Things have passed: Or to deceive his Enemies, as if he feared them: Or to prevent the Effects of the Folly of his Friends; for no foolish or mad Person is the Friend of *GOD*. *De Repub.* Lib. I. p. 382. D. E. Vol. II. Edit. H. Steph.

⁵ For *GOD*, having an infinity of Means for the Attainment of his Ends, has no need of this to which Men are obliged to have recourse, because they cannot otherwise effect certain Things they propose to themselves. From whence it appears

^a Lib. 3. Epist. 16. n. 3, 4, 5, 6.

^b Liv. l. 1. c. 27. n. 8.

XV. And when he that speaks, uses that Sovereign Power that he has over his own Subjects.

2. An Example of this, perhaps, innocent Falshood we have ⁶ in *Joseph*, and commended by *Philo*, ^a who being Viceroy, pretends, tho' against his Knowledge, to charge his Brethren, first with being Spies, and afterwards Thieves. And in *Solomon*, who gave a remarkable Demonstration of his divine Wisdom, when to discover the true Mother, he commanded the living Child to be divided, when he intended nothing less. 1 *Kings* iii. 25, 26, 27. True is that Saying of *Quintilian*, ⁷ Sometimes the common Good requires that some Falshoods should be maintained.

XVI. *Fifthly*, ¹ When the Life of an innocent Person, or something equal to it, cannot otherwise be preserved, or the Execution of a dishonest Act be otherwise prevented; as was the Fact of *Hypermnestra*, ² commended by *Horace*.

Splendide

^a *De Joseph.*
p. 550. & seq.
Ed. Paris.

XVI. Or perhaps, when the Life of an innocent Person, or something equal to it, cannot otherwise be preserved.

that Men are no more obliged to imitate GOD in this Respect, than to desire to be omnipotent like him. This might suffice to answer the specious Objection which is deduced from the Example of the Supreme Being, and which opens a fine Field for Declamation. But let us say something more, in Order to set the Weakness of such an Argument in its full Light. It is with Pleasure I find that the learned and judicious Mr. NOODT has answered this Difficulty in a few Words, in an Addition made by him to the second Edition of his Treatise, *De forma emendandi doli mali, &c.* "It will be objected, says he, that GOD, whose Perfections Men ought to imitate as much as possible, is true in his Words. Be it so; but who does not know, that the same GOD, who is true, is also, above all Things, a Lover of the Good and Preservation of Mankind? Why therefore should not Man, to whom the Example of GOD is proposed, continually labour to make himself useful in all Respects to the Rest of his Species; if that can be, by telling them the Truth; if not, by using Disguise and Dissimulation necessary to their Good?" Let us add some Reflections, which will serve more clearly to shew, that those who make the Objection under Consideration, extend too far what is here truly imitable in the Divine Perfections. The Veracity of GOD engages us to love Truth; but not all Sorts of Truths; and still less to speak always whatever is true. We are obliged to love and seek after those Truths only which are useful in Regard to our Condition; as for those which are not so, we may neglect them, and are even obliged to do so sometimes, because the searching after them would injure the Knowledge of useful Truths. When we have discovered these useful Truths, we ought to communicate them to others; but we are not obliged to do it at all Times, and in all Places: There are Conjunctions wherein the Discovery of this Kind of Truths would produce no good Effect, or even sometimes occasion more Hurt than Good; they may then be concealed. Our Saviour JESUS CHRIST has set us an Example of it, which his Apostles have imitated. If this may take Place in Regard to Truths the most useful to others, why is it not allowable in Relation to Things, of which the Knowledge is of no Service to those we speak to, or which might give them Occasion to hurt either our selves or others, whether with or without Design, and thereby to commit an Imprudence, or a Sin; why, I say, is it not allowable to conceal, not only the Truth, but even to tell them positively something false? It is not necessary to push these Reflections any further; those who will consider them without Prejudice, and give Attention to all that has been said above, and in the great Work of PUFENDORF, will easily be convinced, that there is no Subject on which all the Evidence of common sense is more visibly contradicted, than it is by

those who maintain the Opinion I oppose. But I cannot help referring the Reader further to some Passages of an Author which I have cited above, and which I again direct to, because, in the Judgment of some People, there are Authorities which add great Force to Arguments, and even sometimes make more Impression upon them than the best Reasons in the World. This Author is MOSE'S AMYRAUT, whose *Morale Chrétienne* may be seen, Vol. III. p. 249, 307. and Vol. IV. p. 514, 532. Tho' he has not cleared up the Point so well as has been done since; he has however abundance of judicious Reflections, and solid Answers to divers Objections, deduced either from Reason or the Holy Scriptures. Since I wrote this Note I have an Opportunity to add a more modern Authority, and which will strike no less a great Number of Persons: It is that of the celebrated Mr. SAURIN, Pastor of the Hague, in his *Historical, Critical, Theological, and Moral Discourses, upon the most memorable Events of the Old and New Testament*, where he treats of the innocent Artifice of the Egyptian Midwives, tho' he does not venture to determine, whether what they told *Pharaoh* was true, or an officious Lye; he declares however, that admitting the latter, *No one can justly blame their Behaviour, or maintain the Thesis, that they would have acted with more Sanctity, had they observed a different Conduct.* He afterwards rejects, (as I do below, and as I have already done, in my great Note upon the Chapter of PUFENDORF which answers to this) *The Distinction made between their Intention, and the Means they employed to put it in Execution.* Disc. XLIII. p. 7. Edit. in Octav. But I know this Author will explain himself still better upon the Question of Lying, in the Sequel of his Work, where, on the Occasion of *Rahab's* History, related in the Book of *JOSHUA*, he will give the World a Dissertation in Form upon that Subject.

⁶ CASSIODORUS calls this a wise Dissimulation of Severity. *Quum fratribus dispensatoria, &c. De Amicitia.* GROTIUS.

⁷ *Non semper autem, etiam si frequentissime, &c. Institut. Orator. Lib. II. Cap. XVII. p. 131. Edit. Obrecht.*

XVI. (1) St. AUSTIN on the fifth Psalm, related by GRATIAN, in *Caus. XXII. Quæst. II.* C. nequis, *There are two Sorts of Lyes, not much to be blamed, yet not wholly blameless, when we either jest, or tell a Lye to serve our Neighbour. The jocular one is not pernicious, because it does not deceive, for he to whom it is directed knows it was spoken in Jest. And the other, the officious Lye, is the less faulty, because it has in it something of Kindness (or Charity).* TERTULLIAN, in his Book *De pudic.* among our daily Sins of Infirmary, to which we are all subject, puts also this, *To Lye out of Necessity.* Cap. XIX. GROTIUS.

² The Commentator says decently; for it is a brave

*Splendide mendax, & in omne Virgo
Nobilis ævum.*

Lib. 3. Od. 11.

*A Virgin famous for her pious Lye,
Whose glorious Memory shall never die.*

XVII. *That it is lawful by speaking false to deceive an Enemy, by whom asserted.*
^a *De Rep.* l. 2.
^b *Memor. Socrat.* l. 4. c. 2.
§ 16. *Ed. Oxon.*
& de Cyr. Inst.
l. 2.

XVII. 1. What we have now laid down, does not extend so far as the common Maxim of some wise Men, who assert in general, and without Restriction, that it is lawful to lye to an Enemy: Thus ^a *Plato* and ^b *Xenophon* among the *Greeks*, ¹ *Philo* among the *Jews*, and *St. Chrysostom* among ² the *Christians*, to the Rule given against Lying, add this Exception, Unless we have to do with an Enemy. Hither we may perhaps refer that Message sent by the Men of *Jabesh Gilead* to the *Ammonites*, by whom they were besieged, *1 Sam. xi. 10.* And that of ³ *Elisba* the

brave Thing to lye for Justice. Like to that of *St. CHRYSOSTOM*, on *Rahab*, *O excellent Lye! O laudable Deceit! Not of one that betrayed the Interests of Religion, but that did an Act of true Piety.* And *St. AUSTIN*, of the *Egyptian Midwives*, *O brave Invention of Humanity! O pious Lye to save Life!* *St. JEROME* also commends those Midwives, and believes the Rewards given them to be eternal, upon *EZEKIEL xvii.* and *ISAIAH lvi.* *St. AMBROSE*, on *Syagrius*, *B. VI.* and *St. AUSTIN* himself, to *Consentius*, *Against a Lye*, *Cap. XV.* varying here, according to Custom, are of the same Opinion. *TOSTATUS* says there is no Sin in it. And *St. AUSTIN* doubts of it, *B. II. Quæst. super Exod.* And *THOMAS*, *II. 2. Quæst. XC. Art. LV. Ad. IV.* And also *CAJETAN*. See also *ERASMUS's Moria Encomium*, and the learned *MASIVS* upon *JOSHUA ii. 5.* *GROTIUS*.

St. AMBROSE should not be named amongst those, who praise the Conduct of the *Egyptian Midwives*; for that Father, on the contrary, speaks as if he doubted whether they did well. The Passage our Author had in View is this, *Qui locus, ut superiori utilis ad Hebræorum salutem, ita reliquo confragosus ad obstrictum fidem, quæ didicerunt mentiri pro salute, & fallere pro excusatione.* *Lib. VIII. Epist. LXIV. p. 625. A. Edit. Paris. 1569.* In regard to *Rahab's Lye*, see what is said upon *PUFENDORF, Law of Nature and Nations, B. IV. Chap. I. § 16. Note 2.* The first Example of the *Egyptian Midwives* is very remarkable, and furnishes an Argument to which it would be very difficult to say any Thing plausible by Way of Answer. I have spoke of it in the great Note upon Paragraph 7. of the Chapter now cited, and shall add two weak Evasions used, after other Writers, by the late *Mr. BERNARD*, whose Knowledge and Judgment I otherwise respect, and for which we ought, without Doubt, to honour his Memory. One of these Subterfuges is, that *GOD* rewards the Actions of Men, tho' imperfect; otherwise he would not reward any; because our best Works are attended with a thousand Imperfections. The other is, that the Rewards conferred upon the Midwives were proportioned to their Works, which being only materially good, were in Consequence rewarded only with some temporal Blessings. *Discourse upon Lying*, at the End of the Treatise *Of the Excellency of Religion*, *Vol. II. p. 813.* I say, with Respect to the first of these Answers, that the Imperfection of our Actions, which does not hinder *GOD's* being pleased with, or rewarding them, does not regard the Nature of the Things we would do, or of the Means employed in Order to succeed; but the Disposition with which we do them. When we do a good Action, and employ

only lawful Means to that Purpose, tho' we are not actuated with all the Ardor we ought; and even tho' some human Consideration has a Share in it, *GOD*, however, approves it, as if there were no Imperfection at all: This is worthy of his Goodness, and does not clash with any of his Perfections. But the Holiness of *GOD* does not permit him to give the least Sign of Approbation, in Regard to an Action bad in itself, or that has been effected by Means bad in themselves; such as Lying would be, according to the Principles of those against whom we dispute. However good the Intention may have been, that does not hinder the Action, upon the Whole, from being bad, and, consequently, punishable, rather than worthy of Reward. *GOD* may not punish, and may pardon it, in Consideration of the other Part of the Person's Conduct who has acted thus; but to pretend, that the most holy Being authorizes and approves in the least such an Action, upon Account of the good Intention of the Agent in doing it, is opening a Door for the most pernicious Maxims of the loosest Morality. So that those who affect to be so rigid on the Question of Lying, run into an extreme Looseness of Principle, without perceiving it. The other Subterfuge, to which they have Recourse on this Occasion, is no less frivolous. Does the Nature or Degree of the Reward prevent its being a Reward; and, consequently, a Thing which necessarily supposes an Approbation? And where do we find, that the temporal Blessings with which *GOD* vouchsafes to reward Men, are dispensed indifferently to those who do Evil and those who do Good? *If he makes his Sun to rise upon the Righteous and upon the Wicked, and his Rain to fall upon the Lands of the Just and the Unjust*, it is, with Regard to the latter, an Effect of his Goodness, which waits their Repentance; and of his Wisdom, which does not permit him to suspend every Day, by sensible Miracles, the Laws it has established in Nature.

XVII. (1) Our Author quotes in the Margin, the Book intitled *De migratione Abraham*, in which I find nothing that is to the Purpose. But there is something upon this Subject in a Passage which I have already referred to, § 14. Note 10. *De Cherubim*, p. 110. *D. Edit. Paris.*

2 That Father says, that if we examine the Actions of the most celebrated Captains in all Ages, we shall find that most of their Victories were the Effect of some Fraud; and that such as have obtained Advantages in that Manner, are more praised than those who have performed Exploits by open Force. *De sacerdot. Lib. I. GROTIUS.*

3 The same Prophet gives us another Example, in the second Book of *Kings*, *Chap. VIII. ver. 10.* according

the Prophet, 2 Kings vi. 19. as also that of *Valerius* ⁴ *Lævinus*, who boasted that he killed *Pyrrhus*.

2. To the *third*, *fourth*, and *fifth* of the Observations above-mentioned, we may refer that of *Eustratius* Archbishop of *Nice*, ⁵ ὁ εὖ βελούδιον ἐν ἐξ ἀνάγκης ὁ ἀληθῶν ἐστίν· ἐστὶ γὰρ ποτὶ τὸν ὀρθῶς, βελούδιον καὶ περὶ αὐτῶν τὰ ψεύδεις βελούδιον, ἢ ἐν πειρηθῆς ψεύδῃ· πρὸς τινα ἢ ἐχθρὸν ὄντα, ἢ αὐτὸν (φάλη αὐτὸν, ἢ φίλον ἢ ἐκ- κέψη αὐτὸν ἀπὸ κακῶ, καὶ τέτων τὰ ἀρεδείματα ἐν τῇ ἰστορίαις πολλὰ. *There is not always a Necessity that a good Counsellor should speak Truth; for possibly a good Counsellor may consult how he may designedly tell a Lye, whereby either to deceive his Enemy, or save his Friend from Harm. Examples of these Kinds are common in all Histories.* And *Quintilian* ⁶ says, that a Lye, otherwise blameable, even in a Slave, will deserve Commendation, when a wise Man makes Use of it to hinder one from being murdered by Highwaymen, or to save his Country by deceiving an Enemy.

3. I know the Schoolmen of some Ages past will not allow of this, ^c who out of all the primitive Fathers have generally chose ⁷ *St. Austin* for their Guide in almost every Thing; yet, tho' they are scrupulous of admitting false Speaking in any Case, they allow of tacit Interpretations, so contrary to all Use, that it is doubtful whether it be not better to admit of false Speaking to some Persons, in the fore-mentioned Cases, or some of them (for I do not here pretend to determine any Thing) than so generally to distinguish them from Falshood, as when they say *I know not*, they mean, *I know not how to tell you so*. Or, *I have nothing*, they mean, *I have nothing to give you*. And many such like mental Reservations, which even common Sense is ashamed of; and which, if allowed, will introduce plain Contrarieties; so that he that affirms any Thing, may be said to deny it, and he that denies a Thing, may be said to affirm it.

4. For it is certain, that there is no Word ⁸ but may admit of a double Interpretation, because every Word, besides the primitive ⁹ Signification, ¹⁰ has also a derivative one, and that divers, ^d according to the Diversity of Arts, and also others by Metaphor, or some such Figure. Neither do I like their Device better, who, as if

^c *Thom. Summ. Theol. ii. 2. qu. 110. art. 1. & 3. Covarr. in cap. Quamvis, de pactis, in vi. part. 1. § 1. n. 15. Soto de Justit. 5. qu. 6. art. 2. Tolet. 1. 4. c. 21. & 1. 5. c. 58. Less. 1. 2. de Justit. c. 42. Dub. 9.*

^d See above, § 10. and 1. 2. c. 16. § 9.

according to the Correction of the *Massorethes*, followed by the vulgar Translation; for *Elisba* says thus to *Hazael*, *Go, say to him* [King Benhadad] *thou mayest certainly recover: Howbeit, the LORD hath shewed me that he shall surely die.* GROTIUS.

Elisba, as has been observed, speaks of the Disease which the King of Syria actually had, and of which, in Truth, he did not die. This was a very true Answer to the Question that Prince had sent to ask him. But at the same Time the Prophet foretold that he should die in another Manner, as the Event verified.

4 Our Author cites Nobody here: But he has undoubtedly taken this from *FRONTINUS*, who does not say, however, that *Valerius Lævinus* boasted of having killed *Pyrrhus*; but only, that a Soldier of *Pyrrhus's* Army having been killed, *Valerius Lævinus*, shewing the Sword all bloody with which he had been slain, made both Armies believe that it was the King. *Valerius Lævinus adversus Pyrrhum Epirotarum regem, occiso quodam gregali, tenens gladium cruentum, exercitui utrique persuasit, Pyrrhum interemtum. Stratagemat. Lib. II. Cap. IV. Num. 9.* This happened, as we may see in *PLUTARCH*, from *Pyrrhus's* having caused *Megacles*, one of his Men, to put on his Armour and Habit; he was killed by a Roman, who believed him to be the King. *Vit. Pyrrh. p. 393. E. F.* So that here was no Lye, as our Author imagined, upon *FRONTINUS's* Authority. *Quamobrem hostes, destitutos se ducis morte credentes, consertati a mendacio, se pavidi in castra receperunt.* The Example of *Jugurtha* might have been alledged

with more Propriety, which follows, *Num. 10.* who boasted falsely, that he had killed *Marius* See *SALLUST, Bell. Jugurth. Cap. CI. (CVII Edit. Waff.)*

5 In *Ethic. ad Nicomach. Lib. VI. Cap. IX.*

6 The Passage has already been cited, upon Paragraph 9. Note 14.

7 The Abbe RUPERT has writ against the Opinion of that Father, who had himself been formerly of another. GROTIUS.

8 This the Philosopher *Chrysippus* maintained, according to *AULUS GELLIUS*; *Chrysippus ait, omne verbum ambiguum natura esse, quoniam ex eodem duo vel plura accipi possunt.* Noct. Attic. Lib. XI. Cap. XII. *SENECA* says there are a great many Things that have no peculiar Names, and which we are obliged to express by borrowed Names. *Ingens copia est rerum sine nomine, &c. De Benefic. Lib. II. Cap. XXXIV. GROTIUS.*

9 *Primæ notionis.* This is what *CICERO* calls *Domicilium proprium*; and derived Significations, *Secundæ notionis*, he terms *Migrations in alienum*; according to the learned *GRONOVIVS's* Remark, *Unde illud tam ἀνεγόν, valetudini fideliter infer-viando? Unde in istum locum fideliter venit? Cui verbo Domicilium est proprium in officio, migrationes in alienum multæ. Nam & doctrina, & domus, & ars, & ager fidelis dici potest, &c. Lib. XVI. Ad familiar. Epist.*

10 *St. AUSTIN, De mag. That we have found out no Sign, which among the other Things that it denotes, does not also signify itself.* Nullum nos signum, &c. *De Magistro. Cap. VII. GROTIUS.*

they quarrelled more with the Word than the Thing, call that Jest which they speak with a Countenance and Pronunciation very serious.

XVIII. *This is not to be extended to Words promissory.*

XVIII. But we must observe, that what we have here said concerning false Speaking, is to be referred to assertory (or affirming) Speech, (and that too so far only as to hurt Nobody, but a publick Enemy) ¹ but not to promissory. For every Promise, as I said before, confers a new and special Right to the Person promised: And this is in Force, even among Enemies, notwithstanding their open Hostility, and that not only in express Promises, but also in tacit ones, as when an Interview is demanded, of which we shall treat more hereafter, when we come to speak of publick Faith to be preserved amongst Enemies.

XIX. *Nor to Oaths.*

XIX. Neither is it to be extended to Oaths, either assertory or promissory, for Oaths have a Power to exclude ¹ all Exceptions which may arise from the Party we deal with, because therein we treat not only with Men, but with GOD, to whom we stand obliged by our Oaths, tho' there should arise no Right at all to Man: And, as I have said already, it is not so in other Speeches, as in Oaths, for in others it is enough to clear us of a Lye, if the Words be true in any Sense, not altogether unusual; but in Things sworn ² it is necessary that our Words be true in that Sense, in which we sincerely believe those to whom we swear, understand them; so that we perfectly abhor ³ their Impiety, who scruple not to affirm, that it is as lawful to deceive Men with Oaths, as Children with Toys.

XX. *It is more generous, and more agreeable to Christian Simplicity to abstain from Falshood, even to our Enemies, illustrated.*

XX. 1. We know there are some Kinds of Fraud, which, tho' naturally permitted, yet are rejected by some Nations and Persons, not so much on the Account of any Injustice in them, as out of either a Greatness of Spirit, or sometimes a Confidence of our own Strength. There is in ¹ *Ælian* a remarkable Saying of *Pythagoras*, that *Man comes near to GOD in two Things, in always speaking Truth, and in doing Good to all Men.* And in *Jamblicus*, ² *Truth is the Guide to all Good; both divine and human.* And in *Aristotle*, ³ *ὁ μετὰ λόγῳ παρρησιαστικὸς, καὶ ἀληθολικός*, A Man of a great Soul delivers himself with Freedom and Truth. And in ⁴ *Plutarch*, *τὸ ψεῦδος δειλοπρεπές*, It is base and servile to lye. And ⁵ *Arrianus* of King *Ptolemy*, *καὶ αὐτῷ βασιλεῖ ὅτι αἰσχροτόνῳ ἢ τῷ ἄλλῳ ψεύσασθαι ἤν, It is much worse in a King to lye, than in another.* ⁶ So the same Author, of *Alexander*, *οὐ χρῆναι τὸν βασιλέα ἄλλο τι ἢ ἀληθεύειν, πρὸς τὰς ὑπηκόους*, A Prince should speak nothing to his Subjects but Truth. And ⁷ *Mamertine* speaks of *Julian*. *Admirable is the Agreement between our Prince's Tongue and his Heart; he is sensible that Lying argues a base and mean Spirit, and is a servile Vice; and whereas Fear or Want makes Men Lyars, that Prince is ignorant of his own Majesty that lyes.* *Plutarch* ⁸ records of *Aristides*, *φύσις ἰδρυμένη ἐν ἡβῇ βεβέω καὶ πρὸς τὸ δίκαιον ἀτελής, ψεῦδος δ' ἐστὶ ἐν παιδείᾳ τινι τρόπῳ προσιεμένη*, He was naturally so great an Admirer of Truth, that he would ⁹ not allow of a Lye in Jest. And *Probus* of *Epaminondas*, ⁹ *So great a Lover of Truth, that he would not tell a Lye, tho' but*

XVIII. (1) *Agésilas*, in *PLUTARCH*, distinguishes thus, *To break Leagues is to despise the Gods; but otherwise to deceive an Enemy, is not only just but glorious, and a Pleasure with Profit.* *GROTIUS.*

The Original of this Passage has been given above, § 6. Note 8. All the Difference is, that here our Author quotes it, as it is in the Life of *Agésilas*, where the Terms are a little different, but the Sense exactly the same.

XIX. (1) See what is said upon *B. II. Chap. XIII. § 14. & seq.*

² This is not peculiar to an Oath; but we ought to express ourselves in that Manner as often as those we speak to have a Right to require a faithful Discovery of our Thoughts; in a Word, as often as Lying cannot be innocent. See what I have said upon Note 2. of § 10. of this Chapter. So that Swearing would then only make the Lye more criminal.

³ *Δεῖ τὰς παῖδας, &c.* Some ascribe this Saying to *Lyfander*, some to *Philip of Macedon*,

and others to *Dionysius* the Tyrant. See *ÆLIAN*, *Var. Hist. Lib. VII. Cap. XII.* and the Commentators upon that Place.

XX. (1) *Var. Hist. Lib. XII. Cap. LIX.*

² *Protrept. Cap. XX.*

³ *Ethic. Nicomach. Lib. IV. Cap. VIII.*

⁴ *De educatione liberor. p. 11. C. Vol. II. Edit. Wech.* See *PHILO* the Jew, *Lib. Quod omnis probus est liber*, (p. 888. B. Edit. Paris.)

⁵ For which Reason he considers *PTOLEMY* as an Historian most to be relied on, with Regard to the Actions of *Alexander the Great.* *De Expedit. Alexand. Lib. I. (init.)*

⁶ *Lib. VII. (Cap. V.)*

⁷ *Mira est in principe nostro [Juliano], &c. Pannegyr. Julian. (Cap. XXVI. Num. 3. Edit. Cellar.)*

⁸ *PLUTARCH, Vit. Aristid. Vol. I. p. 319. D. Edit. Wech.*

⁹ *Adeo veritatis diligens, &c. CORNELIUS NEPOS, Vit. Epaminond. Cap. III. Num. 1. Edit. Cellar.*

for Sport. Which ought the more religiously to be observed by ¹⁰ Christians, who are not only commanded to use Simplicity, *Matt. x. 16.* but are also forbidden idle ¹¹ Talk, *Matt. xii. 36.* having him for an Example in whose Mouth was found no Guile. Wherefore, as ¹² *Lactantius* said, *he that is truly honest and just will not say with Lucilius, Homini amico ac familiari non est mentiri meum, It is not my Custom to tell a Lye to my Friend; but also will think it his Duty not to lye to a Stranger, or an Enemy; nor will his Tongue ever speak what his Heart does not think.* Such a one was *Neoptolemus*, says *Sophocles*, ¹³ *ὑπερβίων ἀπλότῃ, ἢ δ' ἐνείᾳ, Excelling for his generous Candor: As Dion Prusænsis* rightly observed, who being urged by *Ulysses* to use Treachery, replied,

*I grieve to hear your secret Treacheries,
But should do more to act as you advise.*

¹⁴ *If I (Ulysses) were not nobly born,
I yet should base unmanly Actions scorn:
But it would ever shame Achilles Son,
To steal by Craft what should by Force be won.*

And *Euripides*, ¹⁵

*A gallant Soul will gallant Actions do,
And scorns by Treachery to kill his Foe.*

3. Thus ¹⁶ *Alexander* said he would not steal a Victory; and *Polybius* ¹⁷ writes, that the *Achæans* hated to use Fraud against an Enemy, esteeming that the surest Victory, which, to use *Claudian's* Words,

¹⁸ *Confessus animo quoque subjugat Hostes.*

A Victory confes'd by Enemies is true.

So were the *Romans* till the second *Punick War*; so that ¹⁹ *Ælian* said, *ἴσασι ῥωμαῖοι ἀλᾶθῆναι εἶναι ἢ ἔ μὲν διὰ τέχνης ἢ δι' ἐπιβουλῆς καὶ ἀλῶνισαδὲς τὰς ἐχθρὰς. The Romans are truly valiant, overcoming their Enemies, not by Craft and Subtilty, but by plain Force.* And when *Perseus* the *Macedonian King* was deceived by the Hopes of Peace, ²⁰ the old Senators disallowed the Act, as inconsistent with *Roman Bravery*, saying, that their Ancestors prosecuted their Wars by Valour, not Craft, not like the subtil *Carthaginians*, nor cunning *Grecians*, among whom it was greater Glory to overcome their Enemies by Treachery, than by true Valour. To which they added, *That sometimes Cunning might for a little While prevail against Valour, but his Courage was for ever lost, who was convinced that in a regular and*

¹⁰ Christianity, rightly understood, prescribes nothing upon this Head more than the Law of Nature. It is not probable that our Saviour intended, for Instance, to render the Condition of *Christian Nations* more unhappy than that of *Pagan States*, by prohibiting them to use the Stratagems of War; by the Means of which great Advantages may be obtained, and great Dangers avoided.

¹¹ The Term in the Original signifies more than *Idle and useless Talk*; it imports inconsiderate or malicious Words, which produce some bad Effect. See *HAMMOND* and *LE CLERC* upon this Passage.

¹² *Itaque viator ille verus ac justus, &c.* *Instit. Divin. Lib. VI. Cap. XVIII. Num. 6. Edit. Cellar.*

¹³ *Philætet.* (ver. 85. & seq.)

¹⁴ What *Neoptolemus* says of his Father *Achilles*, is confirmed by *HORACE*,

*Ille non inclusus equo, Minervæ,
Sacra mentito, &c.*

Lib. IV. Od. VI. (ver. 13. & seq.)

*Not he in great Minerva's Horse
Had cheated Troy, and Priam's heedless Court,
Dissolv'd in Wine and Sport;
But hot, and deaf to all Remorse,
Had fiercely storm'd our Walls with open Force.*

CREECH.

Upon which the Scholiast remarks, that the Aversion of *Achilles* to the Stratagems of War, arose from the Confidence he had in his own Valour and Strength. *Achillem nihil fraude, sed semper palam, virtutis fiducia, dimicasse.*

¹⁵ *Rhes.* ver. 510, 511.

¹⁶ *PLUTARCH, Vit. Alex. p. 683. D. Vol. I. Edit. Wechel.* See *QUINTIUS CURTIUS, Lib. IV. Cap. XIII. Num. 9.* and the Commentators there.

¹⁷ *POLYBIUS, Lib. XIII. (Cap. I.)*

¹⁸ *In VI. Consul. Honor. ver. 248, 249.*

¹⁹ *Var. Hist. Lib. XII. Cap. XXXIII.*

²⁰ *Hæc, ut summa ratione acta, &c.* *LIVY, Lib. XLII. Cap. XLVII. Num. 4, 8.*

just War, he was neither by Fraud, nor by Chance, but engaging closely in Battle, with his whole Strength, fairly vanquished. So in later Times we read in Tacitus, ²¹ That the Roman People avenged themselves on their Enemies, not by Craft or Cunning, but openly, and by Force of Arms. Such also were the ²² Tibarenes (a People of Cappadocia) who always proclaimed the Time and Place of Battle. The like does Mardonius in Herodotus ²³ testify of the Grecians in his Time.

XXI. That it is not lawful for us to force another to do what is lawful for us to do, but not for him.

XXI. As to the Manner of prosecuting a War, this Rule is also necessary, ¹ that whatsoever is unlawful for a Man to do, is also unlawful for another to force or persuade him to. As for Example, ² it is unlawful for a Subject to kill his Prince, or to deliver up a Town without the Consent of a Council of War, or to plunder his Countrymen. Therefore it is also unlawful to persuade him, who continues a Subject, to do so; for he that causes another to sin, always sins himself; neither is it enough to say, that it is lawful for him who tempts another to a base Act to do it himself, as to kill an Enemy, suppose; he may kill him, it is true, but not in such a Manner. And St. Augustine ³ says true, *It signifies nothing, whether a Man commit a Crime himself, or employ another to do it for him.*

XXII. Yet we may use his Service that freely offers it.

² B. ii. ch. 26. § 5.

XXII. But it is another Thing if a Person shall freely offer himself, without any Persuasion to it; for it is not unlawful for us then to make use of him, as an Instrument, to do that which it is lawful for us to do. As we have proved already, ^a by the Example of GOD himself. *We receive a Deserter by the Law of War*, said Celsus, ¹ that is, it is not contrary ² to the Law of War, to receive him, who quitting the Enemy's Party, embraces ours.

²¹ Reperio apud Scriptores, &c. Annal. Lib. II. (Cap. LXXXVIII. Num. 1.) ÆLIAN says the same.

²² This we learn from the antient Scholiast upon APOLLONIUS, in Argonautic. Lib. II. &c. in ver. 1112.

²³ This last Example is not very clear. All that Mardonius says in his Speech, to persuade Xerxes to make War upon the Greeks, is, "The Greeks, as I am informed, generally make War in a very rash Manner, on Account of their Ignorance, and Want of Ingenuity: For after having declared War against each other, if they find a fine level Country, they go thither, in Order to fight." HERODOTUS, Lib. VII. Cap. IX. Our Author might have here applied the Passage of LIVY, Note 20. with more Propriety than this.

XXI. (1) SO MAIMONIDES teaches, הלכות חונק, Chap. V. Sect. X. GROTIUS.

² See upon this PUFENDORF, B. VIII. Chap.

VI. § 16. and what will be said below, Chap. IV. of this Book, § 18.

³ Nihil interest, utrum ipse scelus admittas, an alium propter te admittere velis. This is in his Treatise De moribus Manichæorum, where the last Words are conceived in this Manner, An propter te ab alio admitti velis. But our Author quotes after ALBERICUS GENTILIS, who gives the Passage in those Words, De Jure Belli, Lib. II. Cap. IX.

XXII. (1) Transfugam jure belli recipimus. Digest, Lib. XLI. Tit. I. De adquir. rerum Domin. Leg. LI. See upon this Law, CUJAS, Observ. Lib. IV. Cap. IX. and PETER DU FAURE, Semest. Lib. II. Cap. III. p. m. 13.

² Neither are we to deliver them up, unless it be so stipulated by the Articles of Peace, as in the Peace with Philip, the Ætolians, and Antiochus, POLYBIUS, In Excerpt. Legat. IX. XXVIII. XXXV. MENANDER, Protecl. is of the same Opinion. GROTIUS.

CHAP. II.

How Subjects Goods, by the Law of Nations, are obliged for their Prince's Debts: And of Reprisals.

I. Naturally no Man is bound by the Fact of another but the Heir.

I. 1. **L**ET us now come to those Rights ¹ which the Law of Nations allows us, which partly belong to every War, partly to some particular Kinds of War only. Let us begin with the first. By the bare Law of Nature no Man is bound by the Fact of another, but he that inherits his Goods. ² For when Property

I. (1) See the Beginning of Chap. I.

² It is determined in the Decretals, that the Heirs of an Incendiary or Usurer, shall make good

the Wrong he has done, or Damage caused, out of his Goods. Et Hæredes ejus moneas, & compellas, &c. Lib. V. Tit. XVII. De raptoribus, incendiariis,

perty was first introduced, it was then agreed on, that all Debts should pass together with the Goods to the next Possessor. The Emperor Zeno used to say, ³ that it was contrary to natural Equity, that one Man should be troubled for another Man's Debt. Hence arise those Titles in the Roman Laws, ^a that a Wife shall not be sued for the Husband; nor the Husband for the Wife; the Son for the Father; ^a Cod. l. 4. tit. 12. and tit. 13. nor the Father or Mother for the Son.

2. Neither (as Ulpian ⁴ says expressly) shall particular Persons be obliged for the Debts of the Community, that is, if the publick Stock be able to discharge them; otherwise they shall be, not as particular Persons, but as they are part of the Whole. ⁵ Seneca says, *If any Man lend Money to my Country, I shall not own myself his Debtor, nor take it as my own Debt, ^b but shall willingly pay my Proportion to discharge the Debt.* He had said before, *As one of the People, not as for myself, I shall pay, but advance it for my Country.* So again, *Every particular Person owes, not as his own Debt, but as part of the Publick.* Hence it was particularly provided by the Roman Laws, that no ⁶ Peasant should be obliged for the Debts of another Peasant; and in another Place, that ⁷ no one's Possession should be distrained for the Debts of another, nor even for the Publick; and in Justinian's Novels, ἐνεχυρασμοὶ, *Reprisals*, ⁸ are expressly forbid; giving this Reason for it, because it is not just that one Man should be the Debtor, and another be forced to pay the Debt; where also such Exactions are called odious. And Theodorick, ⁹ in Cassiodore, called it a base License, for one Man to be kept as a Pledge for another.

II. 1. Tho' this be true, yet by the ¹ voluntary Law of Nations, it may be, and as appears has been introduced, that whatsoever Debts any State, or the Prince, shall

II. But by the Law of Nations, the Goods and Persons of Subjects are obliged for their Prince's Debts.

incendiariis, &c. Cap. V. *Quod Filii ad restituendas usurias*, &c. Tit. XIX. *De usuris*, Cap. IX. See what we have said above, B. II. Chap. XXI. § 19.

3 *Grave est non solum legibus*, &c. Code. Lib. XI. Tit. LVI. *Ut nullus e vicaneis pro alienis vicaneorum debitis teneatur*. Leg. unic.

4 *Si quid universitati debetur*, &c. Digest. Lib. III. Tit. IV. *Quod cujuscunque universitatis nomine, vel contra eam agatur*, Leg. VII. § 1.

5 *Si quis patriæ meæ pecuniam*, &c. De Benefic. Lib. VI. Cap. XX. *Deinde ego quoque illi*, &c. Cap. XIX. *Debebunt autem singuli*, &c. Ibid.

6 The Law has been cited a little above, Note 3. See Cujas upon it.

7 *Nullam possessionem alterius*, &c. Cod. Lib. XII. Tit. LXI. *De Executoribus & Exactoribus*, Leg. IV.

8 *Inhonestas pignorationes*, &c. Novell. LII. princ. & Cap. I. What the Emperor here calls *Pignorationes*, is the Translation of the Greek Word ἐνεχυρασμοὶ. and in barbarous Latin it is expressed by the Word *Repressalix*, which has been received in the vulgar Tongues; as appears by the *Decretals*, *Et si pignorationes, quas vulgaris elocutio Repressalias nominat*, &c. In VI. Lib. V. Tit. VIII. *De injuriis*, &c. Cap. unic. Where it is better to read with some Manuscripts, *Reprensalias*; for that Word answers exactly to the Saxon *Witthernam*. But Use has carried it for *Repressalix*. GROTIUS.

See lower, § 4.

9 *Fædum est, inter jura publica*, &c. Var. IV. 10.

II. (1) This is not an arbitrary or voluntary Establishment, founded upon any pretended Right of Nations, of which the Existence cannot be proved, and where all is reduced to a Custom more or less extended, but which, in itself, has never the Force of a Law. The Right in Question is a necessary Consequence of the Constitution of Civil Societies, and an Application of the Maxims of the Law of Nature to that Constitution. In the Indepen-

dence of the State of Nature, and before there was any Kind of Civil Government, one could come upon those only who had done the Wrong, or upon their Accomplices; because there was then no Tie between Men, by Virtue of which a Man might be deemed to have consented, in some Manner, to what others did, even without his Participation. But after Civil Societies were formed, that is to say, Bodies, of which all the Members were united together, for their common Defence; there resulted from thence a Community of Interests and Wills; whereby, as the Society, or the Powers which govern it, engage to defend each against the Injuries of every other, whether Citizen or Stranger; so every Individual may be deemed to be engaged to answer for what the Society, or Powers which govern it, do, or owe. No human Establishment, no Tie into which Men enter, can dispense with the Obligation of that general and inviolable Law of Nature, *That Damage or Wrong ought to be made good*; unless those, who are thereby exposed to suffer Wrong or Damage, have manifestly renounced their Right to demand that Reparation. And when such Kind of Establishments prevents, in certain Respects, the injured from obtaining so easily the Satisfaction due to them, that Difficulty should be made up, by supplying the Persons interested with all other possible Means of doing themselves Justice. Now it is certain, that the Society, or the Powers which govern it, by being armed with the Force of the whole Body, are encouraged to baffle, and may often with Impunity baffle, Strangers, who come to demand something due to them: And every Subject contributes some Way or other to enable them to act in this Manner, so that he may thereby be deemed to consent to it. But if he does not actually consent; there is, after all, no other Means to facilitate, to injured Strangers, the Prosecution of their Rights, become difficult from the united Force of the whole Body, than to authorize them to come upon all those who are Members of it, whether they have or have not consented. Besides, how can Strangers know

shall contract, either primarily by themselves, or be engaged for by not restoring to others what is their Right; all the Goods, both corporal² and incorporeal, of their Subjects, shall be obliged to discharge. But this was occasioned by a Kind of Necessity, otherwise there would be such a Loose given, as to let in all Manner of Injuries, for the Goods of Princes cannot so easily be seized upon as those of private Men, who, being many in Number, have each their own. Wherefore *Justinian*³ reckons it among those Rights which Nations have established amongst themselves, because they judge it useful and necessary to Mankind.

^a *Thom. Summ.*
Theol. ii. 2. qu.
40. art. 1. *Molin.*
Disp. 120.
& 121. *Valent.*
Disp. 3. qu. 16.
n. 3. *Navarr.*
c. 27. n. 136.

2. Neither is this so disagreeable to Nature, ^a that it might not be brought in by Custom, and the tacit Consent of Nations, since Sureties stand obliged for other Mens Debts, without any other Cause than their own free Consent. It was also believed, and with Reason believed, that Foreigners, for whom little Regard is had in many Places, would not be able so easily to obtain their Right, or find Means to be indemnified, as the Members of the same Civil Society amongst themselves. Besides, the Benefit arising from this Obligation being common to all People, they that find themselves aggrieved by it at one Time, may be relieved by it at another.

3. That this has passed into a Custom, appears not only from ⁴ compleat Wars between Nation and Nation, (for what is practised in such Wars the very Words of the Denunciation declare). ⁵ *Against the antient Latin People, and the Men of old Latium, I denounce and make War,* says the Herald in *Livy*. So when the People's Consent was demanded, ⁶ *Is it your Will and Pleasure that War shall be proclaimed against King Philip, and the Macedonians, and all under his Dominion?* And in the Decree itself, *The Roman People do denounce War against the Hermundulian People, and the Men of Hermunduli.* Which is out of *Cincius*, in his *Res* ⁷ *Militaris*. Also, in another Place, *Let him be an Enemy, and all that are* ⁸ *under his Protection.* But also from what is practised where no perfect War is absolutely denounced; yet where a certain violent Prosecution of our Right is necessary, which is, as it were, an imperfect War. *Agessilaus* formerly told *Pharnabazus*, a Subject to the King of *Persia*, ⁹ *ἡμεῖς, ὦ Φαρναβάζε, καὶ φίλοι ὄντες πρότερον βασιλέως, ἐχράμεθα πῶς ἐκείνῳ πράγμασι φιλικῶς· καὶ νῦν πολεμικοὶ γεγονότες, πολεμικῶς ἐν ἐν καὶ σε τῷ βασιλέως κημάτων ὀρῶντες εἶναι βεβλόμενον, εἰκότως διὰ σὲ βλάβητορ ἐκείνῳ, When (O Pharnabazus) we were heretofore Friends to the King, we dealt*

know who those are that actually have or have not given their Consent? If they must wait to be fully informed on that Head, they might, generally speaking, as well continue quiet, and patiently suffer the Injury done them: So that, from a necessary Consequence of the Constitution of Civil Societies, every Subject, whilst he continues such, is answerable, with Regard to Strangers, for what the Society, or the Powers that govern it, do or owe; he may, however, demand to be indemnified, when there is any Fault or Injustice on the Part of his Superiors; or when, having been exposed to suffer unjustly for the Body, what it has cost him amounts to more than the Quota he is obliged to contribute for the publick Good. And if he is sometimes disappointed of this Reparation, it must be considered as one of the Inconveniencies which the Constitution of human Affairs renders inevitable in all human Establishments. The Reasons alledged by our Author, serve to strengthen the Principles I have now advanced, which, when considered together, will, in my Opinion, plainly shew that it is not necessary to suppose here a tacit Consent of Nations.

2 See *PUFENDORF*, *Law of Nature and Nations*, B. IV. Chap. IX. § 7. Note 5. where this Distinction is explained.

3 *Jus autem gentium*, &c. *Institut. Lib. I. Tit. II. De Jur. Nat. Gent. & Civili.* § 2.

4 The learned *NICOLAUS DAMASCENUS* distinguishes Wars from these Reprisals, where he shews, that tho' it were not lawful for *Herod* to

make War upon the *Arabians*, he might yet ῥύσιναι λαμβάνειν, *use Reprisals*, for Debts due unto him by Contract. *JOSEPHUS*, *Lib. VI. Antiq. Hist.* where he has these Words, *Saying that there were five hundred Talents due to Herod, and a Bond given that if the appointed Day of Payment were passed, he might take what he could through all the Country of Arabia, he therefore called this Action, not a warlike Expedition, but a just Execution, to recover his own Due.* *GROTIUS*.

5 *Ob eam rem ego, Populusque Romanus, &c.* *LIVY*, *Lib. I. (Cap. XXXII. Num. 13.)*

6 *Isque [P. Sulpicius] rogationem, &c.* *Idem*, *Lib. XXXI. (Cap. VI. Num. 1.)*

7 *Quodque Populus Romanus cum Populo Hermundulo, &c.* This Passage is part of a Declaration of War which *AULUS GELLIUS* has preserved from a lost Treatise of *CINCIVS*, *De re militari*. *Noct. Attic. Lib. XVI. Cap. IV.*

8 *Cneus Manlius* being accused of having made War upon the *Gauls*, tho' it had been only decreed by the Senate against *Antiochus*, defended himself with this Reason; that the *Gauls* were amongst the Troops, and in the Fortresses of *Antiochus*, and therefore, that the War ought to be deemed declared also against them. *Atqui cum Antiocho, non cum Gallis bellum, &c.* *LIVY*, *Lib. XXXVIII. Cap. XLVIII. Num. 9.*

9 *PLUTARCH*, *In vit. Agesil.* p. 602. D. F. See also *XENOPHON*, *Hist. Græc. Lib. IV. (Cap. I. § 15.)*

friendly to all that belonged to him; but now being his Enemies, we shall use them all as Enemies; and therefore, since you resolve to continue one of his, we shall endeavour to hurt him through you.

III. 1. A Branch of the Execution of this Right is, what the Athenians called *Ἀνδροληψίαν*, *Taking of Men Prisoners*: Concerning which the Attick Law was this, Ἐάν τις βιάῳ θανάτῳ δοθάνῃ, ὑπὲρ τῆς τοῦ προσήκοντος εἶναι τὰς ἀνδροληψίας, ἕως ἂν ἡ δίκας τῆς φόνος ὑπόχρῳσιν, ἢ τοὺς ἀποκτείναντας ἐκδῶσι· ἢ ὃ ἀνδροληψίαν εἶναι μέχρι τριῶν πλέον ὢ μὴ, *If any Man was found murdered, the next of Kin had a Right to take any three Men, and no more, and detain them till the Murderer were either punished or delivered up in Order to it.* Hence we may see, that there is a Kind of incorporeal Right of Subjects, (that is, a Liberty to live where they please, and to do what they please) engaged for the Debts of every Society, which ought to punish such of their own Body, who shall injure those of another Society; so that the Members thereof may be held in Bondage until the Society do that which it is bound to do, that is, punish the Offenders. For tho' the Egyptians (as we learn out of *Diodore*) did maintain, that it was not just to imprison a Man for Debt, yet there is nothing in it contrary to Nature; and the contrary Practice prevailed, not only amongst the Greeks, but also amongst other Nations.

III. An Example in taking of Men prisoners.

2. *Aristocrates*, who was Contemporary with *Demosthenes*, proposed that a Decree might pass, that whosoever should kill *Charidemus*, might be taken wherever he was met with; and whoever made Resistance should be held as an Enemy. In which *Demosthenes* finds these Faults. First, That *Aristocrates* did not distinguish the killing *Charidemus* justly or unjustly, since it was possible to have been justly. Next, That he did not put in this Clause, that in Case *Charidemus* happened to be killed, Judgment should first be demanded against the Murderer, before the Permission of seizing him was made use of. And thirdly, That not they among whom he should be killed, but they that protected the Murderer, should be reputed as Enemies. The Words of *Demosthenes* are these, ὁ μὲν νόμος, ἂν μῆτε δίκας ὑπόχρῳσι παρ' οἷς ἂν τὸ πάθος γένηται, μῆτε τοὺς δεδρακότας ἐκδίδωσι, κελεύει καὶ πύτων εἶναι τὸ ἀνδρολήψιον καὶ τριῶν ὃ ὃ πύτους μὲν ἀθάνατος παρήκει, καὶ εἰ δὲ λόγον πεποιθὴ περὶ αὐτῶν εἰδέναι, τοὺς ὃ τὸν ἥδ' ἐπεφύλακτα, φήσω γὰρ ἔγω, καὶ τὸν κοινὸν ἀνθρώπων νόμον, ἐς καὶ τὸν φεύγοντα δέχεσθαι ὑποδεξαμένους ἐκπίνδους εἶναι γράφει ἂν μὴ τὸν ἱκέτην ἐκδῶσιν, *If a Murder be committed among any People, and they refuse either to punish, or deliver up the Murderer, the Law allows us to seize on three Men; but he (Aristocrates) leaves these Men untouched, and does not so much as mention them, but would have those prosecuted as Enemies, who have, according to the common Right of Nations concerning Suppliants, received him that has fled to them for Protection, (for so I put the Case) unless they deliver him up.* The fourth Thing that he finds Fault with, is, That *Aristocrates* would immediately bring it to an open and compleat War, whereas the Law only demands the taking up of three Men.

3. Of these four Exceptions, the first, second, and fourth are reasonable, but the third, unless confined to the sole Event of the Murder done, either accidentally, or in Self-Defence, I cannot help thinking, that *Demosthenes* reasons here rather like an Orator, or one that seeks for every Thing that may serve to favour his Cause, than according to Truth and Right; for (as we said^a before) that Right of Nations to receive and defend Suppliants, does only concern them whom Fortune, not their own Crime, has made miserable.

^a B. ii. ch. 21. § 5.

4. Otherwise there is no Difference between those among whom the Crime was committed, and them who refuse either to punish or to deliver up the Offender. And therefore the Law itself, cited by *Demosthenes*, has been thus interpreted

III. (1) DEMOSTHENES, *Orat. adversus Aristocrat.* p. 440. C. See the learned SALMASTIUS, *De modo usurarum*, p. 212. & seq.

2 *Orat. adversus Aristocrat.* (p. 440. C.) GROTIUS.

Our Author reads ἱκέτην instead of οἰκέτην, in the End of this Passage; which Correction I

find in the last Edition of WOLFIUS that I use. But there are some other Places, where he restores the Text, without taking Notice of it, in a Manner which seems to me to be well founded. He might have only added, φήσω καὶ ἔγω, instead of φήσω καὶ ἔγω, as good Manuscripts, and some Editions have it.

either by Custom, or by some express Clause, added afterwards to prevent the like Cavils: No Body will deny the Truth of one of them, who has read that of ³ Julius Pollux, ἀνδρολήψιον ᾧ ἴταν τις τὰς ἀνδροφόνους καταφυγόντας ὡς τινας ἀπαλλῶν μὴ λαμβάνη ἐξέσιν ἐκ τῆ ἐκ ἐκιδίδων ἀρχὴ τῶν ἀπαγαγόντων, *The seizing of Men is then lawful, when a Man having demanded Murderers who have fled to others for Refuge, cannot receive them; for the Right of apprehending three Men, is against those that refuse to deliver up the Delinquent.* And so ⁴ Harpocration, ἀνδροληψία τὸ ἀρπάζειν ἀνδρας ἐκ τινος πόλεως ἐνεχύραζον γὰρ τὸ ἐχρσταν πῶλιν τὸν ἀνδροφόνον, ἢ μὴ πορεύμενην αὐτὸν εἰς τιμωρίαν, *The Right of taking Prisoners, is to snatch away some Men from some City: For against such States, who received Malefactors, and refused to deliver them up to Punishment, they antiently used this Right of Reprisal.*

5. The like may be done by any State, whose Subject has been manifestly and injuriously taken away and detained. So at Carthage some opposed the taking Ariston the Tyrian Prisoner, ⁵ upon this account, *That the like would be done against the Carthaginians, both at Tyre, and in other trading Towns, where their Business called them.*

IV. Another Kind of forcible Execution is ἐνεχυρασμός, ¹ *Reprisals among divers Nations*, called so by our modern ^a Lawyers, which the Saxons and English call ² *Withernam*, and the French, where commonly an express Permission must be obtained from the King for that Purpose, *Letters of* ³ *Mark*, and is of Force (as ⁴ Lawyers say) where Right is denied.

V. 1. Which may be supposed, not only when Judgment cannot within a reasonable Time be obtained against a Malefactor, or a Debtor, but also when in a Case that will not admit of any Doubt, (for in doubtful Cases the Presumption is in favour of the Judges established by publick Authority) Sentence shall pass plainly against Right. For the Authority of the Judge is not of the same Force against Strangers, as Subjects: Nay, even between Subjects, it does not make void a just Debt. For (as Paulus ¹ the Lawyer observes) *A real Debtor, tho' he be discharged by*

IV. And in seizing their Goods.

^a Bald. 3.

Conf. 58.

V. Which is lawful when our Right is first denied, and when that is, where is also shewed, tho' the Thing be adjudged, yet it neither gives, nor takes away any Man's Right.

³ Lib. VIII. § 50. Edit. Amstel.

⁴ Voc. Ἀνδροληψία.

⁵ Orta deinde Altercatio est, &c. LIV. Lib. XXXIV. Cap. LXI. Num. 12, 13.

IV. (1) It is also writ ἐνεχυρασμός and ἐνεχυράζειν. SALMASIUS makes some Difference between these Words, according as the *iota* is retained or left out; *De modo usurarum*, p. 553. & seqq. But see the late Baron SPANHEIM upon the *Clouds* of Aristophanes, Ver. 35. Our Author added here in a little Note, that the Right of Reprisals is expressed also by the Greek Word, Σύλας: and cites DEMOSTHENES, *Orat. pro Coron.* and ARISTOTLE's *Oeconomic.* Lib. II. The Passage of the latter will be cited in the End of the following Paragraph, Note 9. As for the other, the Term in Question is not in it, that I can find. Our Author saw that HARPOCRATION, at the Word Σύλας, cites that Oration, ἐν τῷ περὶ τῆς σεφάνης τῆς τετραρχίας: And the Passage, to which HENRY DE VALOIS refers us, is: καὶ μόναις ὑμῖν εἰσαμύσει ἐστὶν ἀνεὺ κηρυκῆς βασιῶσαι διὰ τὰς ὑπὸ τῶν ἀνδροληψίας ἢ σύλας κατεσκευασμένας. p. 717. B. He has thereupon confounded this little Oration with the famous long one for Ctesiphon, περὶ τῆς σεφάνης, where a different Sort of Crown is spoken of. For the rest, the learned Commentator upon the Greek Lexicographer, whom I have just quoted, alledges several Examples from good Authors, where Σύλας and συλαῖς are taken for a kind of Right of Reprisals.

2 From *Wither* or *Wider*, which signifies again, and *Nam* or *Namp* that is to say, *taken*. This Etymology alone shews that those are mistaken, who, with Mr. BOHMER (*Introd. ad Jus Publicum Universale*, p. 348.) pretend that the Right of Reprisals consists properly, in the refusal of the Sove-

reign of one Country to do Justice to the Subjects of another Sovereign, who has refused it to his Subjects: This is only a Thing, which has the same Foundation, as what is understood by *Reprisals*, or is sometimes reduced to the same Thing; because, for Instance, it is all one either to take some Effects from foreign Merchants, or to prevent the People of the Country from paying them what they owe them.

3 This Word is derived from the German Word *March*, that is to say *Boundaries*; because Reprisals are generally made upon the Frontiers. See the Glossary of DU CANGE, upon the Word *Marcha*.

4 See BARTOLUS, *De Repressaliis*, Quæst. V. § *Ad Tertium*, Num. 9. INNOCENT. and PANOR. in Can. VIII. Decretal. *De immunit. Eccles.* &c. DOMINIC. SOTO. Lib. III. Quæst. IV. Art. V. JACOB DE CANIBUS, ANCHAR. DOMINIC. FRANC. in Can. I. *De Injuriis*, in VI. FULGOSIUS and SALICETUS; in *Authent. Omnino*, Cod. *De At. & Obligation.* JACOB DE BELLO VISU, in *Authent. Ut non fiant pignorationes.* SYLVESTER. Verb. *Repressaliæ*. GUIDO PAPA, Quæst. XXXII. GAILIUS; *De Pignor.* Observ. I. Num. 5. FRANCISC. VICTORIA, *De Jure Belli*, Num. 41. COVARRUVIAS, in *Cap. Peccatum*, Part II. § 9. Num. 4. GROTIUS.

V. (1) He followed in this the Opinion of JULIAN another Lawyer: JULIANUS, *verum debitorem, post litem contestatam, manente adhuc judicio*, &c. Digest. Lib. XII. Tit. VI. *De conditione indebiti*, Leg. LX. Princ. See GAILIUS, *De Pace publicæ*, Lib. II. Cap. VIII. Num. 7. and FERNAND VASQUEZ, *Controv. Illust.* Lib. IV. Cap. X. § 41. GROTIUS.

Mr. COCCEIUS in a Dissertation, *De vero Debitore sententiâ absolutâ*, Sect. IV. § 1. & seqq. has racked his Wits to explain the Law here cited, so as to elude the Sense our Author finds in it, and which is what naturally offers itself. The antient Lawyer

by the Judge, yet by the Law of Nature still continues a Debtor; and when by an unjust Sentence, a Creditor had taken away something from the right Owner, that had not been the Debtor's, as if engaged to him, the Question being put, whether the Debt being paid, that Thing should be restored to the Debtor; ² Scævola maintained that it should. Here is the Difference; Subjects are bound up by the Sentence of the Judge, tho' it be unjust, so as they cannot oppose the Execution of it lawfully, nor by Force recover their own Right, for the Efficacy of that Power under which they live: But Strangers have a coercive Power, tho' it be not lawful to use it, whilst they may recover their Right in a judicial Way.

2. Therefore in such a Case, that both ³ the Persons and Moveables of his Subjects, that refuses to render Justice, may be seized, is not indeed authorized by Nature, but generally received by Custom. We have a very old Example of this in Homer's *Iliad*, where Nestor is said to drive away the Cattle of the Eleans, because they had before plundered his Father's Horses, ⁴ ῥύσι' ἐλαυνόμεναι, taking them by way of Reprisal; where ῥύσια is expounded by Eustathius; τὰ ἀνὶ τινῶν

Lawyer there decides clearly enough, that if the Person who is actually Debtor, pays during the Course of the Suit, before Judgment given, he cannot afterwards redemand as not due what he has so paid; and he proves it by this Argument, *a majori ad minus*, that if the Debtor had paid after final Judgment, he could not even then redemand any Thing, tho' the Cause had been adjudged in his Favour: *Quia nec absolutus, nec condemnatus, repetere posset*:

For this cannot be understood, as simply intended to mean, that the Debtor, who has paid before Judgment, cannot redemand any Thing after it; because as soon as he has satisfied the Plaintiff, the Suit is at an End. There is in the same Title a Law of the Civilian PAULUS, the same who recites and approves JULIAN's Opinion in this Case, wherein he says, that if, after Sentence past, the Debtor pays of his own free Will (that is to say, without Compulsion, but thro' Error, which must always be supposed on this Subject) even tho' he has cast his Adversary, he loses thereby the Right of redemanding his Money: Which is founded upon the Principle established by JULIAN in a general Manner, I mean, that a Debtor continues such by the Law of Nature, whether the Judge condemns or discharges him: *Judex, si male absolvit, & absolutus sua sponte solverit, repetere non potest*, Leg. XXVIII. Our German Lawyer however goes so far as to maintain, that by Virtue of the Authority, which the civil Law gives to the Sentence of the Judge, the natural Obligation of the Debtor, discharged without Reason, is entirely extinguished, so that he may in Conscience dispense with paying his Debt, or redemand what he has paid thro' Ignorance. But this is a very evident Example of the Extremes into which People run when they are for reconciling, at any Rate, the Decisions of the antient Civilians, well or ill understood, with the Principles of natural Equity. The Debtor, in the present Question, either believed himself such before the Sentence, or was not convinced of the Debt, till after he was unjustly discharged. In the first Case, he ought not to have pleaded, and is as culpable in so doing, as the Person, with whom any Thing is deposited, is in denying the Trust. In the other, he is very excusable for having refused to pay what he did not believe he owed; but the Moment he discovered himself to be a Debtor, the Obligation of paying begins to display its whole Force. The Judge's Sentence does not diminish it in the least, and only leaves the Breach of Faith unpunished; supposing the Laws extended so far his Authority. The End, which Legislators propose to themselves, requires no more, as appears from the Principles I have laid down in my *Discourse upon the Permission and Benefit of the Laws*. For the rest, if we examine all

Mr. COCCÆIUS says, in the Dissertation I speak of, to support his Hypothesis, and reconcile it with the Laws alledged to prove, that a Debtor unjustly discharged continues a Debtor by the Law of Nature, we shall conclude, I believe, that it would be very difficult to understand that modern Lawyer's Meaning, without acknowledging, that the antient Lawyers in this as well as many other Things, were of a different Opinion: A Confession, which it would have been as hard to have extorted from Mr. COCCÆIUS, as to have made him own that their Principles were sometimes incoherent, and inconsistent with the Law of Nature. The Reader need only see the extravagant Encomiums he makes upon them in the beginning of that Dissertation.

² *Et quum, per injuriam judicis, &c.* Digest, De Distractione Pignoris & Hypothec. Leg. XII. § 1.

³ There is an Example of this in AMMIANUS MARCELLINUS, where we find that Julian the Emperor seized some Franks, till their King had restored all the Prisoners, as he had engaged to do by a Treaty of Peace: *Quatuor comites ejus [Regis Hortarii] quorumope & fide, &c.* Lib. XVII. (Cap. XI. p. 189. Edit. Vales. Gron.) See LEO AFER, where he speaks of the Mountain Beni Gualid, (Lib. III. p. 211. of the old French Translation.) GROTIUS.

They were not Franks, but Alamanni, whom Julian seized. Besides, they were kept for Hostages; so that this Example belongs to another Subject.

⁴ These Horses were seized by Augeus King of Elis, and were sent by Nestor's Father to some Games that were celebrated there:

Καὶ γὰρ τῷ χρεῖας, &c.

Iliad, (Lib. XI. Ver. 697. & seqq.) Hyperochus reigned at that Time in Elis: Nestor killed his Son Hymoneus, who opposed his taking away the Herds of Oxen:

—“Ὅτ' ἐγὼ πτόνον Ἰτυμενίη, &c.

Ibid. (Ver. 761. & seqq.) POLYBIUS uses the Word ῥύσια in the same Sense as EUSTATHIUS, speaking of the Achæans, who used Reprisals against the Bæotians, with Philopæmen's Permission, *Excerpt. legat.* XXXIII. See also *Excerpt.* CXXIII. I find also ῥυσιάζειν used in DIODORUS SICULUS to express, to make Reprisals, *Excerpt.* Pierefc. But ῥύσια καὶ ἀγγέλλειν is an Expression used in War, upon a Subject very like this, as we shall see in the following Chapter, § 7. GROTIUS.

ῥυήματα, ὃ ἐστὶν ἐλπίματα ἢ ἀντὶ τῶν προαρπαθέντων ἀρπαζήματα, *Things taken in lieu of others, that is, seized, and carried away to make amends for others taken from us.* Whereupon, as the Story goes, Proclamation was made, that every Man to whom the *Eleans* owed any Thing, should come, and take of the Spoil proportionably to his Debt, that is to say,

⁵ Μή τις οἱ ἀτεμβέριον κίσι ἴσης.

That no one might go without his just Share.

Another Example we have in the *Roman History*, where *Aristodemus*, *Tarquin's* Heir, seized the *Roman Ships* at *Cumæ*, ⁶ for the Goods of the *Tarquins* detained at *Rome*. ⁷ *Dionysius Halicarnassensis* says he took the Servants, Cattle, and Money. And in *Aristotle* ⁸ in his second Book of *Oeconomicks*, we find a Decree of the *Carthaginians* to seize foreign Ships, εἰ τις σύλαν ἔχει, *If any had a Right of Reprisals.*

VI. *This Right reaches not to the Life of him that is taken.*

^b *B. 2. ch. 15. n. 7. and ch. 21. §. 2. n. 2.*

VI. It has also been believed among some People, that the Lives of innocent Subjects stand engaged on the like account, and that perhaps upon this Presumption, that every Man has an absolute Power over his own Life, and that it may be transferred to the State; which we have said elsewhere, ^a is without Foundation, and not consistent with sound Divinity. Yet it may happen, that Subjects may be killed, tho' not designedly, but accidentally; ¹ namely, while they attempt by Force to hinder the Execution of this Right. But if such a Thing may be foreseen, we are obliged by the Law of Charity ² to forbear the Prosecution of our Right, (as we have shewed in another Place) since by that Law we Christians especially should set a greater Value upon the Life of a Man, than upon our Goods, as has been also shewed ^b elsewhere.

^b *B. 2. ch. 1. § 12, 13.*
VII. *The Distinction herein between the Civil Law, and the Law of Nations.*

^a *Decius, Conf. 352. Bald. in leg. 3. Digesti, De Offic. Adfessor.*

VII. 1. Moreover in this, as in several other Cases, we must take heed, that we distinguish between those Things that are properly due by the Law of Nations, and those that are due by the Civil Law, or by particular Agreements between some People.

2. By the Law of Nations ^a all the Subjects of the Sovereign from whom one has received an Injury, who are such from a *permanent Cause* (i. e. *settled in the Country*) are liable to this Law of Reprisals, whether they be Natives or Foreigners; but not if they be only Travellers, or sojourn there but for a little Time. For these Reprisals are much of the same Nature with Taxes, which are introduced for the paying of publick Debts. Wherefore they are exempted from them, who only for a Time are Subjects to the Law of the Place. Amongst perpetual Subjects,

⁵ *Iliad. Ver. 704.*

⁶ *Frumentum Cumis quum coemptum esset, &c. Liv. Lib. II. Cap. XXXIV. Num. 4.*

⁷ That Historian relates the Fact otherwise: He says, that the *Romans*, who had followed *Tarquin*, and whose Estates had been confiscated at *Rome*, upon seeing *Roman* Embassadors come to *Cumæ* to buy Corn, immediately solicited *Aristodemus*, King of *Cumæ*, first to put those Embassadors to Death: But not being able to obtain that, they fell in their Demand, and only desired Permission to arrest them by Right of Reprisals, till the *Romans* had restored them their Effects. *Aristodemus* set the Embassadors a Time to plead their Cause before him, and left them at Liberty, upon laying down a Sum of Money by Way of Security for their Appearance. As the Suit were commenced, and Nobody kept them in Custody, they fled. This Account is in *Chap. II. and XII. of the Roman Antiquities*. The Prince upon this caused the Servants, Cattle and Money they had brought for the purchase of Corn, to be seized, *Cap. XII. p. 411. Edit. Oxon. (427. init. Edit. Syll.)*

⁸ The Philosopher says, the *Carthaginians* had a great number of Strangers in their pay, whose

Arrears they were not able to discharge. In order to pay off their Debts, they thought of this Expedient. They put out a Proclamation, that such Citizens and Inhabitants, as had a Right of Reprisals in regard to any State or Person, and were willing to claim it, should declare it. A great number of People presented themselves upon this Proclamation, and Ships, trading in the *Euxine Sea* under some manifest Pretext, were seized: After which a Time was fixed for judging what was a lawful Prize. By this Means a great Sum of Money was raised, and they were enabled to pay off the Troops, which they disbanded. The State out of its Revenues made Restitution to those who had been seized unjustly. *Oeconomic. Lib. II. p. 503. C.*

VI. (1) See an Example of this in the Passage of *HOMER*, cited in the foregoing Paragraph, *Note 5.*

2 But see what I have said upon the Place referred to in the Margin. Certainly, if our Author's Opinion took Place, the Right of Reprisals would be very useless to a Christian, when those, against whom he would use it, knew him to be in that Disposition: For they would not fail to defend themselves, till there should be a Necessity of killing them, if he did not let them go.

the Law of Nations excepts only from Reprisals, the Persons of Ambassadors ¹ and their Baggage, when they are not sent to our Enemies.

3. But by the Civil Law of Nations, the Persons of Women and Children use to be privileged, and even the Goods of Scholars and such as go to Fairs. By the Law of Nations every Person ² is permitted to use the Right of Reprisals, as at *Athens*, ἐν ἀνδρολεψία, in the seizure of Persons. By the Civil Law of many Nations this Right must first be desired of the Sovereign, in other Places from the Judges: By the Law of Nations ³ the Propriety of Things taken, is immediately acquired to the Value of the Debt and Charges, ⁴ the remainder to be restored: By the Civil Law, the Persons concerned therein use to be cited, and the Goods by publick Authority sold, and delivered to the Creditors. But in these and the like Cases one may consult the Civilians, and especially *Bartolus*, who has written concerning Reprisals.

4. I shall add this because it helps somewhat to qualify the Severity of this Right, in itself too rigid, viz. ^b that they who either by not paying what they owe, or not doing Justice to injured Persons, have occasioned these Reprisals, are bound by the Laws of GOD and Nature, ⁵ to make Satisfaction for those Losses, which others have suffered upon this account.

^b See *Ægid. Regius, De Act. Supern. Disp. 13. Dub. 7. n. 117.*

VII. (1) But according to our Author himself, the Privileges of Embassadors take Place only with Relation to the Powers to whom they are sent, and not with Regard to those, thro' whose Dominions they pass: And he requires also, their having been acknowledged and received as Embassadors. See above, *B. II. Chap. XVIII. § 5.* Wherefore then should they not be liable to Reprisals, on the Part of those, to whom they are not sent; especially as Reprisals suppose certain Dispositions, which approach the State of Hostility?

2 The Law of Nations grants this Right to all those, who cannot obtain Justice from the Sovereign of a Country, without considering whether they are Members of some other civil Society or not. So that for Instance, at the first Institution of civil Societies, when there were still many Individuals, who continued in the Independence of the State of Nature, those Individuals might no doubt use the Right of Reprisals, with Regard to those who were Subjects. Besides, those who being Subjects, use the Right of Reprisals, have not that Right, properly speaking, as Members of a civil Society; because they would have had it independently of that Relation, by Virtue of the Law of Nations, or rather the Law of Nature itself, according to what we have laid down above. Thus far therefore our Author's Opinion may be admitted. But it is true on the other Hand that Reprisals, being a kind of Act of Hostility, and an Introduction to a War; the End of civil Society requires, that private Persons should not make use of this Right, but with the Permission, either express or tacit, of the Sovereign; as the Commentators upon our Author have observed, who does not explain himself sufficiently in this Place. And in the Example,

he alledges of this kind of Reprisals, which was practised by the *Athenians*, the Power, which the Relations of the Deceased had to seize three Persons of the State, that protected the Murtherer, was founded, as we find, upon a formal Law.

3 This must be understood in the same manner, as what we have just said in the preceding Note. The Refusal which has been made of restoring what was due, excuses the injured Person from keeping as a Pledge, the Things he has seized by Way of Reprisals and authorises him to appropriate them to himself. See *PUFENDORF, Law of Nature and Nations, B. V. Chap. XIII. § 10.* or last. But in a civil Society, the good of Order, and the fear of Consequences, require that the injured Persons be not Judges, and absolute Masters of the Reparation, which they may make to amount too high; and that we should even wait some Time to know whether Foreigners will not come to themselves, and pay what they owe, with the Charges, Damages and Interest.

4 The *Venetians* followed this Rule of Equity, having taken the *Genoese* Ships in *Galata*. But they did not in the least diminish any Thing of the Goods in the Ships taken; their Lading was *Wheat and Barley, and salt Fish, taken in the Lakes of Capais and Mæotis and the River Tanais; but these they carefully preserved, and when they had received their Debt, they restored them entire.* *NICEPHOR. GREGOR. Lib. IX. GROTIUS*

5 Thus *PLUTARCH* (in the Life of *Cimon*) of the *Scyrians*: Many of them would not contribute Money, but commanded those, who either had then in Possession, or had taken away other Men's Goods, to repair the Loss, (p. 483. C. Vol. I. Edit. Wech.) *GROTIUS.*

CHAP. III.

Of a just or solemn War, according to the Right of Nations, and of its Denunciation.

I. I. **WE** have ^a already mentioned, that according to the Opinion of the best Authors, a War is often said to be just, not from the Cause whence it

⁶ Z

arises,

¹ That a solemn War by the Right of Nations, is to be between divers People.
^a B. 1. ch. 3.

arises, nor, as elsewhere, from the great Actions ¹ done in it, but from some peculiar Effects of Right. But what manner of War this is, is best understood by the Definition which the Roman Lawyers give of an Enemy. Pomponius says, ² *They are Enemies, who publickly denounce War against us, or we against them; the rest are but Pirates, or Robbers.* So says Ulpian, ³ *They are Enemies against whom the People of Rome have publickly declared War, or they against the Romans; the rest are called pilfering Thieves, or Robbers.* Wherefore he that is taken by Robbers, is not a Slave to those that take him, neither does he want the Right of Postliminy. But one taken by the Enemy, suppose by the Germans, or Parthians, is the Enemies Slave, and may recover his former Condition by the Right of Postliminy. And Paulus the Lawyer says, *They that are taken ⁴ by Pirates, or Robbers, continue free.* To which we may add that of Ulpian, ⁵ *In civil Dissentions, tho' by them the State be often wounded, yet the Ruin of the State is not intended; they that embrace either Party, are not such Enemies as they who have the Right of taking Prisoners, and of Postliminy; therefore they who are taken and sold, and afterwards recover their Liberty, have no Occasion to petition the Prince for their Freedom, having never lost it.*

2. This only is to be observed, that under the Example of the People of Rome, whosoever has sovereign Power in a State is to be comprehended. He is an Enemy (⁶ says Cicero) who has the Government of publick Affairs, a publick Council, a Treasury, the Right of commanding the People by Vertue of their Consent and Union, the Power of making Peace and War, when necessary.

II. A Distinction of a Nation doing unjustly from a Company of Pirates and Robbers.

II. 1. Neither does ¹ a State immediately cease to be a State, tho' it commits some Acts of Injustice, even by publick Deliberation; nor is a Company of Pirates and Robbers to be reputed a State, tho' perhaps they may observe some kind of Equity among themselves, ² without which no Body can long subsist. For these latter are ³ associated on the account of their Crimes; but the other, tho' sometimes not wholly guiltless, do associate for the peaceable Enjoyment of their own Rights, and to do Right to Foreigners, if not in all Things according to the Law of Nature, which (as I have elsewhere ^a shewed) among many Nations, is in part forgotten, at least according to the Agreements which they have made, and the Customs that are established. Thus the Commentator upon *Thucydides* observes; ⁴ that whilst the Greeks allowed Piracy they abstained from Murders, from robbing in the Night and from stealing plowing Oxen. And *Strabo* ⁵ informs us, that other Nations,

^a B. 2. ch. 15. § 5. n. 2. and ch. 20. §. 43.

I. (1) To which the Epithet Just is sometimes applied: Thus a Fight is said to be Just in Opposition to some slight Skirmish: *Qui intentiore cura suos, quasi ad justum prælium, paucis adhortatus, &c.* QUINT. CURT. Lib. III. Cap. XIII. Num. 8. See PIT. SCUS, upon this Passage, and ALBERICUS GENTILIS, *De Jure Belli*, Lib. I. Cap. II. p. 20, 21.

2 HOSTES hi sunt, &c. Digest, Lib. L. Tit. XVI. De verborum significatione, Leg. XCVIII.

3 Hostes sunt, quibus bellum publice Pop. Romanus, &c. Digest. Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. XXIV. We find Examples of Persons taken by Robbers in the *Pæ-nulus* of PLAUTUS and the *Eunuchus* of TERENCE. This was also the Fate of *Eumæus*, as he relates it himself in the *Odyssey* of HOMER, Lib. XV. (Ver. 402. & seqq.) GROTIUS.

4 A piratis, aut Latronibus, capti, liberi permanent. Digest. Lib. XLIX. Tit. XV. De Captivis & Postlim. &c. Leg. XIX. § 2. Pompey declared those who had been taken by the Pirates to be free. APPIAN. *Bell. Mithridatic.* (p. 237. Edit. H. Steph.) See HERRERA, Vol. II. GROTIUS.

5 In civilibus dissensionibus, &c. Ibid. Leg. XXI. § 1.

6 He insinuates this in speaking of the antient Wars of the Romans, in Opposition to the civil War of Mark Anthony: *Ac majoribus quidem vestris, &c.* Orat. Philip. IV. Cap. VI.

II. (1) See PUFENDORF, Lib. VIII. Chap. VI. § 5. Of the Law of Nature and Nations.

2 Consult what our Author says in his preliminary Discourse, § 24.

3 PROCOPIUS describes them thus: A Multitude assembled and united not according to the Laws, but by their Crimes. *Vandalic.* Lib. II. (Cap. XV.) GROTIUS.

These Words are in the Oration of BELISARIUS, upon the Revolt of the Roman Soldiers in Africa.

4 In Lib. I. (§ 5. Edit. Oxon.)

5 *Geograph.* Lib. XI. The Grammarian SAXO relates the same Thing of another People, Lib. XIV. (p. 234. where, however, there is nothing that has any Relation to this Subject.) PLUTARCH, speaking of the Inhabitants of the Isle of Scyros, says, that formerly they were contented with Piracy; but at Length they had arrived at such a Degree of Wickedness, as to rob the Strangers, who came to traffick with them. *Vit. Cimon.* p. 483. C. Vol. I. Edit. Wech. GROTIUS.

The People STRABO speaks of are the *Achæans*, the *Zygiens*, and the *Heniochians*, all Inhabitants of one Coast of the *Bosphorus*, which makes a Part of Mount *Caucasus*. The Passage is: *Μετὰ δὲ τὴν Σινδὸν*, &c. p. 758. A. 759. A. Edit. Amstel. JACOBUS THOMASII, who refers us to this Passage in his Dissertation intitled, *Historia de latrocinio gentis in gentem*, § 22. criticises our Author, as if thro' mistake he had understood all the Booty those People made, whereas the Geographer speaks only

tions, tho' they lived by Piracy, upon their return Home, would send to the Owners, that if they would they might redeem their Goods at a moderate Price; to which we may refer that of *Homer Odyss.* ξ. 14.

⁶ καὶ μὴ δυσμενέες, &c.

*In search of Prey to foreign Coasts they sail,
And if successful, then do with full Gale
Return unto their Country, fearing still
The Gods, that do regard both Good and Ill.*

2. But in Morals, the principal Part gives form to the Whole: And as *Cicero* well observed in his 5th Book *De Finibus*, *Because it contains the greatest Parts, and spreads furthest, the Whole is named from it*; to which agrees that of *Galen*, ἀπὸ τῆς πλεονεκτέοντος ἐν τῇ κράσει γίνονται αἱ προσηγοραί, *In Mixtures the Denomination is always taken from that which is the greatest Portion.* The same Author often calls them ὀνομαζόμενα καὶ ἐπικράτησιν, *named from the most powerful.* Wherefore ⁸ *Cicero* was too loose in his Expression, in saying, when a King is unjust, the Nobles unjust, or the People, it is not properly a corrupt State, but none at all. Which *St. Augustine* ⁹ thus corrects, *Neither can I therefore say that a People is no People, or the State no State, as long as there remains a Multitude of reasonable Creatures associated for the Defence of the Things that they love.* A sick Body is yet a Body. And a State, however distempered, is still a State, as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights. ¹⁰ *Dion Chrysostome* is more in the right, who says that the Law (especially that of Nations) is in a State, as the Soul in a human Body, ¹¹ for that being taken away it ceases to be a State. ¹² *Aristides* in his Exhortation to the *Rhodians* unto Peace, shews that many good Laws may be consistent even with *Tyranny.*

of the Persons they took. But he is mistaken himself, in having blindly followed the *Latin* Version, which without Reason so determines the Generality of the Sense, apparently from the ἀνδραποδισμόν χάριν which goes before. The same Author also without ground confines the Passage in Question to the *Heniochi*, which relates equally to both the other People; as will appear upon examining the Sequel of the Discourse. In another Dissertation, *De moralitate latrocinii gentis in gentem*, § 9. he quotes *ARISTOTLE*, who ranks the *Heniochi* amongst the Anthropophagi [or Man-eaters] and thereupon seems to question, what *STRABO* says of them in the Passage here cited. But the one does not hinder the other from being true.

⁶ Ver. 85. & seqq.

⁷ Semper enim ex eo quod maximas partes continet, &c. Cap. XXX.

⁸ This is in a Fragment of his third Book, *De Republica*, which *St. Austin* has preserved in his *De Civitat. Dei*, Lib. II. Cap. XXI. I shall give the Whole Passage, because it is fine: *Respublica res est Populi, quum bene ac juste geritur, sive ab uno Rege, sive a paucis Optimatibus, sive ab universo Populo. Quum vero injustus est Rex, quem Tyrannum voco; aut injusti Optimates, quorum consensus Factio est; aut injustus ipse Populus, cui nomen usitatum nullum reperio, nisi ut etiam ipsum Tyrannum adpellem: Non jam vitiosa, sed omnino nulla, Respublica est; quoniam non est res Populi, quum Tyrannus eam, Factione, capeffat: Nec ipse Populus jam Populus est, si sit injustus; quoniam non est multitudo juris consensu, & utilitatis communione, sociata:* A State is really a State, that is to say, the Government of the Affairs of the People, when they are administered well, and according to the Rules of Justice, either by a King or the principal Persons of the State, or the Whole Body of the

“ People. But when the King is unjust, which I
“ call a *Tyrant*; or the principal Persons are unjust,
“ and by agreeing together, form a *Faction*; or even
“ the Body of the People are unjust, an Abuse, for
“ which there is no Name that I know of, unless
“ it may be called a *Tyranny* of the People: This,
“ cannot properly be called a *bad* Government
“ but absolutely *none* at all; since it is a *Tyrant* or
“ *Faction*, that reigns and administers his, or their
“ Affairs, and not those of the People. The Peo-
“ ple themselves are no more a Body of People,
“ from the Moment they are unjust; because they
“ are no longer a Multitude of People united to-
“ gether by a Community of Rights and Interests.”

It appears from hence that *CICERO* speaks of an Abuse of the Supreme Authority, carried so far by those, who have that Authority in their Hands, as to be an entire Subversion of lawful Government; in which Case he might well say, that the State, or Government was destroyed; tho' indeed, with regard to Strangers, it remains still a State, but an ill governed one.

⁹ Nec ideo tamen vel ipsum, &c. *De Civit. Dei*, Lib. XIX. Cap. XXIV.

¹⁰ Orat. Borythenit. & *De Lege*.

¹¹ This *CICERO* says of the Condition in which the publick Affairs were in his Time: *Nec Leges ullæ sunt, nec judicia, nec omnino simulacrum aliquod ac vestigium civitatis*, Lib. X. *Ad Famil. Epist.* I. *GROTIUS*.

¹² That Orator does not speak of a Sovereign, who reigns tyrannically, but of a Man, who has possessed himself of the Government of a free State; for the *Greeks* gave the Name of Tyrant to such Usurpers, whatever Moderation and Equity they administered the publick Affairs with. *ARISTIDES* to induce the *Rhodians* to Unity and Concord, shews, that it is better for a Republick to lose

Tyranny. And ¹³ *Aristotle* says, that tho' in an Aristocracy, or Democracy, the Nobles or People govern ill, yet that does not immediately destroy the Civil Government, but only renders it vitious. Let us illustrate this by Examples.

3. We have already declared the Opinion of *Ulpian*, ¹⁴ that they who are taken by Robbers do not become their Slaves; but he says, those taken by the *Germans* lost their Freedom. Yet among the *Germans*, whatever Robberies were committed without the Bounds of any State, were not blamed; they are ¹⁵ *Cæsar's* own Words. And *Tacitus* tells us, that the *Venedi* ¹⁶ *robbed in the Woods and Mountains between the Peucini and Fenni*. He also observes, that the *Catti*, ¹⁷ a noble People of *Germany*, practised Robberies. And again the *Garamentes*, ¹⁸ a Nation abounding in Robbers, and yet a Nation. The *Illyrians*, ¹⁹ without Distinction, used to rob by Sea, yet a Triumph was granted to their Conqueror, tho' it was denied to *Pompey* ²⁰ over the Pirates. So great a Difference is there between a Nation, however wicked, and those who, not making a Body of People, are confederated only to do Mischief.

III. Yet sometimes there happens a Change.

IV. It is required in a solemn War, that he that makes it have a Sovereign Power; and how that is to be understood.
^a B. I. ch. 3.
^b *Cajet.* 2.
² Qu. 40.
Art. 1.
V. And that it be solemnly denounced.

III. Yet sometimes there may happen a Change, not only in particular Persons, as in ¹ *Jephtha*, ² *Arfaces*, ³ *Viriatus*, who from Captains of Thieves, became lawful Commanders; ⁴ but also in Companies; as when a Company of Robbers leaving their wicked Practices, and following an honest Course of Life, become a civil Society. *St. Augustine* says thus of Robberies, ⁵ *If this Mischief by a great concourse of desperate Men should grow so great, that they should seize on certain Places, settle themselves in them, take Cities, and subdue Nations, it then assumes the Title of a Kingdom.*

IV. We have already ^a shewed who are they that have Sovereign Power, whence we may also gather, that he that hath it but in part, may for that Part make a just War; ^b much more they who are not Subjects, ¹ but unequally Confederates: As between the *Romans* and their Allies, (tho' upon unequal Terms) the *Volscians*, *Latins*, *Spaniards* and *Carthaginians*, every Thing that a War in form requires was observed, as we may learn from History.

V. But that War may be called just in the Sense under Consideration, it is not enough that it is made between Sovereigns, but (as we have heard before) it must be undertaken by publick Deliberation, and so ¹ that one of the Parties declare it to the

its Liberty in that manner, than to be torn in pieces by Sedition and Civil Wars, and he alledges this amongst other Reasons, that some Legislators themselves have believed it necessary to make Laws under a Tyrant or an Usurper, whereas Nobody ever imagined, that a Government could ever be formed or subsist during a Sedition. *Orat. De Concordia, ad Rhodios, Vol. II. p. 385. A. B. Edit. Paul. Steph.*

¹³ *Politic. Lib. V. Cap. IX. p. 401. B. C. Vol. II. Edit. Paris.*

¹⁴ See Paragraph I. of this Chapter, Note 3.

¹⁵ *Latrocinia nullam habent infamiam, &c. De Bell. Gall. Lib. VI. Chap. XXIII.*

¹⁶ *Nam quicquid inter Peucinos, &c. German. Cap. LXIV. Num. 2.*

¹⁷ *Hisdem temporibus, &c. Annal. Lib. XII. Cap. XXVII. Num. 3.*

¹⁸ *Nam populus Oënsis, &c. Ibid. Hist. Lib. IV. Cap. L. Num. 6.*

¹⁹ A Triumph was decreed to *Augustus Cæsar*, as we learn from *APPIANUS ALEXANDRINUS, Bell. Illyric. p. 1208. Edit. Amstel. (766. Edit. H. Steph.)* and not to *Cneus Fulvius Centumalus*, as *GRONOVIVS* says here, who confounds the Times and Persons. For that Consul's Expedition was followed by a Peace.

²⁰ He triumphed on their account, but at the same Time he triumphed for having conquered *Mithridates*. See *APPIANUS ALEXANDRINUS, De Bell. Mithridatic. p. 416, 417. Edit. Amstel. (252. Edit. H. Steph.)* *PLINY* has preserved the Inscription of this Triumph, at the Head of which

are these Words: *Quum oram maritimam a prædonibus liberasset, &c. Hist. Natur. Lib. VII. Cap. XXVI.* *Pompey* was not the only Person who had the Honour of a Triumph, for having conquered Pirates. See the Note of the learned *GRONOVIVS*.

III. (1) It is said in the Book of *Judges*, Chap. XI. Ver. 3. that *Jephtha* went to settle in the Land of *Tob*, and there were gathered vain Men to *Jephtha*, and went out with him. This was against the Enemies of *Israel*, that harassed and pillaged them often. See *Mr. LE CLERC's* Commentary upon the Place. So that he only rendered like for like.

² He became a famous King of *Parthia* from being a Captain of Robbers: *Erat eo tempore Arfaces, vir, sicut incertæ originis, ita virtutis expertæ, &c. JUSTIN, Lib. XLI. Cap. IV. Num. 6, 7.*

³ *Ceterum Lusitanos VIRIATUS crexit, &c. FLORUS, Lib. II. Cap. XVII. Num. 15.*

⁴ The ancient *Mamertines* are an Example of this Kind. See *DIODORUS SICULUS, in Fragment. (Lib. XXI. XXII.) GROTIUS.*

⁵ *Hoc malum si in tantum, &c. De Civit. Dei, Lib. IV. Cap. IV.*

IV. (1) As the Duke of *Lorrain* in *CRANTZIUS, Saxon. XII. 13.* The City of *Stralsund* declared War against the Dukes of *Pomerania*, its Princes; the same *CRANTZIUS, Vandal. XIV. 35. GROTIUS.*

V. (1) *JOSEPHUS*, the Jewish Historian, says, that it is unjust to make War without having first declared it. *Antiq. Jud. Lib. XV.* See Examples of Declarations of War, in *CRANTZIUS, Saxonie.*

the other: Whence *Ennius* calls it published Battles. ² *Cicero* in his first Book of Offices observes, *There is no lawful War but what is made after redemanding what was due, or after a Declaration in form.* The antient Writer quoted by *Isidore* is not so clear, *That War is just which is made in consequence of a Declaration, either for the recovering our own, or for repulsing the Enemy.* *Livy* ³ says, a just War is that which is openly made, and by publick Deliberation. And having first declared, that the *Acarnanians* had wasted the *Athenian* Lands, ⁴ says, *That was the beginning of Disputes, but that afterwards they came to a War in form, decreed and declared by the States.*

VI. 1. For the better understanding of these and other Passages that treat of the denouncing of War, we must carefully distinguish what Things are due by the Law of Nature, and what are not by the Law of Nature, and yet are honest; and also what Things are required by the Law of Nations to obtain the proper Effects of the Right of Nations; and lastly, what Things do arise from the peculiar Customs of some People.

By the Law of Nature, where either Force is repelled by Force, or Punishment demanded of him who is the Offender, there no denouncing of War is required. And this is what *Sthenelaidas* the *Ephorus* pleads in ¹ *Thucydides*, *ἡ δὲ λόγους διακρίσεια μὴ λόγῳ καὶ αὐτὰς βλαπτομένης, There is no disputing with Words and Arguments when we have been injured by them otherwise than in Words.* And *Latinus* observes in *Dionysius Halicarnassensis*, ² *τὸν ἀρχὸν πολεμῶν πᾶς ὁ περιπαθὼν ἀμύνεται, Whoever is attacked defends himself immediately against the Aggressor.* And as ³ *Æli-*

VI. In denouncing what is required by the Law of Nature, what by the Law of Nations is banded distinctly.

Saxonic. Lib. XI. and in the Life of *Basiliides*, Great Duke of *Muscovy*, by *ODERBORN*, Lib. III. *NICETAS*, Lib. III. (*Histor. Manuel. Comnen.* Cap. VI.) blames the Sultan *Chliziaflan*; and elsewhere, Lib. V. (Cap. IV.) *Neeman*, a Prince of the *Servians*, for having acted in a different manner. *GROTIUS*.

The *promulgata praelia* is not *ENNIUS*'s but *CICERO*'s, who uses this Expression of his own Head in citing some Words from that antient Poet: *Etenim ut ait ingeniosus Poeta & Auctor valde bonus praeliis promulgatis, Pellitur e Medio non solum ista vestra verbosa simulatio prudentiæ, sed etiam ipsa illa domina rerum SAPIENTIA: VI GERITUR RES. Orat. pro Muræna.* Cap. XIV. See *AULUS GELLIUS*, Lib. XX. Cap. IX. where he recites the Verses, from whence this is taken. Our Author fell into this small Mistake from having followed *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. I. p. 217. In the Passage of *JOSEPHUS*, it is *Herod* who speaks and gives *Athenion* to understand, that in attacking him by Surprise, and without having declared War, he had committed a second Injustice, Cap. VIII. p. 522. D.

² *Ac belli quidem æquitas*, &c. *De Offic. Lib. I. Cap. XI. JUSTUM BELLUM est, quod*, &c. (Origin. Lib. XVIII. Cap. I.) *GROTIUS*.

I do not find that *ISIDORE* gives this Definition as from an antient Author: *GROTIUS* cites the Passage here, as he found it recited in the *Canon Law*, *Caus. XXIII. Quest. II. Can. I.* But according to *DENNIS GODEFROY*'s Edition, which I use, it is: *Iustum Bellum est, quod ex prædicto geritur, de rebus repetitis, aut propulsandorum hostium causâ.* The Corrector of the *Roman* Edition maintains also, that this is the better reading, as it is confirmed by all the Manuscripts, as well as Editions. The Sense is much the same, according to our Author, who understands by *edictum* the same Thing as is meant by *ex prædicto*; which appears, from what he says a little lower, § 7. Num. 4. So that the Definition, according to him, is defective, in not expressing the other Condition, or publick Deliberation, which the Declaration however supposes. *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. I. p. 216, 217. pretends that *ex edicto* should be read; founding his Opinion solely upon the Passage in *LIVY*, which will be recited in the following Note.

³ *Bellum palam & ex edicto gerere*, says our Author. He does not direct us to the Passage, where these Words are, tho' he might easily have done it after *ALBERICUS GENTILIS*, (*ubi supra*) from whom he has taken them. It is in the first Book, where the Historian, speaking of the War of the *Fidenates* and *Veientes* against the *Romans*, says, that *Metius Fuffetius*, Dictator of *Alba*, had secretly encouraged them to undertake it, upon promise to assist them by betraying the *Romans*: *QUIA suæ civitati animorum.* &c. Cap. XXVII. Num. 2.

⁴ *Hic exercitus [Acarnanum] primo*, &c. Lib. XXXI. Cap. XIV. Num. 10.

VI. (1) Lib. I. Cap. LXXXVI. *Edit. Oxon.* The same Author makes the *Platæan* Deputy say, that by the Laws of all Nations, it was allowable for a People to defend themselves against an Invader, Lib. III. Cap. LVI. For this Reason *Flaminius*, as *DIODORUS SICULUS* tells us, called the Gods and Men to witness, that he was not the Aggressor, but King *Philip*. Excerpt. Peiresc. p. 297. See *MARIANA XIX. 13.* and *DEXIPPUS*, in Excerpt. *Legat.* *GROTIUS*.

The Passages, quoted in this Note, speak only of the Justice of Defence against an unjust Aggressor; but have nothing in them that relates to Declarations of War.

² It is where he complains of *Æneas* and the *Trojans*, for having plundered his Country without any Reason, and without having declared War. *Antiq. Roman.* Lib. I. Cap. LVIII. p. 46. *Edit. Oxon.* (47. *Edit. Sylb.*)

³ It is in his *Tacticks* or Treatise upon the manner of drawing up an Army in order of Battle, a Work believed to be done by an Author more antient than him, whose *Var. Histor.* and *Histor. Animal.* are known to all the World. *OBRECHT* directs us to the Place of that Work, where this Passage is found, and that of *PLATO* quoted there. But he should have added, that neither the one nor the other are to the Purpose. *ÆLIAN* to prove the Utility of the military Art, says, that all Men ought to provide for War, for the Reason contained in the Passage of *PLATO*, which, as we shall see in the following Note, signifies something different from what our Author finds in it. The Words of him who cites the antient Philosopher are: *Ὅτι μὲν τοι τὸ μαθημα,* &c. Cap. I. p. 12. *Edit. Arcer. 1618.*

an out of *Plato*, ⁴ That War made to beat away an Invader needs no other Herald but Nature itself. Hence *Dion Chrysostome* observes, ⁵ πόλεμοι ὡς ἐπὶ τὸ πλεῖστον ἀκήρυκτοι γίνονται, *Many Wars are made without denouncing*. Neither does ⁶ *Livy* blame *Menippus*, *Antiochus's* General, for any Thing, but that he had killed certain *Romans*, when no War had been denounced, and when they had heard nothing of the drawing of a Sword, or any Bloodshed; thereby implying, that if either of these had been done, it might have justified the Fact. Neither does the Law of Nature require, that the right Owner, ⁷ being to recover his own, should declare War.

2. But as often as one Thing is to be taken for another, or the Goods of a Debtor to be seized for a Debt, a Demand is requisite; much more when the Goods of Subjects are to be seized for the Debt of the Prince, whereby it may appear we have no other way to recover our own, or our Debt (*but by War*). For the Right which we have in those Things is not principal, but secondary, and substituted, as we have declared ^a elsewhere. So a Sovereign ought not to be attacked, either for the Debts or Offences of his Subjects, till Satisfaction has been demanded, the Denial of which puts him in the Wrong, so that he may be deemed to be the Cause of the Damage done to Foreigners, or to render himself culpable towards them, according to what we have ^b treated of before.

But where the Law of Nature does not require such a Demand to be made, ^c yet it may be done honestly ⁸ and commendably, to the End that the Offender may forbear, if he will, to give Offence, or that that already given may be atoned for by Repentance and Satisfaction; according to those Rules which I have ^d already set down, for the preventing the Calamities of War; to which we may apply,

⁹ *Extrema primo nemo tentavit loco.*

No one at first will fly unto Extremes.

And the Command which ¹⁰ GOD gave the ^e *Hebrews*, to offer Peace to a City be-

^e *Deut. xx.*
^{10.}

⁴ The *Cretan* Interlocutor says, that even in Time of Peace, it is necessary to think of War; because properly speaking, there is no true Peace; all States being naturally at War with each other, a War that is not declared by Heralds; that is to say, they either have a secret Enmity, or a Disposition to make implacable War against one another; according to the most common and known Signification of the Epithet, ἀκήρυκτος when joined with the Word War. *De Legib. Lib. I. p. 626. A. Vol. II. Edit. H. Steph.* So that there is nothing in the Passage which tends to establish, that when we act only on the defensive, the Declaration of War is unnecessary.

⁵ *Orat. ad Nicomed.*

⁶ *Et nondum aut indicto bello, &c. Lib. XXXV. Cap. LI. Num. 2, 3.*

⁷ Provided we are well assured that he who detains our Right, will not restore it. Mr. CARMICHAEL, Professor at *Glasgow*, adds another Exception, which is, when we cannot retake our own without hurting others, who keep the Thing taken away or detained unjustly, in which Case he is of Opinion, that a conditional Declaration ought to precede. *Not. in PUFENDORF, De Offic. Hom. & Civ. Lib. II. Cap. XVI. § 7.* But if those People know or can easily know, that he, who gave them the Things to keep, possesses it unjustly; they are Accomplices in the Injustice, and therefore deserve to be treated with no greater Tenderness, than the principal Detainer. And if they are actually ignorant, it is the same in this Case, as when after having declared War in form, we commit Hostilities, which we foresee must hurt the innocent, as well as guilty, Subjects of the Enemy. This is a Misfortune to which they are exposed, by an inevitable Consequence of the Constitution of civil Societies: We are not therefore obliged to

abandon, or suspend, the pursuit of our Effects or Rights, especially, when a favourable Occasion offers, which we are afraid to miss.

⁸ It is not only *honest* and *commendable*; we are even obliged to act so by the Law of Nature, as often as we can without Prejudice to ourselves. We do not indeed injure him, properly speaking, who, as far as in him lies, has given us just Cause to take up Arms against him. But the Love of Peace, Humanity, and Compassion for a great Number of innocent Persons, who are always involved in the Calamities of War, undoubtedly require, that all Means should be used to avoid it, and that we should retain as long as possible the Hope of bringing the Aggressors to right Reason.

⁹ This is a Verse of *SENECA, Agamemn. Ver. 153.*

¹⁰ The *Jewish* Historian, speaking of the War of the other Tribes against the Tribe of *Benjamin*, says, that as soon as they were assembled at *Silo*, after having known what had been done to the *Levite's* Concubine, they would have taken up Arms against the Inhabitants of *Gaba*; but the Council of the principal Persons of the Nation restrained them by representing, that they ought not to proceed so soon to a War with their Countrymen, or before they had proposed their Grievances to them by a friendly Conference; and that they were obliged the more to use such Delay, as the Law did not permit their marching with an Army, even against Strangers, whatever Wrong they might think they had received, without first sending Embassadors to endeavour to obtain a reasonable Satisfaction from them. *Antiq. Judg. Lib. V. Cap. II. GROTIUS.*

The Law of *DEUTERONOMY* did not extend to all People, against whom the *Israelites* might make War. See Mr. *LE CLERC's* Comment. upon it.

fore they fought against it, was peculiarly given to that People; and therefore by some ill confounded with the Law ¹¹ of Nations. Nor was that Peace offered as absolute, but upon Condition of Submission and Tribute. When Cyrus had marched into *Armenia*, he forbore Acts of Hostility, till he had sent Embassadors to the King, to demand the Tribute and Troops he owed, by Vertue of a Treaty, νομίζων Φιλικώτερον εἶναι ἔστας ἢ μὴ προειπένῃα πορευεσθαι, *esteeming it more humane to act thus, than to go on without any Declaration*, as *Xenophon* ¹² speaks in his History of that Action. But by the Law of Nations, a publick Denunciation is required in all ¹³ Cases, as to those peculiar Effects of a just War, if not on both Sides, yet on one.

VII. 1. But this Denunciation is either conditional or absolute. Conditional, when Restitution is demanded at the same Time; but the Feial (or Herald) Law ¹ under the Notion of Things demanded, comprehends not only a Vindication of due by Right of Property, but also the Prosecution of it, whether due upon a civil or criminal Account, as ² *Servius* well expounds it. Hence we meet in the form ³ of it these Words, *to be restored, to be repaired, to be delivered up*; where *to be delivered up* (as we have said ^a in another Place) is to be understood, unless they from whom they are demanded, should chuse rather to punish the Offenders themselves. *Pliny* declares, that this reclaiming of Things was called ⁴ *Clarigatio* (because the Demand was made clearly and with a loud Voice.) A conditional denouncing of War is thus in ⁵ *Livy*, *They are resolved with all their Power to revenge that Injury, unless redressed by the Offender*. And in ⁶ *Tacitus*, *Unless they punish the Malefactors, they will put to Death without Distinction*. And of this Kind we have an old Precedent in *Euripides*, where *Theſeus* orders his Heralds to tell *Creon* the *Theban*,

VII. War denounced sometimes conditionally, and sometimes absolutely.

^a B. 2. cl. 21. § 4.

¹¹ In the Original it is *cum jure Gentium*. But our Author intended no doubt to say, *Jure Naturæ*, or *Jure Gentium communi*; taking thus the Law of Nations in the same Sense as the Roman Civilians, and not as his arbitrary Law of Nations, of which he does not yet speak.

¹² *Cyrop.* Lib. II. Cap. IV. § 19. Edit. Oxon. in fin. Lib.

¹³ But if one of the Enemies has attacked the other without declaring War, and has reduced him to the Necessity of defending himself without giving him Time to make a Declaration in form, shall not this War have the same Effect, as if it had been declared on one Side? And wherefore should the Attacked, who could not declare War, suffer, because the Aggressor, who could, did not declare it? Besides, we shall shew in the following Chapter, that the Effects meant by our Author, which are Impunity, and the Right of appropriating to ourselves what we take from the Enemy; that these Effects, I say, do not arise from the Declaration of War, nor from a pretended arbitrary Law of Nations, and that they are not particular to Wars declared in form. As to our Author's Division of Declarations of War into conditional and pure or simple; some Writers pretend, that it has no solid Foundation, and that every Declaration of War, in whatsoever Manner it be made, is conditional, either expressly or tacitly. For, say they, we ought always to be disposed to accept a reasonable Satisfaction, and the Moment an Enemy offers that, we cannot continue the War against him without great Injustice, even tho' the Declaration, which preceded it, was pure and simple. But, besides, that our Author here treats of the Law of Nations, which according to him, often imports no more than Impunity; the Manner, in which he explains his Division, supposes that he, against whom War is declared purely and simply, has already sufficiently shewn, that he had no Design to spare us the Necessity of

taking up Arms against him. So far therefore the Declaration of War may well be pure and simple, without Prejudice to the Dispositions, wherein we ought always to be, with regard to the future, if the Enemy will hearken to Reason; which relates to the Conclusion, rather than Commencement of a War; to the latter of which the Distinction of pure and conditional Declarations belongs.

VII. (1) See PARUTA, *De Bello Cyprio*, Lib. I. PETER BIZAR. Lib. XXIII. where he speaks of the *Turks*: REINKING. Lib. II. Class. III. Cap. IV. GROTIUS.

² [RES RAPUISSE LICEBIT] *Clarigationem exercere, hoc est per Feciales bella indicare. Nam veteres lædere res, RAPERE dicebant, etiamsi Rapi-næ nullum crimen existeret: Similiter satis facere, res reddere dicebant.* In *ÆNEID.* X. Ver. 14.

³ This will be given in Note 8. upon this Paragraph.

⁴ *Clarigatio.* Et Legati, quum ad hostes clarigatumque mitterentur, id est, res raptas clarè repetitum; unus utique Verbenarius vocabatur. Hist. Nat. Lib. XXII. Cap. II. See also *SERVIVS* in *Æncid.* XI. (Ver. 53.) and x. (Ver. 14.) The Naturalist in the Passage here cited, says, that one of the Heralds, who went to make the Summons, was called *Verbenarius*, because he carried *Vervain* to the Enemy: As is said elsewhere: *Nostri Verbenacum vocant: Hæc est quam Legatos ferre ad bestes indicavimus*, Lib. XXV. Cap. IX. GROTIUS.

⁵ *Eam se contumeliam injuriamque, ni sibi ab iis qui fecerint, dematur, ipsos omni vi depulsuros esse*, Lib. VIII. Cap. XXIII. Num. 7.

⁶ *Præmittit [Germanicus] literas ad Cæcinam, venire se valida manu, ac ni supplicium in malos præsumant, usurum promiscuâ cæde.* Annal. Lib. I. Cap. XLVIII. Num. 1. He speaks there of the Revolt of Legions: So that it was a threatening of Chastisement, and not a Declaration of War.

⁷ Your Neighbour Theseus friendly would obtain
A decent Burial for the thousands slain.
If this you grant, then, Thebes, you may depend,
Theseus, as well as Athens, is your Friend.
If not, prepare for War, to meet with those
Whom you have forc'd to be your deadly Foes.

Statius relating the same says,

Aut Danaïs edice rogos, aut prœlia Thebis.

Grant Burials to the Greeks, or look for War on Thebes.

^b See the Passage cited in § 5. n. 2.
^c See an Example in Bem-
bus, l. 3.

Polybius calls this *ῥύσις καὶ ἀγγέλλειν*, The old Romans, *condicere*. A pure (or absolute) Denunciation, is what is especially called an Indiction (or Proclamation) when either the other Party has begun the War (and this *Isidore* ^b calls a War to repel an Enemy) or he himself has done something that deserves ^c to be punished.

2. Sometimes a pure (and absolute) Denunciation follows a conditional one, tho' not necessarily, but over and above. Hence comes the usual ⁸ Form, *I call the Gods to Witness that Nation is unjust, and will not render what is right. And another of which Things, Differences and Causes, the Declaration has been made by the King at Arms of the People of Rome, to the King at Arms of the antient Latins, and to the People of the antient Latium, they have neither paid, given, nor done those Things they ought to have paid, given, or done; wherefore I judge, agree and declare, that Satisfaction be sought by a fair and just War. To which we will add a third Form, Because the antient Latin People have injured the People of Rome, and failed in their Duty, and because the People of Rome have commanded to make War against the antient Latins, and the Senate of the People of Rome have judged, agreed and resolved to declare War against the antient Latins; therefore I and the People of Rome do denounce and make War against the antient Latins. And that, in this Case, a Declaration of War was not thought absolutely necessary, does appear from hence*

⁷ Ἐλθὼν δ' ἐπὶ τ' Ἀσῶπον, &c.

Supplic. Ver. 383. & seqq. There is a Declaration of War of the like Kind in the *Battle of the Frogs and Mice*, ascribed to HOMER, (*Batrachomyomach. Ver. 135. & seqq.*) In PLAUTUS's *Amphitryon* we see, that General sends first the principal Officers of his Army to the *Telebæans*, to tell them, that if without coming to Blows, they would agree to restore what they had taken from the *Thebans*, and deliver up the Authors of those Violences, he would return with his Troops and leave them in Peace; and if not, he would immediately lay Siege to their City, and push it on with the utmost Vigour:

Principio ut illò advenimus, &c.

(*Act I. Scen. I. Ver. 48. & seqq.*) See also CROMER, *De rebus Polon. Lib. XXI.* GROTIUS.

In the Passage of POLYBIUS, to which the learned GRONOVIVS refers us here, I cannot tell whether any Thing is meant, but the Right of Reprisals, upon which our Author has cited the same Historian in the preceding Chapter, § 5. Note 5. The *Eleutherneans*, suspecting that *Timarchus*, one of their Citizens, had been assassinated by the Order of *Polemocles*, Admiral of *Rhodes*, gave Permission at first to use Reprisals against the *Rhodians*, and afterwards declared War against them, *Lib. IV. Cap. LIII.* In my Opinion, far from departing here from the ordinary Signification of the Word *ῥύσις*, it is very natural to apply it in this Passage. As to *condicere*, see the form of Declarations of War in the following Note.

⁸ *Si non deduntur, quos exposcit [Legatus] diebus*

tribus & triginta, (tot enim solennes sunt) peractis, bellum ita indicit: Audi, Jupiter & tu Juno, Quirine, Diique omnes cœlestes, vosque terrestres, vosque inferni, audite. Ego vos testor, populum illum, (quicumque est nominat) injustum esse, neque jus persolvere. Sed de istis rebus in patria majores natu consulemus, quo pacto jus nostrum adipiscamur. Cum his nuntius Romam ad consulendum redit. Confestim Rex, his ferme verbis Patres consulebat: Quarum rerum, litium, causarum, condixit pater patratus Populi Romani Quiritium patri patrato priscorum Latinorum, hominibusque priscis Latinis, quas res dari, fieri, solvi, oportuit, quas res nec dederunt, nec fecerunt, nec solverunt, dic, inquit ei quem primum sententiam rogabat, quid censes. Tum ille: Puro pioque duello quærendas censeo; itaque consentio, consciscoque. Inde ordine alii rogabantur: Quandoque pars major eorum, qui aderant, in eandem sententiam ibat, bellum erat consensu fieri solitum; ut Fecialis hastam ferratam, aut sanguineam præustam, ad fines eorum ferret, & non minus tribus, puberibus præsentibus diceret: Quod populi priscorum Latinorum, hominesque prisci Latini, adversus populum Romanum Quiritium fecerunt, deliquerunt, quod Populus Romanus Quiritium bellum cum priscis Latinis iussit esse, Senatusque Populi Romani Quiritium censuit, consensit, conscivit, ut bellum cum priscis Latinis fieret; ob eam rem ego populusque Romanus populis priscorum Latinorum, hominibusque priscis Latinis, bellum indico, facioque. Id ubi dixisset hastam in fines eorum emittebat. LIV. Lib. I. Cap. XXXII. Num. 9. 14. where the form of declaring War by the Romans is very curiously related at large. The late Mr. JAMES GRONOVIVS,

hence, that it was sufficient, if it was but proclaimed at the next Garrison. As the Heralds in the Case of ⁹ Philip of Macedon, and afterwards of Antiochus, ¹⁰ gave their Opinion; whereas the first Time it was necessary to declare War to the Person himself, against whom it was intended to take up Arms. Nay, the War against Pyrrhus was denounced only to one of his Soldiers; and that in the Flaminian Cirque, where that Soldier was ordered to purchase a Place, for Form sake, as ¹¹ Servius observes on the 9th of the *Æneid*.

3. Another Thing which shews that a pure and simple Declaration after a conditional one is needless, is that a Denunciation of War is often made by both Parties, as the Peloponnesian ¹² War by the Corcyreans and Corinthians, when the denouncing of it by one would have been sufficient.

VIII. We must not confound with the Rules which properly belong to the Law of Nations, the Use of the Caduceum ¹ established amongst the Greeks;

VIII. In denouncing War, what belongs to the Civil Law and not to the Law of Nations.

in a long Note upon this Passage, has pretended, that our Author was deceived in believing after TURNEBIUS that the Word *Condit*, used here in the Deliberation upon the War, signifies the preceding Summons, or the conditional Declaration of War. But I confess, the Reasons of that learned Man do not appear sufficiently strong to make me subscribe to his Criticism. He says that neither in LIVY nor elsewhere is it found, that the King at Arms (*Pater patratus*) was employed to make that Summons or Demand; that it was always attributed to the Heralds, without mentioning their Chief, and that LIVY in Chapter XXIV. of the same Book says very expressly, that the *Pater patratus* only took the Oath, and recited the Conditions in Treaties of Alliance. But it suffices, that this Chief did not go alone, and that he was attended by some other Heralds, in order to his being comprised under the general Name of *Feciales*: Now this is what SERVIVS says in so many Words, upon Ver. 14. of B. X. of the *Æneid*, tho' he speaks elsewhere of the *Feciales* in general, without mentioning the *Pater patratus*. Unless therefore it be clearly proved, that in this Passage of LIVY, the Summons (*clarigatio*) is not meant, his Authority is of Use to explain, what other Authors and himself have said in a general manner, in Places, where the Question was not to describe more particularly a Thing, which they supposed sufficiently known. The Grammarian SERVIVS, in one and the same Passage, (one Part of which I shall cite presently, and the other in Note 11.) after having said, that the Chief of the Heralds was the Person who declared War, ascribes that Declaration a little lower to the *Feciales* in general. As to the twenty fourth Chapter of LIVY, I find there indeed, that the *Pater patratus* is employed to treat of Alliances, but I find nothing which insinuates that this was his sole Business. And on the contrary, the Passages, cited also from SERVIVS, say, that the Heralds, and their Chief without Distinction, made Alliances and declared War: *Atqui Feciales & Pater patratus, per quos bella vel Fœdera confirmabantur, numquam utebantur vestibus lineis* — *Qua [verbena] coronabantur Feciales & Pater patratus fœdera facturi, vel bella indicturi*. In *Æneid*. XII. 120. Thus the order of the Things are changed, that we may not think the one regards the *Feciales*, and the other the *Pater patratus*. But here is an express Passage of the same Grammarian: *Quum enim volebant bellum indicare, Pater patratus, hoc est, princeps Fecialium, proficiscebatur ad hostium fines, & præfatus quædam solennia, clara voce dicebat, se bellum indicare propter certas causas: Aut quia Socios læserant, aut quia nec abrepta animalia, nec obnoxios, redderent. Et hæc Clarigatio dicebatur a claritate vocis*. In *Æneid*. IX. 53. He will have it moreover that the Word *Condicere* is only said of Things in regard to which the two Parties agree.

But FESTUS tells us, that it signified in general to declare and make known: *CONDICERE est dicendo enuntiare*. In short the whole Connection of the Discourse, and even the Terms of the Deliberation upon the War, are repugnant to what is meant here by *condixit*, a Treaty lately made between the Latins, and the Romans, as he imagines who criticises our Author in this Place. The Historian describes in general the manner in which Satisfaction was demanded, and the War afterwards declared. Whence it is that after the refusal of restoring what was due, mention is made of a People, whosoever they were: *Populum illum (quicumque est nominat.)* The Latins are indeed named after: But that is because the Terms of Forms require their being determined to some particular People. And in the Form in Question, the first Words, *Quarum rerum, litium, causarum* plainly denote every Kind of Complaint in general, and all Affairs, about which they might have any Controversy with each other: So that they do not seem to me compatible with the Determination of the Sense of *condixit*, to the Ceremony of concluding a Treaty. But farther: The Historian says clearly, that the Reason, why Satisfaction was demanded of the Latins was their having made Incursions into the Territories of the Romans: *Et quum incursionem in agrum Romanum fecissent, repetentibus res Romanis superbè responsum reddunt*, Num. 3. He was not therefore speaking of the Violation of a Treaty: Of which it is probable he would not have omitted to say something. I insert this Note, as I composed it several Years ago at Lausanne. I have since seen with Pleasure, that Mr. JENS in a good Dissertation, *De Fecialibus Populi Romani*, (which is Part of his *Ferculum Literarium* published 1717.) is exactly of the same Opinion with me, and tacitly refutes the late Mr. GRONOVIVS almost by the same Reasons. It may be seen, by what there is of more or less in the one and the other, and by the different manner in which our Arguments are turned; that as that learned Gentleman could not take from me, I have not robbed him. All the rest of his Dissertation is well worth reading.

9 *Consultique Feciales ab Consule Sulpicio*, &c. LIVY, Lib. XXXI. Cap. VIII. Num. 3.

10 *Consul deinde Manius Acilius*, &c. *Idem*, Lib. XXXVI. Cap. III. Num. 9, 11.

11 *Denique, quum Pyrrhi temporibus*, &c. In *Æneid*. IX. 53.

12 See THUCYDIDES, Lib. I. Cap. XXIX. Edit. Oxon.

VIII. (1) It was a Staff, or Kind of Scepter, wrapped up in a Figure of Serpents twisted together. PLINY says, that the Use of this Figure came from a Sort of Eggs, formed by a Heap of Serpents twined and glued in a Manner to each other; so that this Staff was intended to be an Emblem of Peace between two Enemies, who reciprocally

that ² of Vervein, and the Spear made ³ of Cornil, amongst the *Romans*, who took it from the *Æquicolæ*; the solemn Renunciation ⁴ of all Friendship and Alliance, if ever there had been any, with him against whom War was declared; a Renunciation made after the Term of thirty Days, in which he was allowed to restore what had been demanded; the Ceremony ⁵ of throwing once more a Spear into the Enemy's Ground; and such other Things which proceed merely from the peculiar Customs of some Nations. For ⁶ *Arnobius* tells us, that many of these Formalities were left off in his Time, and some disused, even in ⁷ *Varro's* Days, The

ciprocally send Heralds with the *Caduceus* in their Hands, *Angues innumeri, æstate convoluti, &c.* Hist. Nat. Lib. XXIX. Cap. III. See also *SERVIVS* upon the *Æneid*. Lib. IV. (ver. 242.) and Lib. VIII. (ver. 138.) *GROTIUS*.

It appears by the Passage of *PLINY*, which our Author only quotes, and still better by those of *SERVIVS*, to which he refers us; that the *Caduceus* was a Token of Peace rather than War, and therefore, that the proper Design of its Institution was not to declare War. The Commentator upon *VIRGIL* says expressly, that those who carried the *Caduceus* were Embassadors of Peace, as the *Feciales* were employed in declaring War. *Unde, secundum LIVIUM, legati pacis Caduceatores dicuntur. Sicut enim per Feciales, a fœdere [dictos] bella indicebantur; ita pax per Caduceatores fiebat.* In *Æneid*. IV. 242. See also *ISIDORUS*, Orig. Lib. VIII. Cap. XI. Col. 1027. Edit. Gothofr. *SUIDAS* calls the *Caduceus* Σύνθημα φιλίας, a Symbol of Friendship, (voce Κηρύκειον) which he has taken from *POLYBIUS*, Hist. Lib. III. Cap. LII. And *AULUS GELLIUS* informs us, upon the Authority of some ancient Histories, that the General *Quintus Fabius*, intending to give the *Carthaginians* their Choice of War or Peace, sent them from the *Roman* People, a Pike and a *Caduceus*, as two Signs, the one of War and the other of Peace. *Quod Q. Fabius, Imperator Romanus, dedit ad Carthaginientes epistolam, ubi scriptum fuit Populum Romanum misisse ad eos hastam & caduccum, signa duo belli aut pacis, &c.* Noct. Attic. Lib. X. Cap. XXVII. But I find in *THUCYDIDES*, two Passages which prove clearly, that the Use of the *Caduceus* supposed the War already declared. The first is in the Place where he relates the Sea-Fight between the *Corinthians*, and the People of *Corfu*. The latter being victorious, the others thought of retiring, but as they apprehended that the *Athenians*, who were come to the Aid of the People of *Corfu*, with a considerable Reinforcement, would look upon the Fight as a Rupture of the Alliance, and consequently, upon them as Enemies; they sent some Persons to them in a Skiff, without the *Caduceus*, to sound their Sentiments, says the Historian; which manifestly implies, they intended to shew on their Side, that they did not mistrust them, nor consider them as declared Enemies. Lib. I. Cap. LIII. Edit. Oxon. The other Passage is at the End of the same Book, where the Historian says, that notwithstanding all the Differences which he had related, the People of *Peloponnesus* had not discontinued their Commerce with each other, and went freely into each other's Country, without the *Caduceus*, tho' not without some Mistrust. Cap. CXLV. The Historian says also, in the Beginning of the following Book that after the *Peloponnesian* War broke out, they had no longer any Communication without the *Caduceus*. See the Greek Scholiast upon the two last Passages.

² See the Passages of *PLINY*, which are cited above, § 7. Note 2. and *FESTUS*, on the Word

Sagmina. *LIVY*, however, mentions the Use of this Herb only in the Ceremony of Treaties of Alliance, for which the chief Herald at Arms was sent. Lib. I. Cap. XXIV. Num. 4, 5. and Lib. XXX. Cap. XLIII. Num. 9. He says not a Word of it in the Place where he relates the Manner of demanding Satisfaction, and declaring War, tho' every Thing there seems well circumstantiated. Might not the Circumstances of those two Ceremonies have been confounded? We may be induced to believe so, from a Passage in *VARRO*, where that learned *Roman* says, that *Vervein* was to the *Romans* what the *Caduceus* was amongst the *Greeks*; namely, a Token of Peace; *Caduceus, pacis signum VARRO pronuntiat. De Vita Populi Romani. Lib. II. Verbenatus ferebat verbenam; id erat Caduceus, pacis signum, nam Mercurii virgam possumus æstimare. Apud NON. MARCELL. p. 528. Edit. Paris. 1614.*

³ That Javelin was burnt at the End, as *LIVY* says, who puts also the Alternative of a Javelin, headed with Iron. See the Passage cited in Note 9. upon the preceding Paragraph.

⁴ This is what *LIVY* tells us the College of Heralds were consulted upon, in the War against *Antiochus* and the *Ætoliens*. *Et num prius societas eis [Ætolis] & amicitia renuntianda esset, quam bellum indicendum.* Lib. XXXVI. Cap. III. Num. 10.

⁵ See *SERVIVS* upon the ninth Book of the *Æneid*, (ver. 53.) and *AMMIANUS MARCELLINUS*, Lib. XIX. (Cap. II. p. 229. Edit. Gron. Vales.) with the Note of the learned *LINDENBROG* upon that Passage. *GROTIUS*.

Our Author supposes in this Place, that the Heralds threw a Javelin twice into the Enemy's Lands, *Hastæ missis iterum*. But he was mistaken, through his misunderstanding the Sequel of the Discourse, in the Passage of *SERVIVS* which he cites; as it would be easy for me to prove.

⁶ It is in the Place where, to retort the Reproach of Novelty thrown on the Christians, he shews that the *Romans* themselves had in many Things abandoned the Customs of their Ancestors. Amongst others he gives for an Example, that the College of the *Feciales*, or Heralds at Arms, were no longer consulted in Regard to War, nor sent to demand Satisfaction in Form, before the Declaration of War; and that the Time for beginning a War was no longer signified by a Flag displayed upon the Capitol. *Quum paratis bella, signum monstratis ex Arce? Aut Fecialia jura tractatis? Per clarigationem repetitis res raptas?* Adversus Gentes, Lib. II. p. 91. Edit. Ludg. Batav. 1651.

⁷ I shall set down the Passage wherein he informs us, that in his Time the *Feciales* were still employed in making publick Treaties, but not in declaring War. *Feciales, quod fidei publicæ inter Populos præerat: Nam per hos fiebat, ut justum conciperetur bellum, (& inde desitum) & ut fœdere fides pacis constitueretur. Ex his mittebant, antequam conciperetur, qui res repeterent: & per hos etiam nunc fit fœdus, &c.* De Ling. Lat. Lib. IV. p.

The third *Punick War* ⁸ was both denounced, and commenced at the same Time. And ⁹ *Mæcenas*, in *Dion*, will have some of these Ceremonies to be peculiar to popular States only.

IX. War denounced against a Sovereign, is presumed at the same Time to be denounced, not only against all his Subjects, but also others who shall join him, and who ought to be considered, in Regard to him, only as an Accessory. And this our modern Lawyers mean, when they say, '*A Prince being defied, all his Adherents are defied.*' For to denounce War they call *diffidare*, to bid Defiance, which is to be understood of that very War which is made upon him against whom it is proclaimed. Wherefore, when the *Romans* had declared War against *Antiochus*, they would not do it separately against the *Ætolians*, because they openly sided with him. ² The Heralds replied, *The Ætolians have voluntarily proclaimed the War against themselves.*

IX. War denounced against a Prince, is denounced also against his Subjects, and all his Adherents.

X. But that War being ended, if we are to attack any other Prince, or People, for having assisted in the War, we ought to denounce War anew, to obtain the Effects of a just War by the Law of Nations. For they are not then looked on as Accessories, but as Principals; ¹ wherefore it is well observed, that the War of *Manlius* against the *Gallo-Greeks*, and of *Cæsar* against ² *Ariovistus*, were not

X. But not by themselves considered, this illustrated by Examples.

³ just

23. *Edit. H. Steph.* As for these Words, *et inde destitum*, I am inclined to believe that the Author wrote *sed inde destitum*. The Change of *sed* into *et* might very easily happen. Mr. JENS, in his Dissertation cited above, p. 64. suspects that there is another Word corrupted in this Place; *consciperetur* for *conscisceretur*.

8 It is from *APPIANUS Alexandrinus*, that our Author has taken this Circumstance. *De bell. Punic.* p. 69. *Edit. Amstel.* (43. *H. Steph.*)

9 Our Author had probably in his Eye the long Discourse made by *Mæcenas* to *Augustus*, when the latter asked his Advice with Regard to his Design of abdicating the Government of the Republick. But I find nothing, either in this Discourse or that of *Agrippa*, that relates to the Forms used in Declarations of War. The Origin of the false Citation is this, *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. I. in fin. p. 218. remarks, that *Mæcenas*, (apud *DION. Lib. LII.*) seems to say, that only Democratical States observe the Formalities with which Declarations of War are attended. What gave the *Italian* Civilian Occasion to form this Conjecture, was the Passage where *Mæcenas* says, that in advising *Augustus* to retain the Government of the State, he does not pretend to persuade him to act as a Tyrant, but only to regulate, in Concert with the chief Men of *Rome*, all the Affairs of the State, in a just Manner, and conformably to the Good of the Publick. He represents at the same Time, that the State would thus be much better governed, and in Consequence more happy, than if the supreme Authority were put into the Hands of the People. *When it shall be necessary* (says he, amongst other Things) *to undertake a War, you will do it secretly, and by making good Use of favourable Occasions.* p. 542. *E. Edit. H. Stephens.* The War here meant is not one made rashly, and without being declared; but *Augustus's* Courtier, as appears from the Sequel of his Discourse, opposes Wars undertaken wisely to dangerous Wars, in which the *Romans* had been engaged by the tumultuous Deliberations of the People; Secresy not being observed in them, and the ambitious great Men finding Means to win the Populace, and to make them consent to take Arms under their Conduct. This is the true Sense of the Passage: Our Author has followed, without Hesitation, that which *GENTILIS* spoke with some Doubt.

IX. (1) *Diffidato Principe, diffidati ejus adherentes.* See *BALDUS, Ad Leg. II. Code, De Servis*, Num. 70. For in their barbarous Phrase *Diffidare* signifies to declare War.

2 *Feciales responderunt.* — *Ætolos ultro sibi, &c.* *LIVY, Lib. XXXVI. Cap. III. Num. 13.*

X. (1) See what is said above, *B. I. Chap. III. Num. 4.*

2 Mr. *BUDDEUS*, in his Dissertation intitled *Jurisprudentiæ Historiæ Specimen*. § 110. subscribes here to our Author's Opinion, which is also that of the Generality, even of his Commentators, except *OBRECHT*. The latter, speaking of the Case in Question, upon the Passage cited in the preceding Note, which however relates to another Thing, contents himself with referring to *Chap. XXXV. of B. I. of CÆSAR's* own Commentary upon the War in *Gaul*. *CÆSAR* there, alledging his Reasons for undertaking the War with *Ariovistus*, says, amongst other Things, that in the Consulship of *Messala* and *Piso*, the Senate had decreed, that whoever should be Proconsul of *Gaul*, should defend the *Eduans*, and the other Friends of the *Roman* People, as much as he could, without Prejudice to the Welfare of the Republick. *Quoniam M. Messala M. Pisone, Coss. &c.* *BOECLER*, in his Dissertation *De Actis Civitatis*, Vol. I. p. 887. approves this Reason, and confirms it by the Example of *CICERO*, who, when Proconsul of *Cilicia*, believed himself authorized to act something like it, by Vertue of a like Decree of the Senate, as appears from what he says himself, *Lib. XV. Epist. Ad Familiæ. II.* *FLORUS* also speaks of *Cæsar's* Expedition against *Ariovistus*, as of a very just War. *Sed prima contra Germanos illius pugna, justissimis quidem ex causis: Hædui enim de incursionibus eorum querebantur. Quæ Ariovisti superbia? &c.* *Lib. III. Cap. X. Num. 10.* And *DION CASSIUS* makes *Cæsar* say, that the extraordinary Command decreed him by the Senate and People of *Rome*, included a Permission to undertake War against whomsoever he should think fit. *Lib. XXXVIII. p. 96. B. Edit. H. Steph.* So that the Question only is to know whether *Cæsar* had good Reasons for making Use of this Permission. It is not denied but that this Conqueror might have been prompted by his Ambition, which made him seek and embrace eagerly all Occasions for taking up Arms: But as the Thing itself, and not the secret Motives, is the Matter in Question, it

just by the Law of Nations: For they were not now Accessories of another War, but attacked as Principals, on which Account, as a Denunciation of War was requisite by the Law of Nations, so a new Decree of the Roman People was necessary by the Laws of Rome. ⁴ If the Consent of the People to make War against Antiochus was desired in this Form, *Is it your Will and Pleasure, that War be made against Antiochus, and his Adherents?* Which was also observed in the ⁵ Decree against King Perseus: It ought to be understood thus, as long as that War should continue against those two Kings, and their Adherents.

XI. The Reason why Denunciation is requisite to some Effects of War.
¹ Alb. Gentilis, l. 2. c. 2.

XI. The Reason why a solemn Proclamation was required unto such a War as by the Law of Nations is called just, was not (as ^a some imagine) to shew that they would do nothing in Secret, or by Deceit; for this Motive would not tend so much to establish any Right as to distinguish them by an extraordinary Valour and Generosity. As some Nations ¹ (we read) have appointed both the Time and Place of Battle. But that it might manifestly appear, that the War is not made by a private Authority, but by the ² Consent of both Nations, or of their Sovereigns. For hence arise certain peculiar Effects, which in a War against Robbers, or a War

it suffices that Ariovistus had given him just Occasion to attack him. Now this is what the late Mr. CELLARIUS proves very well in a good Dissertation, *De C. Julii Cæsaris adversus Ariovistum Regem, aliosque Germanos Bello*; which is the sixth of the Collection, published MDCCXII. Ariovistus, says he, had no Right to appropriate a Part of Gaul to himself: That Prince pretended in vain, that he had made himself Master of it by Right of Conquest. Admitting that he had Reason for passing the Rhine, and for joining the Sequani against the Hædui, why did he not return home after the War was ended? Why did he oppress both his conquered Enemies, and the Conquerors his Friends, by loading the former with Imposts, and depriving the latter of the best Part of their Lands. It was besides the Interest of the Romans, not only to protect the Hædui, their Allies, but also to hinder Ariovistus from continuing too long in Gaul. The Example of the Cimbri and Teutones gave them just Reason to apprehend lest the Fancy should take him to enter their Province, and settle in it.

³ In the same Class may be placed the War made by Ulysses, and his Companions, against the Ciconians, who, during the Siege of Troy, had sent Aid to Priam, under the Command of Mentès. See HOMER, *Odyss.* Lib. VIII. and the Scholia of DIDYMUS, upon Ver. 40. GROTIUS.

⁴ *Patres rogationem ad Populum, &c.* LIVY, Lib. XXXVI. Cap. I. Num. 5.

⁵ *Senatus consultum inde factum, &c.* Idem. Lib. XLII. Cap. XXXI. Num. 1.

XI. (1) As the Romans did to Porfenna, as PLUTARCH relates, in the Life of Publicola. The Turks two Days before a Battle make Fires in several Places. CHALCOCONDYLAS, Lib. VII. GROTIUS.

See what is said, Chap. I. of this Book, § 20.

² But are People more assured of that, when a Herald comes to declare War with certain Ceremonies, than they would be when they see an Army upon their Frontiers, commanded by some principal Person of the State, and ready to enter the Country? On the contrary, might it not more easily happen, that a Person, or some few Persons, should assume the Character of Heralds, than that one Man should raise an Army by his own Authority, and march at the Head of it to the Frontiers, without the Sovereign's Privy? And the Thing could still less be supposed to happen on both Sides. The Truth is, that the principal End of

Declarations of War, or at least what occasioned the Custom of them to be established, was, as some Commentators upon our Author observe, to make known to all the World, that there was just Cause for taking up Arms, and to signify to the Enemy himself, that it had been, and still was, his Fault, if he did not avoid it. I find in NONIUS MARCELLUS, a Passage of VARRO, part of which our Author has cited elsewhere, (*Preliminary Discourse*, § 27.) from whence it appears clearly, that this was the Opinion of the ancient Romans. They undertook no War hastily, says he, or without just Cause; from whence it was that they declared it beforehand, and established, for that Purpose, some Heralds at Arms, whom they sent, to the Number of four, to demand Satisfaction of those from whom they believed they had a Right to exact it. This is visibly the Sense of the following Words, tho' not very correct in some Places, *Itaque bella & tardè & magna licentia*, [MERCIER tells us it is writ so in all the Manuscripts, instead of *nulla licentiâ*, which was in the other Editions. Might not *magna decentia* be read, a Term of which that Grammarian cites an Example, p. 203. from CICERO? for the Explanation MERCIER gives us here, *valde licito*, appears too subtle] *suscipiebant: Quòd bellum nullum, nisi pium, putabant geri oportere, prius indicerent*, [*indicebant* probably should be read, a Word, which having been changed by the Copists into *indicerent*, has occasioned the foisting in *quam* after *prius* in the preceding Editions] *bellum iis, a quibus injurias factas sciebant: Feciales legatos res repetitum mittebant quatuor, quos Oratores vocabant.* In Voce Feciales, p. 529. Edit. Mercer. DIONYSIUS HALICARNASSENSIS refers also to the extreme Regard the Romans had to Justice in their Wars, the Establishment of the College of the Feciales, and in particular, the Function of declaring War, with which these were charged. *Antiq. Rom.* Lib. II. Cap. LXXII. The Grammarian SERVIUS is of the same Opinion, in a Passage which our Author has quoted several Times: He says, that Ancus Marcius seeing the Roman People too fond of War, and that they often engaged in it without just Cause, borrowed from the *Æquicolæ* the Fecial Law. *Sed Ancus Marcius, quum videret Populum Romanum ardentem amore bellorum, &c.* In *Æneid.* X. 14. It does not appear, that in all this they thought of the Effects of which our Author speaks.

made by a Prince against his own Subjects, will not be allowed. Therefore ³ *Seneca* distinguished Wars denounced against Neighbours from Civil Wars.

XII. Now, as ^a some observe, and by Examples teach, that even in such Wars as these, whatever is taken becomes the Captor's, ¹ it is true but only on one Side, and that too by the Law of Nature; and not by the voluntary Law of Nations, which only provides for the Interest of Nations, not of those who are either no Nation, or but Part of one. They are also mistaken that ^b think a War, undertaken in Defence of our Persons or Goods, needs no Denunciation. ² For it is absolutely necessary, indeed not simply, but to obtain the Effects proper to a just War, as we have already mentioned, and shall more fully explain by and by.

XIII. Neither is that true, that War cannot justly be made as soon as it is proclaimed, which *Cyrus* did against the *Armenians*, and the *Romans* against the *Carthaginians*, as I said ^a before. For by the Law of Nations, a Denunciation ¹ requires no Time to be allowed after it; but it may happen, that by a natural Right some Time may be required from the Quality of the Business, as if Restitution be demanded, or Punishment required against an Offender, and not yet denied; for then convenient Time is to be granted for the performing it.

XIV. Nay, tho' the Rights of Embassadors should be violated, it will not thence follow, that there is no Need of Denunciation to obtain those Effects proper to a just War; but it will be sufficient if it be done the safest Way it can, that is, by Letters: As it is usual, in Law, to give a Summons or Intimation, in Places that are not safe.

XII. *That those Effects are not to be found in other Wars.*

^a *Ayala*, l. i. c. 1.

^b *Alberic*, *Gen-til*. l. 2. c. 2.

XIII. *Whether a War may be made as soon as denounced.*

^a § 6. n. 6. & § 8. in fin.

XIV. *Whether against him that has violated the Right of Embassadors a War may be made, tho' not denounced.*

³ *Ad arma protinus, &c.* De Ira, Lib. III. Cap. II.

XII. (1) See what I shall say, Chap. VI. of this Book.

² But see what I have already said in Note 13. upon Paragraph 6. of this Chapter.

XIII. (1) This is required even by the Law of Nature itself, as often as it can be done without Prejudice to ourselves, even tho' there is not much

Hope that he, against whom War is declared, should be inclined to prevent it, by giving us Satisfaction. For we ought to neglect no Means of letting all the World know, and even the Enemy himself, that we do not take Arms to obtain or defend our just Rights, till reduced to the last Extremity, and after having tried all other Methods, and given the Enemy full Time to come to himself.

C H A P. IV.

The Right of killing Enemies in a solemn War; and of other Hostilities committed against the Person of the Enemy.

I. *SERVIVS* upon this Verse of *Virgil's*,

¹ *Tum certare odiis, tum res rapuisse licebit.*

*Then is your Time for Faction and Debate,
For partial Favour, and permitted Hate.*

Dryden.

I. *The Effects of a solemn War generally explained.*

Deriving the Feacial (or Herald) Law from *Ancus Marcius*, who had borrowed it himself from the *Æquicolæ*, says thus, ² *When Men or Cattle were taken from the Romans by any other Nations, the Pater Pratatus (King at Arms) with some other Heralds, whose Office it was also to make Treaties of Alliance, went to the Borders of that Nation, and standing there, with a loud Voice proclaimed the Cause of the War; and if they would not restore the Things taken, or deliver up the Offender, (within thirty Days) he threw a Javelin into their Territories, which was the Be-*

I. (1) *Æneid*. Lib. X. ver. 11. & seqq.

² *Nam si quando homines aut animalia, &c.* In *Æneid*. Lib. X. ver. 14.

ginning of Hostilities, and then it was lawful to plunder, as is usual in War. But he had before said, that *The Antients* by ³plundering, (*Res rapere*) understood the damaging what belonged to the Enemy, tho' nothing be taken from him: And by restoring what was redemanded (*Res reddere*) they meant all Manner of Satisfaction for the Injury done. Whence we learn, that a War solemnly denounced between two Nations, or their Sovereigns, ⁴ has some peculiar Effects, which do not follow from the Nature of the War itself: Which is very agreeable to what we have already ^a quoted from the Roman Lawyers.

^a Ch. 3. § 1.

II. The Word Lawful distinguished into what may be done with Impunity, tho' not without a Crime, and what is not criminal, tho' it were an Act of Virtue to let it alone; with the Addition of several Examples.

^a Lib. I. c. 18.

^b Ad Pollent. l. 1. c. 13. and 18.

II. 1. But we must observe, that this Word *Licebit*, will be lawful, in *Virgil*, is capable of a double Meaning. For sometimes that is said to be lawful which is altogether just and honest, tho' perhaps, some other Thing may be more commendably done, as that of the Apostle St. Paul, πάντα μοι ἔξεστιν, ἀλλ' ὃ πάντα συμφέρει, *All Things* (of the same Nature with those he had begun to speak of, ¹ and of which he was going to speak further) are lawful for me, but all Things are not expedient, 1 Cor. vi. 12. Also to marry is lawful, but to abstain from ² Marriage with a pious Intent is more laudable, as St. *Augustine* ^a argues to *Pollentius*, out of the same Apostle. To marry a second Time is likewise lawful; but to marry but once is more laudable, as ³ *Clemens Alexandrinus* rightly decides the Question. A Christian Husband may lawfully put away a Heathen Wife, as Saint *Augustine* ^b allows (which, with what Circumstances it may be proved, is not our Business here to dispute) but yet he may keep her. Therefore he adds, ⁴ Both are equally lawful by the Rules of Justice, which our Saviour hath given us, for he hath prohibited neither of them, but both are not equally expedient. *Ulpian* says of a Trader, who was permitted, by the Roman Law to pour out the Wine, if the Buyer did not come to fetch it at the Time appointed, ⁵ Tho' he may do it, yet if he did it not he is more to be commended.

2. This

³ These Words have already been cited, upon Paragraph 7. of the preceding Chapter, Note 4.

⁴ I do not see how our Author can deduce this Consequence from the Passage of *SERVIVS*. It is plain, in my Opinion, that all the Grammarian means, is, that before War was declared, in the Manner which he informs us was usual, it was allowed to plunder; because, before that, the People of whom there was Room to complain, were not yet considered as Enemies; in a Word they were not yet at War.

II. (1) He speaks of Things indifferent in themselves, as is the Use of all Kind of Meats without Distinction, from which, however, we ought to abstain, when eating them is not expedient; that is to say, when some bad Effect, either in Relation to others, or ourselves, may result from it. But then those Things become obligatory; and consequently, the Passage makes nothing to the Subject. See what our Author himself says, in his Notes upon the New Testament.

² *TERTULLIAN* against *Marcion*, I. Abstinence from Marriage would be no Matter of Commendation, if Licence (to marry) were taken away. See the same Author, B. I. *Ad uxorem*, upon this Subject, and concerning Flight in Times of Persecution; and St. *JEROME* against *Helvidius*, A Virgin deserves the greater Honour, while she disdains that, which to do were no Sin. And against *Jovinian*, Therefore does *CHRIST* love Virgins the more, because they freely give what was not commanded them: And to *Pammachius*, Difficult and heroical Actions are always left to the Choice of those who have Courage to undertake them, that, as they are free, they may be worthy of Recompence. And Saint *CHRYSOSTOM*, upon 1 Cor. vii. declares Continence to be the better; and upon Rom. vii. 6. If we keep not the Commandments, we are threatened with Hell, thereby shewing that Things positively commanded, are not like those that are left to the free Choice of

the Combatant, (such are Virginity, and the renouncing of our Possessions) but the others must of Necessity be performed: And in his second Oration, concerning Fasting, He left Virginity without the Lists, he left it above what we are commanded to strive for, so that they who keep it may shew the Greatness of their Soul, and they who do not may enjoy the Favour of GOD. Which he afterwards applies to ἀντημοσύνη, The Renouncing of Possessions. To which we may add what *GRATIAN* gathers out of St. *AUSTIN*, and others. *Caus. XIV. Quæst. I. GROTIUS*.

This Distinction between Counsels and Precepts, and the Application of it to the Examples here given by our Author, have been sufficiently refuted, B. I. Chap. II. § 9. Note 19.

³ *STROMAT. IV.* where, among other Things, he speaks of one married a second Time, He does not indeed sin against the divine Covenant, for there is no Law that forbids it; but he does not fulfil that most excellent Perfection of an evangelical Life. *GROTIUS*.

That Father speaks here indeed of second Marriages, but in the Words immediately going before he seems to speak of Polygamy in general, as simply contrary to evangelical Perfection, whether a Man has several Wives one after another, or at the same Time. He says, that GOD not only permitted, but required, under the Law, that Men should marry in that Manner, for the Multiplication of Mankind. Ἄλλ' ὁ ἀνὴρ ἀνῆκε, &c.

⁴ *Heic autem ubi de dimittendo, &c. Ad Pollent. De adulter. conjug. Lib. I. Cap. XIX.* See Canon Law, *Caus. XXVIII. Quæst. I. (Cap. VIII. IX.)* where many Things have been copied from Chap. XIV. and XVIII. *GROTIUS*.

⁵ *Si tamen quum possit effundere, Digest. Lib. XVIII. Tit. VI. De periculo & commodo rei venditæ, Leg. I. § 3.* This Example is ill applied. See what I have said upon *PUFENDORF*, Law of Nature

2. This ⁶ Word *Licere*, to be lawful, may be taken for that which is not punishable by human Laws, and yet is not consistent with Piety, or the Rules of Morality. Thus, in many Countries, Fornication is allowed. Among the ⁷ *Lacedæmonians* and *Ægyptians*, Theft was lawful. We read in *Quintilian*, ⁸ *There are some Things not commendable in their own Nature, yet tolerated by the Law, as by that of the Twelve Tables, the Body of the Debtor might be divided amongst the Creditors.* Indeed this Acceptation of the Word *Licere*, to be lawful, is not very proper, ⁹ as *Cicero* observes in the fifth of his *Tusculan Questions*. Speaking of *Cinna*, *On the contrary I think him miserable, not only because he did such Things, but because he so managed, that he might lawfully do them, tho' it is not lawful for any Man to do ill, but we are misled by the Error of Speech, when we say that is lawful which is only allowed.* But yet it is very common, as when the same *Cicero*, in Behalf of *Rabirius Posthumus* thus addresses the Judges, ¹⁰ *Ye ought to consider what is suitable to be done, not what you may do by Strictness of Law, for if you regard what is strictly lawful, you may put to Death whom you please.* Thus it is said, ¹¹ it is lawful for Kings to do what they please, because they are ἀνδραποδοί, exempted from Punishment amongst Men, as we have said ^c elsewhere. But *Claudian* ^c B. i. ch. 3, 4. well advises a Prince or Emperor, when he says,

¹² *Nec tibi quid liceat, sed quid fecisse decebit,
Occurrat mentemque domet respectus Honesti.*

*Think not what is by strictest Law allow'd,
But what by Truth and Conscience is avow'd.*

And ¹³ *Musonius* blames those Princes, Μη τὸ, καθήκει μοι, λέγειν μεμεληκέτας, ἀλλὰ τὸ ἐξ ἐστὶ μοι, *Who say thus I can do, rather than thus I should do.*

3. And in this Sense we find *Licet*, it is lawful, and *Oportet*, it behoveth, often opposed to each other, as by ¹⁴ *Seneca* the Father, in his Controversies. And in *Ammianus Marcellinus*, ¹⁵ *Some Things are not fit to be done, tho' they may be lawfully done.* And *Pliny*, ¹⁶ in his Epistles, *We should avoid Things that are dishonest, not because they are unlawful, but shameful.* And *Cicero*, ¹⁷ in his Oration for *Balbus*, *Some Things are not fit to be done, tho' lawful.* And for *Milo*, ¹⁸ he refers to natural Right what is just or innocent, and to the Laws what is permitted.

Nature and Nations, B. V. Chap. V. § 3. Note 8. of Edition II.

6 *TERTULLIAN*, in his Exhortation to Chastity, *Permission often exposes one to the Temptation of violating the Rules of the Gospel: And again, all Things are lawful, but we cannot do every Thing that is lawful without Prejudice to Salvation.* And *COLUMELLA*, in his Preface to B. VII. *Neither must we take Advantage of whatsoever is lawful, for the Antients reputed Summum jus, the Rigour of the Law, to be the greatest Torment.* And *St. JEROM*, *The Rigour of Law is the highest Wickedness.* Ep. ad Innocent. *GROTIUS*.

7 See *PUFENDORF*, B. VII. Chap. I. § 3. *Law of Nature and Nations*.

8 *Sunt enim quædam*, &c. *Instit. Orat. Lib. III. Cap. VI. p. 173. Edit. Obrecht.* But *Mr. BYNKERSHOEK* has shewn, in his *Observat. Jur. Civ. Lib. I. Cap. I.* that this Orator, and some other antient Authors, have mistaken the Law of the Twelve Tables, which only signifies, that the Creditors might sell their Debtor by Auction, in Order to divide the Price of his Liberty between them. This is not the only Instance wherein Moderns have understood certain Passages of Antiquity better than antient Authors.

9 In speaking of *CINNA*, who had unjustly put some illustrious Romans to Death. *Beatusne igitur, qui hos interfecit*, &c. *Tusculan. Quæst. Lib. V. Cap. XIX.*

¹⁰ *Heic jam, judices, vestri consilii res est*, &c. *Orat. pro C. Rabir. Posthum. Cap. V.*

¹¹ This is what *St. CHRYSOSTOM* says, where he speaks of *St. John the Baptist*, who, notwithstanding that, presumed to say to King *Philip Herod*, and with Authority: It is not lawful for you to have this Wife. *De Pænitent. VIII. GROTIUS*.

¹² *De IV. Consul. Honor. ver. 267.*

¹³ *STOBÆUS* has preserved this Saying. The Philosopher added, that the Princes who use such Language to their Subjects, do not long retain their Dignity. *Florileg. Tit. XLVI. (or XLVIII.) Admonit. De Regno. p. 328. Edit. Gesner. 1549.*

¹⁴ He gives, for Instance, the Permission of going into Bawdy-Houses. *Potest, inquit, Hæc enim Lex, quid oporteat, quærit; aliæ, quid Liceat. Licet ire in lupanar. Lib. IV. Controv. XXV. p. 308.*

¹⁵ *Disimulans scire, quod sunt aliqua, quæ fieri non oportet etiamsi Licet. Lib. XXX. (Cap. VIII. p. 657. Edit. Vales. Gron.)*

¹⁶ *Oportet quidem, quæ sunt inhonesta, non quasi illicita, sed quasi pudenda, vitare. Lib. V. (Ep. XIV. Num. 9. Edit. Cellar.)*

¹⁷ *Est enim aliquid, quod non oporteat, etiamsi Licet. (Cap. III.)*

¹⁸ *Ut eum nihil delectaret, quod aut per naturam Fas esset, aut per leges Liceret. Cap. XVI.*

So *Quintilian*¹⁹ the Father, in one of his Declamations tells us : It is one Thing to have a regard to the Laws, and another to consider what Justice demands.

III. *The Effects of a solemn War generally considered, refer to Lawfulness with Impunity.*
² *Ch. 1. § 2. & seq.*

IV. *Why such Effects were introduced.*

III. Therefore in this Sense it is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are prescribed by the Law of Nature, as we have said^a in the beginning of this Book, but on both Sides, and without Distinction ; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion, neither can any other make War upon him barely upon this Account. And in this Sense we are to take *Sallust*,¹ *By the Laws of War all Things are lawful to the Conqueror.*

IV. The¹ Reason why this was established by Nations, is because when two States are engaged in War, it would be dangerous for any other to pronounce on the Justice of their Cause, for by that Means that State might quickly be involved in a War with other People ; as the² Inhabitants of *Marjeilles* argued in the Cause of

¹⁹ *Ego porro non hanc interpretationem istius verbi video ut jura spectanda sint, sed illud aliquando, uti justitia spectetur.* Declam. CCLI. (See also Declam. CCCLXVI. in fin.)

The Reader, upon this Subject, may see my two Discourses, *De Legum permission. & Benefic.* which are annexed to the fourth Edition of PUFENDORF'S *De Offic. Homin. & Civis.*

III. (1) L. Sulla cui omnia in victoria, &c. (Orat. II. *Ad Cæsar.* De Republ. Ordinanda, Cap. XLVIII. p. 126. Edit. Wasse.) SENECA makes *Pyrrhus* say the same Thing in one of his Tragedies :

Quodcumque libuit facere Victori, licet.
Troad. (Ver. 335.)

IV. (1) It is not necessary to suppose here a tacit Consent of Mankind, or an arbitrary Law of Nations, of which the Reality cannot be proved. We can produce very good Reasons, founded on the Law of Nature itself, and which take Place with regard to other Wars, besides those that are publick and declared in form, to which our Author without Reason confines the Impunity he speaks of. Let us suppose, that in the Independence of the State of Nature, thirty Heads of Families, inhabiting the same Country, but having no other Tie amongst them, than that of Neighbourhood or Friendship, which Neighbourhood might occasion ; should form a League amongst themselves to attack or repel a Body, composed of other Heads of Families : I say, that neither during that War, nor after its being terminated, those of the same Country, or elsewhere, who had not joined in the League of either Side, ought or could punish as Murderers or Robbers, any of the two Parties who should happen to fall into their Hands. They could not do it during the War : For that would be espousing the Quarrel of one of the Parties, and as they continued Neuter at first, they had evidently renounced the Right of intermeddling in what should pass in the War. And much less could they do it after the Conclusion of the War ; because as the War could not be concluded without some Sort of Accommodation or Treaty of Peace, the Parties concerned were reciprocally discharged from all the Evils they had done to each other. This the Interest of human Society also required. For if those, who continued Neuter, had however been authorised to take Cognizance of the Acts of Hostility, exercised in a War of others, and to punish such as they believed to have committed unjust ones, or to take up Arms on that account, instead of one War, two or more might have arisen, and proved a Source of Quarrels and Troubles. The more Wars became frequent amongst Mankind, the more it was necessary for their Tranquillity, as well to avoid espousing rashly other Peo-

ple's Quarrels, as, when it was not judged proper to take Part in a War, to consider all that should pass in such a War, as authorised by the Right of Arms. The Establishment of civil Societies only rendered this Impunity the more necessary ; because Wars then became, if not more frequent, at least more extensive, and attended with a greater number of Evils. There is nothing then here, which either requires the general Consent of Nations, or is peculiar to Wars made between two Sovereigns, and declared in form. The Effect in Question, is founded on one of the clearest and most general Laws of natural Right, and the Custom of most Nations, conformable to it, only renders the Practice of it more indispensable, since, as I have observed several Times, we are, and ought to be, deemed to conform to a known Custom, when we do not declare at a proper Time that we intend not to follow it. Our Author excepts the Wars against Robbers and Pirates : But he probably makes the Exception only with respect to them, as he has done above, in regard to the Right of appropriating to ourselves Things taken in War, § 12. of the preceding Chapter. Now, if those Robbers have not the Privilege of Impunity, it is because they are Robbers, (See DEMOSTHENES, *Orat. de Haloness. Princ.*) and consequently People, whose Acts of Hostility are all manifestly unjust, the declared Enemies of Mankind : Whereas in other Wars, it is often very difficult to determine which Side is in the Right ; so that the Affair remains, and ought to remain, undecided, with regard to those, who have joined neither Party. As to civil Wars, which our Author excepts also, the Reasons I have alledged are still stronger with regard to them, than with regard to the Wars made between two Kings, or two States ; because the Constitution of civil Societies, and the Peace of Mankind make it still more requisite, that Strangers should not rashly intermeddle in what passes within a State. And it is quite another Question, whether Impunity, and the Right of appropriating to ourselves what is taken in War, have, or have not, Place amongst the Members of the same civil Society, either in the Wars of one Part of a Republick against the other, or in those of a King against his Subjects : The Decision of that Question depends on other Principles. In fine, I do not see, that the Declaration of War contributes any Thing to the Effects under Consideration. It is often no more than a meer Ceremony. But whether the War be, or be not, declared, the Reasons I have laid down still subsist in all their Force. See further what I have said in the preceding Chapter, § 6. Note 13. and § 11. Note 2.

² *Atque ex auctoritate [legati Massiliensium] hæc, &c.* CÆSAR, *De Bello civili*, Lib. I. Cap. XXXV.

Cæsar and *Pompey*; that it did not belong to them, nor did their Forces permit them to determine, which had the juster Cause. Besides, even in a just War it is very hard by any outward Tokens to judge, which is the just Measure of defending ourselves, of recovering our own, or of exacting Punishment, so that it is far better to leave it to the Conscience of the Persons engaged in War to determine these Things among themselves, than to appeal to the Arbitration of others. The ³ *Achæans* in *Livy* thus addressed the Senate, *How should what had been acted by the Right of War, now come into Debate?* Besides this Permission or Impunity, there is another Effect, *viz.* the Right of appropriating to ourselves what we take in a solemn War, of which we shall treat hereafter.

V. 1. But that Licence which a just War gives to an Enemy to hurt another (which we have begun to treat of) extends first to his Person, of which we have many Testimonies in approved Authors. There is a great Saying of ¹ *Euripides*, which had passed into a Proverb amongst the *Greeks*, V. Proofs of these Effects.

καθαρός ἅπας τοὶ πολεμῖς ἐς ἀν κλάνη.

*The Blood of an Enemy doth not stain
The Man who kills him.*

Therefore the Custom of the old *Greeks* was, not to wash, drink, much less to perform any Acts of a religious Worship with him that was a Homicide (*that is*, ² *had killed a Man out of War*) but it was lawful to do it with him that in War had slain his Enemy; and frequently to kill is called the Right of War. And *Marcellus* declares in *Livy*, ³ *Whatsoever I did among the Enemies, the Right of War defends.* So does *Alcon* to the *Saguntines* in the same Author, ⁴ *But I think this is rather to be endured, than that you should be all put to the Sword; and suffer your Wives and Children to be dragged about before your Faces, by the Right of War.* And the same *Livy* in another Place, relating the general Massacre of the *Astapenses*, ⁵ adds, that it was done by the Right of War. And *Cicero* pleads thus for *Deiotarus*, ⁶ *But how could he be suspected as your Enemy, who cannot but remember, that when you might have adjudged him to die by the Law of Arms, you made both him and his Son Kings.* And for *Marcellus*, ⁷ *For when by the Right of that Victory we might have been all put to Death, we were preserved by your Clemency.* And *Cæsar* ⁸ tells the *Hædui*, *That he had out of his Mercy preserved them, whom by the Right of War he might have slain.* And *Josephus* ⁹ in his *Jewish War*, καλὸν ἐν πολέμῳ θνήσκειν, ἀλλὰ πολέμῳ νόμῳ, τὰτ' ἐστὶν ὑπὸ τῶν κατὰ νίκην, calls it honourable to die in War, but by the Right of War, that is by the Hands of the Conqueror. And so *Statius* ¹⁰,

Non.

³ *Quonam modo ea, quæ belli jure, &c.* Lib. XXXIX. Cap. XXXVI. Num. 11.

V. (1) *Ione*, Ver. 1334.

See also Ver. 1046 1047. *PLATO* says, that according to an antient Law, founded upon an Oracle at *Delphos*, those, who had killed an Enemy in War, ought not to be looked upon as defiled; no more than if they had killed a Friend without Design in some public Exercise: About which the Philosopher makes a Law in his imaginary Republick; where he often borrows those already established amongst the *Greeks*. *De Legib. Lib. IX. p. 165. A. B. Vol. I. Edit. H. Steph.*

² See above, *B. I. Chap. II. § 5.* with the Notes 5. and 7. I find a remarkable Passage on this Subject in *ANTIPHON, Orat. XIV, XV.* The *Greek* Orator says, that the Reason why all Tribunals, which take Cognizance of Murther, judge and pass Sentence in an open Place, is solely, that the Judges may not be in the same Place with the Criminal, whose Hands are polluted with Blood, and that the Accuser also may not be under one Roof with the Murtherer, p. 93. *Edit. Wèchel.* See also *Orat. XVI. p. 139.*

³ *Quæ autem singulis victor aut ademi, aut dedi, quum BELLII JURE, tum ex cujusque merito satis scio me fecisse,* Lib. XXVI.

⁴ *Sed hæc patienda censeo potius, &c.* Idem, Lib. XXI. (Cap. XIII.) Num. 9.

⁵ *Atque hæc tamen hostium iratorum, ac tum maxime dimicantium, JURE BELLII, in armatos repugnantisque edebantur,* Lib. XXVIII. Cap. XXIII. Num. 1.

⁶ *Tibi porro inimicus cur esset, a quo quum interfici BELLII LEGE, &c.* Cap. IX.

⁷ *Nam quum, ipsius VICTORIÆ conditione, JURE omnes victi occidissimus, &c.* Cap. IV.

⁸ *CÆSAR, nuntiis ad civitatem Æduorum missis, &c.* Comment. *De bell. Gall. Lib. VII. (Cap. XLI.)*

⁹ *De bell. Judaic. (Lib. III. Cap. XXIV. p. 852. B.)*

¹⁰ (*THEBAID. Lib. XII. Ver. 552, 553.*) The Grammarian *SERVIUS* observes, that *Priam* complains, not that *Pyrrhus* had killed his Son *Polytes*, as he might do by the Right of War: But that he had made the Father the wretched Spectator of the Son's Death: *ME CERNERE] De spectaculo queritur,*

*Non querimur cæsos, hæc bellica jura, vicēque
Armorum—*

*We grieve not for our Men, who bravely dy'd,
This is the Right of War, we're satisfy'd.*

2 Yet we must observe, that when these Authors write thus, they do not mean a Permission that renders the Action of killing the Enemy entirely innocent, but an Impunity, such as I have described, as appears from other Places. Tacitus ¹¹ said, *In Time of Peace every one is treated according to his Desert, but in War the Guilty and Innocent fall alike.* And in another Place, ¹² *Neither would the common Right of Men permit them to reward so unnatural a Murder, nor the Law of Arms to punish it.* Neither is the Right of War to be otherwise taken, where Livy ¹³ mentions, that the Greeks spared Æneas, and Antenor, because they had been always for Peace. And Seneca in his Tragedy of Troas.

Quodcunque libuit facere, victori licet.

The Victor's Will is an assured Law.

And in his Epistles, ¹⁴ *Those Things, which would be punished with Death, had they been done in secret and by private Authority, are commended, when done by Generals of Armies.* And St. Cyprian, ¹⁵ *It is a Crime when a private Person is guilty of Homicide, but when it is done by publick Authority it is called a Vertue; Crimes acquire the Right of Impunity, not because they do but little hurt, but because the Cruelty of them is carried to a great Excess.* And a little farther, *the Laws connive at Sin, and that is esteemed lawful, which is authoris'd by the State.* Thus Lactantius says, ¹⁶ *that the Romans did lawfully injure others; and in the same Sense Lucan, ¹⁷ Crimes were authoris'd.*

VI. All that are found among Enemies may be killed or hurt.

^a Liv. l. 38. c. 48. See above, ch. 2. of this Book, § 2. n. 2.
^b Ch. 2. of this Book, § 7. n. 2.
^c Ad Leg. V. Dig. De Justitia.

VII. What if they came thither before the War.

VI. But this Right of Licence is of a large Extent, for it reaches not only those who are actually in Arms, and the Subjects of the Prince engaged in War, but also all those who reside within his Territories; as may appear from that form in Livy. ^a *Let him, and all that live within his Country, be our Enemies.* And no wonder, since we may apprehend Damage from them, which in a general and uninterrupted War is enough to justify the Right here spoken of, otherwise than in Reprisals, which, as I have said, were first introduced after the manner of Taxes laid for the Payment of publick Debts. Wherefore we are not to be surpris'd, if, as Baldus ^c observes, this Licence in War be much greater, than that in Reprisals. And without doubt Strangers, that come into an Enemy's Country after a War is proclaimed, and begun, are liable to be treated as Enemies.

VII. But they who went thither before the War, are by the Law of Nations allowed ^a a reasonable Time to depart, which if they do not make ² Use

iur, non de morte. Quia JURE BELLI Polyten Pyrrhus occiderat: Sed cur ante oculos patris? In Æneid. II. (Ver. 538.) SPARTIANUS speaking of the Persons, whom the Emperor Severus had caused to be put to Death, distinguishes those who had been killed by the Law of Arms: Multos præterea obscuri loci homine interemite, præter eos, quos jus prælii absumsit. In Vit. Sever. (Cap. XIV.) GROTIUS.

¹¹ *Nam in pace causas & merita spectari, &c. Annal. Lib. I. Cap. XLVIII. Num. 3.*

¹² *Celeberrimos auctores habeo, tantam victoribus adversus fas nefasque irreverentiam fuisse, ut gregarius eques, occisum a se proxima acie fratrem professus, præmium a ducibus petierit. Nec illis, aut honorare eam cædem, jus hominum; aut ulcisci, ratio belli permittebat. Hist. Lib. III. Cap. LI. Num. 1, 2.*

¹³ *Jam primum omnium satis constat, Traja capitia, in ceteros servitum esse Trojanos, duobus Ænea Antenoreque, & vetusti jure hospitii, & quia pacis, reddendæque Helenæ, semper auctores fuerant, omne*

JUS BELLI Achivos abstinuisse, Lib. I. Cap. I. Num. 3.

¹⁴ *Quæ clam commissa capite luerent, eadem, quia paludati fecerunt, laudamus. Epist. XCV. (p. 464. Edit. Gron. Var.) See what is said above, B. II. Chap. I. § 1. Num. 3. GROTIUS.*

¹⁵ *Madet orbis mutuo sanguine, &c. Epist. II. Edit. Pamel. or Lib. Ad Donatum, de gratia Dei, p. 5 and 7. Edit. Fell. Brem.*

¹⁶ *Quantum, autem, &c. Instit. Divin. Lib. V. Cap. IX. Num. 4. Edit. Cellar.*

¹⁷ *Jusque datum sceleri canimus—*

Pharsal. Lib. I. Ver. 2.

VII. (1) See BEMBO, *Hist. Lib. I.* CICERO justifies Ligarius for this Reason, that being in Africa before the Civil War, it was not in his Power to leave it when it broke out suddenly: [*Tertium est tempus, quo post adventum Vari in Africa restitit Ligarius] quod si est criminosum, necessitatis crimen est, non voluntatis. An ille, si potuisset illinc ullo modo evadere, Uticæ potius, quam Romæ;*

² Use of they are accounted Enemies. For thus the *Corcyreans*, before they laid Siege to *Epidamnus*, gave Notice to all ³ Strangers to depart, or else they should be reputed Enemies.

VIII. 1. But such as are really Subjects of the Enemy, that is, ¹ from a permanent Cause, if we respect only their Persons, may in all Places be assaulted; because when War is proclaimed against a Nation, it is at the same Time proclaimed against all of that Nation, as we have shewn^a above, in the Form of Denunciation. So in the Decree against King *Philip*, *They did will and command, that War should be denounced against him, and the Macedonians under his Dominion.* And he that is an Enemy may by the Law of Nations, be assaulted every where; according to *Euripides* ²,

Νόμος γὰρ ἐχθρὸν δεῖν ὅπερ λάβης κακῶς.

Assault your Enemy where'er you find him.

And in *Marcian* the Lawyer, ³ *Deserters, where-ever they are found, may be killed as Enemies.*

2. They may then lawfully be killed in their own Country, in the Enemies Country, in a Country that belongs to no Body, or on the Sea. But that we may not kill or hurt them in a neutral Country, proceeds not from any Privilege attached to their Persons, ⁴ but from the Right of that Prince in whose Dominions they are. For all civil Societies may ordain, that no Violence be offered to any in their Territories, but by proceeding in a judicial Way, as we have proved^b out of *Euripides*,

*If you can charge these Guests with an Offence,
Do it by Law; forbear all Violence.*

But ⁵ in Courts of Justice, the Merit of the Person is considered, and this promiscuous Licence of hurting each other ceases, which I have said was granted among Enemies in Time of War. ⁶ *Livy* relates that seven *Carthaginian* Gallies^c rode in

cum P. Attio, quam cum concordissimis fratribus; cum alienis esse, quam cum suis, malisset? Orat. pro Ligar. Cap. II.] The Roman Consuls, when they went to besiege *Capua*, had Orders to declare first to the *Campanians* within it, that if they thought fit, they might quit the Place with all their Effects: *Consulibus literæ a P. Cornelio prætoris missæ, Ut prius quam clauderent Capuam operibus, &c.* LIVY, Lib. XXV. (Cap. XXII. Num. 12.) GROTIUS.

2 The late Mr. COCCEIUS, in a Dissertation which I have already cited, *De jure Belli in amicos*, § 23. rejects this Distinction, and is of Opinion, that even Strangers, to whom some small Time to retire has not been given, should be deemed of the Enemy's Party, and thereby liable to just Acts of Hostility. He himself afterwards distinguishes, to supply this pretended Defect, between Strangers, who continue in a country, and those, who only pass thro' it, or if they make any stay, are obliged to do so either by Sickness, or the Necessity of their Affairs. But even this shews, that Mr. COCCEIUS here, as well as in many other Places, has censured our Author without understanding him. In the following Paragraph, GROTIUS evidently distinguishes, from the Strangers he speaks of just before, those, who are the Enemy's Subjects from a permanent Cause; by which without doubt he means, as the learned GRONOVIUS explains it, those who are settled in the Country. Our Author explains himself upon this Head, in Chap. II. of this Book, § 7. Num. 2. where he speaks of Reprisals, which he even grants against this kind of Strangers; whereas he does not admit them against those who only pass thro', or stay some short Time in the Country. So that here is the precise Distinction, which the Critick gives for new.

3 They extended this Permission to the People of the City, as well as Strangers. THUCYD. Lib. I. Cap. XXVI. See another Example in the same Historian, Lib. IV. Cap. XV. where a Term of five Days is granted them to depart.

VIII. (1) See above, Chap. II. of this Book, § 7. Num. 2. and Note 2. upon the preceding Paragraph of this Chap. IV.

2 This is a Fragment of a Tragedy of that Poet's, which is not named by the Writer, who has preserved it: It is in p. 429. of our Author's *Excerpta*, and the 363d Verse of Mr. BARNES's Collection; neither of them mention the Author from whom they take it.

3 *Transfugas licet, ubicumque inventi, &c.* Digest, Lib. XLVIII. Tit. VIII. Ad Leg. Cornel. de Siciariis, &c. Leg. III. § 6.

4 See what we shall say below, Chap. VI. § 26. and ALBERICUS GENTILIS, *Hispanic. Advocacion.* Lib. I. Cap. VI. as also PAULUS MATTHIAS WECHNER, *Consil. Franconic.* XCII. GROTIUS.

5 Add, that the Sovereign of the Country, by continuing Neuter has tacitly engaged not to permit Acts of Hostility to be committed on either Side in his Dominions.

6 *Ipse* [Scipio] *cum C. Lælio, &c.* Lib. XXVIII. (Cap. XVII. Num. 12. & seqq.) There are other Examples in History of the like Nature. The *Venetians* hindered the *Greeks* from attacking the *Turks* in one of their Ports. CHALCOCONDYL. Lib. IX. See what was done at *Tunis* in regard to the *Venetians* and *Turks* in BEMBO, Lib. IV. and in *Sicily*, relating to the *Pisans* and *Genoese*. In BIZARRO, *De bell. Pisan.* See also PAULINUS, *Goth.* in regard to *Rostock* and *Gripfswald.* GROTIUS.

VIII. The Subjects of Enemies are every where to be attacked, unless in the Territories of a neutral State. ^a Ch. 3. of this Book, § 9.

^b B. 2. ch. 21. § 6. n. 1.

^c Triremes; with three Oars on each Side.

^a Having five Oars on each Side and not three, as our Author says here.

IX. This Right of hurting extends to Women and Children.

^c B. 2. c6.
21. § 14.

a Port belonging to *Syphax*, who at that Time was in Peace both with the *Carthaginians* and *Romans*, and that *Scipio* came that way with two ^d Gallies; these might have been seized by the *Carthaginians* before they had entered the Port, but being forced by a strong Wind into the Harbour, before the *Carthaginians* could weigh Anchor, they durst not assault them in the King's Haven.

IX. 1. But to return to the Point in Hand, how far this Licence extends itself, will hence appear, in that the Slaughter of Infants and Women is allowed, and included by the Right of War. I will not to this refer the slaying of the Women and Children of *Heshbon* by the *Hebrews*, Deut. ii. 34. nor that they were commanded to do the like to the *Canaanites*, Deut. xx. 16. and other Nations ¹ who were in the same Case ² with them. It was the special Act of GOD, whose Right over Men is far greater, than that of Men over Beasts, as we have ^e proved elsewhere. That which is more proper to testify the common Custom of Nations, is that of the Psalmist, *Psal. cxxxvii. 9. Blessed shall he be, that taketh and dasheth thy little ones against the Stones.* Like to that of *Homer* ³,

Καὶ νήπια τέκνα
βαλλόμενα προτὶ ἄστυ ἐν αἰνῇ δηϊότητι.

When bloody Wars a wretched Land infest,
The harmless Infants suffer with the rest.

^f Lib. 7. c.
29.

^g De Exped. Alexand. l. 1. c. 8. in fin.

^h Bell. Hispan. p. 457. Edit. Amst. (272. H. Steph.)

2. The *Thracians* of old having taken the City *Mycaleffus*, put Women and Children to the Sword, as *Thucydides* ^f informs us. *Arian* ^g relates the same of the *Macedonians*, when they took *Thebes*; and so did the *Romans* at *Ilurgis* a City of *Spain*; *ἐκείνων ἐμαλῶς ἡ παιδιὰ ἡ γυναικας*, They slew Women and Children without Distinction, which are the Words of ^h *Appian*. *Germanicus Cæsar* is reported by ⁴ *Tacitus*, to have wasted the Villages of the *Marfi*, (a People of *Germany*) with Fire and Sword; adding, *Neither Sex nor Age found any Pity.* And the Emperor *Titus* ⁵ exposed the Women and Children of the *Jews* to be devoured by wild Beasts in the publick Shews; and yet these two Princes were never esteemed to be of a cruel Nature: Whence it appears how much that Inhumanity was turned into

IX. (1) *Quædam connexa cum Cananæis erat causa*, says our Author: That is to say, whom the Divine Vengeance had condemned to be utterly extirpated, as well as the seven Nations of the *Canaanites*. Such were the *Midianites*, NUMBERS xxi. 2. the *Amalekites*, EXODUS xvii. 14.

2 JOSEPHUS speaking of the *Amalekites* says, that King *Saul* caused them all to be put to the Sword, without sparing either Women or Children. [See 1 *Samuel* xv. 3.] nor believing, adds he, that he acted too cruelly in that respect; first because they were Enemies whom he treated in that manner, and next because what he did was by the Order of GOD, which he could not disobey without Danger. *Antiq. Jud. Lib. VI. Cap. VIII. GROTIUS.*

3 *Iliad. Lib. XXII. Ver. 61.* The Emperor *Severus*, ordering his Soldiers to put all to the Sword in *Britain*, used some other Verses of *HOMER*, in which *Agamemnon* says, that none of the *Trojans* should be saved, not even the Children in their Mother's Wombs:

—Τῶν [τρώων] μήτις, &c.

[*Iliad. Lib. VI. Ver. 57. & seqq.* See XIPHILINUS, *Vit. Sever.* p. 342. Edit. H. Stephens.] GROTIUS.

4 *Non Sexus, non ætas, miserationem adtulit.* *Annal. Lib. I. Cap. LI. Num. 2.* *Scipio* did the same at the taking of *Numantia*. The Emperor *Julian's* Soldiers killed the Women of the City of *Dacira*, whom the Men had left in it; as *ZOSIMUS* tells us, *Lib. III. (Cap. XV. Edit. Cellar.)* The same Emperor, when he took the City of

Majozamalcha in the Country of *Babylon*, spared neither Sex nor Age: *Et sine sexus discrimine vel ætatis, &c.* AMMIAN. MARCELLIN. *Lib. XXIV. (Cap. IV. p. 436. Edit. Vales. Gron.) GROTIUS.*

Our Author gives us no Authority for what he says of *Scipio*: And indeed in all Appearance he had none to give, but that of an unfaithful Memory. We find nothing like it in the Historians, who have writ of the War and taking of *Numantia*. *Scipio*, far from having put the Women and Children to the Sword, as APPIANUS ALEXANDRINUS expressly says, kept only fifty of the *Numantines*, after the City surrendered, for his Triumph; all the rest were sold. *De Bell. Hispan. p. 532. Edit. Amstel. (311. H. Steph.)*

5 I find nothing in JOSEPHUS, from whence it can be so much as inferred that *Titus* made the *Jewish* Women and Children encounter wild Beasts. On the contrary, that Historian says, after the taking of *Jerusalem*, *Titus* caused all those to be sold, that were under seventeen Years of Age. *De Bell. Jud. Lib. VII. Cap. XVI. in Lat. (XLV. in Græc.) p. 968. C.* Our Author has copied this from ALBERICUS GENTILIS, *De Jure Belli, Lib. II. Cap. XXI. p. 425.* But the latter alledges no Authority except *CARDAN's*, a very inaccurate Author, who declaims on that Head against *Titus* in his *Encomium Neronis*. The Words of the latter are *Pergamus ergo ad illas humani generis delicias, Titum, Neronique comparemus, qui uno spectaculo aliquot millia Judæorum, in quibus pueri & mulieres, feris dilaniandos exposuit. Auctor illius amicus JOSEPHUS: Ne quicquam ex fide decedere credas, Vol. I. p. 205. Opp. Edit. Ludg. 1663.*

Custom. No wonder then if old Men were also killed, as *Priam* by *Pyrrhus*. *Æneid*. ii. 550. & seq.

X. 1. Neither were Prisoners exempted from this Licence; *Pyrrhus* in *Seneca*, X. *Yea, and to Captives, and that at any Time.* according to the Custom at that Time, pleads thus :

² *Lex nulla capto parcat, aut pœnam impedit.*

*No Law commands to spare the captive Slave,
Or does forbid to punish him.*

In the *Ciris* of *Virgil*, this Licence is called *the Law of War*, and that even with respect to captive Women; for thus argues *Scylla* :

³ *At belli saltem captivam lege necâsses.
By Law of Arms your Captive you might kill.*

The Passage of *Seneca* just mentioned speaks of a Woman, namely *Polyxena*, who was to be killed. *Horace* advises,

⁴ *Vendere cum possis captivum, occidere noli.*

Forbear to kill the Captive, thou canst sell. Creech.

For he supposes it lawful to kill him. And *Donatus* derives the Word *Servus* (a Slave) from a Verb that signifies to preserve, ⁵ *Because*, says he, *a Slave is a Person whose Life is preserved, which by the Right of War ought to have been taken away.* Ought, is an improper Expression, for it was lawful: So the Prisoners taken at *Epidamnus* were killed by the *Corcyreans*, as *Thucydides* ^a relates, and 5000 Prisoners by ^b *Hannibal* ⁶. And in *Hirtius*, a *Cæsarean* Captain in the *African War* thus addresses *Scipio*, ⁷ *I return you Thanks, that you have been pleased to engage your Word for my Life and Safety, being Prisoner by the Right of War.*

^a L. i. c. 30.
^b Appian.
Hannibal.
bell. p. 556.

2. Nor is this Licence of killing our Captives confined to any Time, by the Right of Nations, but it is restrained more or less in some Places, by the particular Laws of each State.

XI. We meet also with many Examples of Suppliants that have been slain, as by *Achilles* in ¹ *Homer*, of *Mago*, and *Turnus* in ² *Virgil*; which are not only recorded, but also justified by the Right of War. St. *Augustine* commending the *Goths*, for sparing Suppliants, and those that had fled for Refuge to Churches, acknowledges, ³ *That which by the Right of War they might do, they thought unlawful for them to do.* Neither are they always received to Mercy, that beg it; witness

XI. *Yea, even to such as are willing to yield, if not accepted of.*

X. (1) *JOSEPHUS* speaking of the King of *Syria's* People, who came to take *Elisba*, and having been struck with a miraculous Blindness saw themselves in the midst of *Samaria*; says, that King *Joram*, having asked the Prophet, whether he should put them to Death, that holy Man replied in the Negative, because it was lawful to kill none but Prisoners of War. (*Antiq. Jud.* Lib. IX. Cap. II. p. 303. D.) *VIRGIL* introduces such a Prisoner begging his Life of *Aeneas* :

*Per patrios manes, per spes surgentis Iuli,
Te precor, hanc animam servas natoque patrique*

By young *Iulus*, by thy Father's Shade,

*O spare my Life, and send me back to see,
My longing Sire, and tender Progeny!* DRYD.

(*Æneid*. Lib. X. Ver. 524, 525.) The Emperor *Otho* caused 70,000 *Sclavonians* to be put to Death, whom he had taken Prisoners, as *WITKIND* informs us, *Annal.* Lib. II. *GROTIUS*.

² *Troad.* Ver. 333.

³ Ver. 446.

⁴ Lib. I. Epist. 69.

⁵ SERVI [dicuntur] qui servati sunt, quum eos occidi oporteret jure belli. In *TERENT.* *Adelphi*, Act. II. Scen. I. Ver. 28.

⁶ Et a *M. Bruto* non pauci. And *M. Brutus* also put many to Death. These Words, which were in the first, have disappeared, I know not how, in all the subsequent Editions; tho' the Citation from *DION CASSIUS*, Lib. XLVII. where the Fact is, p. 405. D. is continued in the Margin. They could not have been struck out designedly by our Author, who had no Reason to retrench a Fact well applied.

⁷ Pro tuo, inquit, summo beneficio, *Scipio*, &c. *De bell. Afric.* Cap. XLV.

XI. (1) See the *IL IAD.* Lib. XX. Ver. 463. & seqq. Lib. XXI. Ver. 73. & seqq.

² The Passage, that regards *Mago*, has been given in Note I. on the foregoing Paragraph. That in Relation to *Turnus* is in *Æneid.* XII. 930. & seqq.

³ Quod alibi jure belli licuisset, &c. *De Civit. Dei*, Lib. I. Cap. I.

the Greeks ⁴ who served the Persians at the Battle of the Granicus. And the *Uspenses* in *Tacitus* ⁵ begging Quarter, which (he says) the Conquerors denied, but let them die by the Law of Arms. Observe here also the Right of War confessed by that Author.

XII. *Yea, and to such as yield without Conditions.*

^a See Thuan. l. 70. in fin. in the Affairs of Ireland, at the Year 1580.

^b *Dion Cassius*. l. 43. p. 245. Edit. H. Stephens.

^c *Idem*, l. 40. p. 156.

XII. Neither do they always find Mercy, that ^a surrender without any Condition, but are often slain, as the Princes of *Pometia* ¹ by the Romans, the *Samnites* ² by *Sylla*, the ^b *Numidians*, and ^c *Vercingetorix* by *Cæsar*. Nay, it was almost the constant ³ Custom of the Romans on the Days of their Triumph to put to Death the Commanders of the Enemies, as *Cicero* tells us in his fifth Oration against *Verres*. *Livy* in his 28th Book, and elsewhere. *Tacitus* in his 12th *Annal*, and many others. And the same *Tacitus* informs us, that *Galba* ⁴ caused the tenth Man to be killed of those, whom upon Submission he had received to Mercy; and *Cæcina* upon the Surrender of *Aventicum*, caused *Julius Alpinus* to be slain, as the chief Promoter of the War; he left the rest to either the Mercy, or Cruelty of *Vitellius*.

XIII. *This Right not to be referred to any other Cause, as Retaliation, Obstinacy of Defence, &c.*

^a *Chalcocondylas*, l. 8.

^b *B. 2. c. 21.*

XIII. I. ^a Historians sometimes set down the Reason of this Cruelty, of the Enemies, especially to Captives, and Suppliants, as either by way of Retaliation, or because of an obstinate Defence. But these are rather Motives, than justifying Causes, as I have distinguished in another Place. For just Retaliation (properly so called) is to be executed only upon the Person of the Offender (as has been already said, ^b when we treated of the Communication of Punishment.) But on the contrary, in War this Right of Retaliation is often exercised upon the Innocent. This Custom is thus described by ¹ *Diodorus Siculus*, *The Chance of War being equal on both Sides, neither Party can be ignorant, that if they be vanquished, they must suffer the same themselves, which they intend to their Enemies*. And in the same Author, *Philomelus the Phocian General, Diverted the Enemies from an insolent and cruel Revenge, by treating in the same manner such of them as fell into his Hands*.

2. But there is no Man will judge an obstinate Adherence to our Party punishable, as the ² *Neapolitans* alledged to *Belisarius* in *Procopius*; especially if we were engaged therein either by a natural Obligation, or by an honest and deliberate Choice. It is so far from being a Crime, that on the contrary it is reckoned one if

⁴ Our Author cites Nobody here, and would, I believe, have found it very difficult to have alledged any Authority for this Fact, with which his Memory supplied him. *Alexander the Great's* Historians say nothing like it. That Conqueror sent the Greeks that were taken at the Battle of the Granicus into Macedonia to work as Galley-Slaves. See *ARRIAN*, *De expedit. Alexandr.* Lib. I. Cap. XVII. and at the End of this Book.

⁵ *Postero [die] misere legatos [Uspenses] — quod adspersati sunt victores, quia trucidare deditos sævum, tantam multitudinem custodia cingere arduum: Ut belli potius jure caderent.* *Annal. Lib. XII. Cap. XVII. Num. 1, 2.*

XII. (1) Or rather the principal Persons of the *Aurunci*, to whose Party this Latin Colony had gone over. *Livy*, who relates this Action, condemns it at the same Time: *Ceterum nihilo minus sædè, dedita urbe, quam si capta foret, Aurunci passim principes securi percussi; sub corona vœnierant coloni alii, &c.* Lib. II. Cap. XVII. Num. 6.

2 I find nothing of this Kind in Relation to the *Samnites*, either in *PLUTARCH* or *APPIANUS ALEXANDRINUS*. Our Author has followed *ALBERICUS GENTILIS* in this Place, without examining his Authority, *De jure Belli*, Lib. II. Cap. XVII. p. 364. This appears from his citing, as he does, *DION*, Lib. XLV. instead of XLIII. a Citation that relates to the Example of the *Numidians*, and not as our Author thought, to that of the *Samnites*, for which the Civilian, whom he copies, quotes no Writer. The latter probably had in this Thoughts, what *Sylla* did to the People of *Antenna*, a City of the *Sabines*, but not without

notorious Perfidy, since he had promised them their Lives. *PLUTARCH*, in *Vit. Syll.* p. 471. D. Vol. I. Edit. Wechel. So that the Example is misapplied.

³ See *CICERO*, Lib. V. in *Verr.* (Cap. XXX.) *LIVY*, Lib. XXVI. (Cap. XIII. Num. 14.) and elsewhere: *TACITUS*, *Annal.* Lib. XII. (Cap. XIX. Num. 3.) There is an Example of the same Kind in the Chronicle of *REGINON*, upon the Year 905.

GROTIUS.

⁴ *Galba* upon making his Entrance into Rome, ordered those who had surrendered to him to be decimated: *Horror animum subit, quoties recordor feralem introitum, & hanc solam Galbæ victoriam, quum in oculis Urbis decimari deditos juberet, quos deprecantes in fidem acceperat.* *TACIT. Hist. Lib. I.* (Cap. XXXVII. Num. 3.) *Quumque, direptis omnibus, Aventicum, gentis caput, &c.* *Ibid.* (Cap. LXVIII. Num. 5, 6. *GROTIUS*.

XIII. (1) (*Lib. XIV. Cap. XLVII. p. 421.* Edit. H. Steph.) The other Passage is in *Lib. XVI. Cap. XXXI. p. 526*. See also what the same Historian says in the *Excerpta* of Mr. *PEIRESKIUS*, in regard to *Spondius*, and *Amilcar Barca*, (p. 277.) *GROTIUS*.

2 It was not the *Neapolitans*, who made this Answer to *Belisarius*, but two Advocates, *Pastor* and *Asclepiodotus*, speak thus to the *Goths* and *Neapolitans*, Lib. I. *Gothic.* Cap. VIII. Our Author has again in this Place relied upon *ALBERICUS GENTILIS*, who expresses himself precisely in these Terms, *Lib. II. De jure Belli, Cap. XVI. p. 345, 346.*

a Man quits his Post, especially by the Laws of the antient Roman Discipline ; for in this Case they rarely allowed any Excuse, were the Fear or Danger never so great. ³ *Livy* says, *to desert a Post was capital among the Romans*. Every one therefore may use this Rigour to his own Advantage, and this Rigour is justified before Men, by that Right of Nations, which we now treat of.

XIV. This Right also reaches to Hostages, nor to them only, who freely give themselves as Pledges by a Sort of Agreement, but also those who are delivered up by others. 250 Hostages were slain by the ^a *Theſſalians*, and 300 of the *Volſci Aurunci* by the ^b *Romans*. And we must observe, that sometimes Children were given as Hostages, as we may learn from the ^c *Parthians*, and from ^e *Simon Maccabæus*, and sometimes Women, as by the *Romans* ^d in the Time of *Porſena*, and by the ² *Germans* in *Tacitus*.

XV. 1. As the Law of Nations permits many Things, in the Sense we have explained, which are forbid by the Law of Nature, so it prohibits some Things allowed by this Law of Nature. For if we respect the Law of Nature, when it is permitted to kill a Man, it signifies not much, whether we do it by the Sword or Poison. I say the Law of Nature, for indeed, it is more generous to attempt another Man's Life in such a manner, as to give him an Opportunity of defending himself, but we are under no Obligation to use such Generosity towards those who deserve to die. But the Law of Nations, if not of all, yet of the more civilized, allows not the taking the Life of an Enemy, by Poison ; which Custom ¹ was established for a general Benefit, lest Dangers should be increased too much, since Wars were become so frequent. And it is probable, that it was first introduced by Kings. For if their Life be more secure, than that of others, when attacked only by Arms ; it is, on the other Hand, more in danger of Poison, unless protected by a regard to some Sort of Law, ² and the fear of Disgrace and Infamy.

³ *Præſidis decedere, apud Romanos, capital eſſe. LIVY, Lib. XXIV. (Cap. XXXVII. Num. 9.)* See also *POLYBIUS, Lib. I. (Cap. XVII.)* and *Lib. VI. (Cap. XXXV.)* GROTIUS.

XIV. (1) *TACITUS*, whom our Author cites here in the Margin, speaks only of the Children of Kings in general, without saying whether young or not : *Ideo Regum obſides liberos dari* [a Parthis] &c. *Annal. Lib. XII. Cap. X. Num. 5.* He ſays elſewhere, *partem proliſ, Lib. II. Cap. I. Num. 2.* In the Paſſage of the *MACCABEES*, there is only *uirgines*. However as the Term is general ; nothing hinders its including young Children, whom their tender Age and Innocence might render more dear to their Parents, and thereby more proper to ſerve as Sureties to thoſe, who demanded or received them for Hoſtages. This may be inferred almoſt with certainty from a Paſſage in *STRABO*, quoted by *JUSTUS LIPSIUS*: For we find there, that *Phraates* King of *Parthia* gives *Titius*, Governour of *Syria* for the *Romans*, four of his legitimate Sons as Hoſtages, with two of their Wives, and four of their Sons. *Geograph. Lib. XVI. p. 1085, 1086. Edit. Amſtel. (748. Edit. Caſaub. Par.)* For in this Number there muſt have been ſome Children very young. But the following are expreſs Authorities. *SUETONIUS* informs us, that *Caligula* in one of his ridiculous Diverſions, placed himſelf upon a Chariot in the Habit of a Coachman, and ſet an Infant, named *Darius*, before him, who was an Hoſtage of the *Parthians*: *Poſtridie quadrigarum habitu, curriculoque bijugi famoſorum equorum, præ ſe ferens Darium PUERUM, ex Parthorum obſidibus, &c. Vit. Caligal. Cap. XIX.* The ſame Hiſtorian ſpeaks elſewhere of certain Hoſtages, probably given by ſome People of *Germany*, whom *Caligula* ordered to be taken from School: *Rufus obſides quosdam abduetos e literario ludò, &c. Cap. XLV.* But it is alſo known that the famous *Clelia*, having the Choice amongſt all the Hoſtages given with her by the *Romans*, obtained Liberty for thoſe, who were not arrived at the Years of Puberty: *Productis omnibus*

eligiffe IMPUBERES dicitur, &c. LIVY, Lib. II. Cap. XIII. Num. 10.

2 Our Author cites here the fourth Book of *TACITUS's Hiſtory* in the Margin, where I find nothing to this Effect. The Paſſage is in the Deſcription of *Germany*, where the Hiſtorian ſays, that thoſe People believed themſelves more ſtrongly obliged, when they gave Maids of illuſtrious Birth as Hoſtages: *Adeo ut efficaciùs obligentur animi Civitatum, quibus inter obſides puellæ quoque nobiles imperantur, Cap. VIII. Num. 2.* He adds, that the *Germans* imagined moſt Women to have a Spirit of Prophecy : And as he ſpeaks alſo of this in the fourth Book of his Hiſtory, *Cap. LXI. Num. 4.* that probably made our Author conſound the two Paſſages in his Memoiry.

XV. (1) Without this general Conſent, which it is more eaſy to ſuppoſe, than prove ; it ſuffices to ſay, that, it being the Cuſtom among Nations at Variance with us, not to make Uſe of Poiſon againſt an Enemy, we are ſuppoſed to comply with it, when on beginning a War, we do not declare, that we are at Liberty to act otherwiſe, and leave it to the Enemy's Option to do the ſame. This tacit and particular Convention is ſo much the more real, as Humanity, and the Intereſt of both Parties, equally require it ; ſince Wars are ſo frequent, and often undertaken upon ſo ſlight Occaſions, eſpecially ſince the Mind of Man, ingenious in inventing Means to do hurt, has ſo much multiplied thoſe, which are authorized by Cuſtom, and conſidered as honeſt. See upon this Head Mr. *GRIBNER*, Profeſſor at *Wittemburg*, in his *Principia Jurisprudentiæ Naturalis, Lib. III. Cap. IX. § 3.*

2 The Senators, or rather the Conſuls, *C. Fabricius*, and *Q. Æmilius*, in the Letter they wrote to inform *Pyrrhus*, that one of his People had offered to poiſon him, ſay, that it was not for his ſake they gave him that Information, but that they might not incur the Infamy of having cauſed him to be deſtroyed in that Manner. [*PLUTARCH, in Vit. Pyrrh. p. 396. C. Vol. I. Edit. Wechel.*] GROTIUS.

XIV. It extends alſo to Hoſtages.

^a *Plut. De Virt. Mulier.*
^b *Dion. Halicarn. 1. 6 c. 30.*

^c *1 Mac. xiii. 16.*

^d In the famous Story of *Clelia, Liv. 1.*

^{2. c. 13.}
XV. By the Law of Nations it is forbidden to kill any by Poiſon.

2. *Livy* speaking of *Perseus*, ³ calls it a clandestine Villany. *Claudian* of the Offer of *Pyrrhus's* Physician to poison him rejected by *Fabricius*, ⁴ calls it an abominable Action; and *Cicero* ⁵ hinting at the same Story terms it a Crime. It concerns the common Interest of Nations, that no such Examples be given, ⁶ say the Roman Consuls, in their Letter to *Pyrrhus*, which *Gellius* recites out of *Cl. Quadrigarius*; and *Val. Maximus* ⁷ observes, Wars should be waged by Arms, not by Poison. And *Tacitus* ⁸ relates, that when the Prince of the *Catti* offered to poison *Arminius*, *Tiberius* refused it, imitating by that glorious Action the Conduct of antient Generals. Wherefore ⁹ they that hold it lawful to poison an Enemy (as *Baldus* ⁹ did upon the Authority of *Vegetius*) do regard the mere Law of Nature, but over-look that Law which is established by the Consent of Nations.

^a See Bemb. Hist. l. 2. in fin.

XVI. Or to empoison Waters or Weapons.

XVI. Somewhat different from this manner of poisoning (as having something of open Force in it) is to poison the Heads of Darts, and thereby force Death a double way, which *Ovid* says ¹ was much practised by the *Getes*, ² *Lucan* by the *Parthians*, and *Silius* by some of the ³ *Africans*, and *Claudian* particularly by the ⁴ *Ethiopians*. But this also is ⁵ contrary to the Law of Nations, tho' not of all, yet of the *European*, and others civilized like them, which is rightly observed by *Johannes Salisberienfis*, ⁶ whose Words are these: *Neither do I find the Use of Poison allowed by any Law, tho' sometimes practised among Infidels.* Therefore *Silius* calls it, ⁷ to render Arms infamous by Poison,

2. So also the empoisoning of Springs (which cannot be concealed, or at least not long) *Florus* declares to be contrary not only to the Custom of the antient Romans, but also to ⁸ the Laws of the Gods; for the Antients frequently ascribed to the Divinity the Rules of the Law of Nations, as I have elsewhere observed; neither should it seem strange, that there are such tacit Agreements among Nations, in order to lessen the Dangers that attend Wars, when of old it was agreed between the

³ *Hæc ad ea, quæ ab Eumene delata erant, accessere, quo maturius hostis Perseus judicaretur. Quippe, quem non justum modo adparare bellum regio animo, sed per omnia CLANDESTINA grassari SCELERA latrociniorum ac VENEFCIORUM cernebant.* Lib. XLII. Cap. XVIII. Num. 1.

⁴ ——— *Bellumque negavit [Fabricius] Per famuli patrare NEFAS. ———*
De Bell. Gildonic. Ver. 273, 274.

⁵ *Sed magnum dedecus & flagitium, quicum laudis certamen fuisset, eum non virtute, sed SCELERE superatum.* De Offic. Lib. III. Cap. XXII.

⁶ *Sed communis exempli & fidei ergo visum est, uti te salvum velimus; ut esset, quem armis vincere possemus.* Ex CLAUD. QUADRIGAR. No. Attic. Lib. III. Cap. VIII.

⁷ *Et [memor Senatus] armis bella, non venenis, geri debere.* Lib. VI. Cap. V. Num. 1.

⁸ The Passage has been recited above, Chap. I. § 20. Note 21.

⁹ That Lawyer would, I believe, have found it very difficult to point out the Passage of *VEGETIUS*, where he pretends to have read this: As *ALBERICUS GENTILIS* has already observed, *De Jure Belli*, Lib. II. Cap. VI. p. 256.

XVI. (1) They made use of the Gall of Vipers. *OVID*, who tells us this, calls it giving Death two Ways with one Wound:

*Qui mortis sævo gement ut vulnere caussas,
Omnia vipereo spicula felle linunt.*

De Ponto, Lib. I. Eleg. II. Ver. 17, 18. *PLINY* says of the *Scythians*, that they rubbed their Darts with human Blood, and the Gore of Vipers: *SCYTHÆ sagittas tingunt viperina sanie, & humano sanguine, irremediabile id scelus, mortem illico adfert levi tactu.* *PLINY*, Hist. Natur. Lib. XI. Cap. LIII. See *HELMOLDUS's* Supplement, where he

says something like this of the *Servians*, Chap. IV. *GROTIUS*.

² *Spicula nec solo spargunt [Parthi] fidentia ferro
Stridula sed multo saturantur tela veneno.*
Pharsal. Lib. VIII. Ver. 303, 304.

³ The Nubians:

*Tempora multiplici mos est [Nubis] defendere lino;
Et lino munire latus, scelerataque succis
Spicula dirigere & ferrum infamare veneno.*

SILIUS ITALIC. Lib. III. Ver. 271. & seqq. NICHOLAS HEINSIUS reads *inflammare veneno*.

⁴ *Sed didicit non Ethiopum geminata venenis
Vulnera ———*

In *I. Conf. Stilicon. Lib. I. Ver. 350.*

⁵ Therefore *Ilus Mermerides* denies Poison to *Ulysses* for his Darts.

⁶ *Ἐπεὶ καὶ θεῶς νεμεσίζετο διὲν ἐόντας.*

He justly dreaded the immortal Gods.

Odyss. Lib. I. (Ver. 263.) GROTIUS.

⁶ *Nec Veneni, licet videam ab Infidelibus, &c.* *Polycratic. Lib. VIII. Cap. XX. p. 653.*

⁷ In the Verses quoted above, Note 3. upon this Paragraph.

⁸ Where he speaks of a Roman General, who had poisoned the Springs, to oblige some Cities to surrender: *AQUILIUS Asiatici belli reliquias consecit, mixtis (nefas!) veneno fontibus ad deditionem quarundam urbium. Quæ res, ut maturam, ita infamem fecit victoriam: Quippe quum CONTRA FAS DEUM, MORESQUE MAJORUM, medicaminibus impuris, in id tempus sacrosancta Romanorum arma violasset.* Lib. II. Cap. XX. Num. 9. See ult.

Chalcidians ⁹ and *Eretrians* during the War, Μη χρησθαι τηλεβολαις, *Not to make use of Darts.*

XVII. But it is not the same, when Waters are ¹ (without Poison) so corrupted, ² that they cannot be drunk, which *Solon*, and the ³ *Amphictyones* approved against the Barbarians. *Oppianus*, of Fishing, declares it was commonly done in his Time; it being, in Effect, the same Thing as if the Current of a River ^a were turned, or ^b *The Veins of a Spring cut off*, which, by the Law of Nature, and the general Consent of Nations, are allowed.

XVII. But not any other ways to corrupt the Waters.

^a Frontin. l. 3.

^b Priscus, in Excerpt. legat.

XVIII. 1. But it is frequently disputed, whether the Law of Nations permits the sending one privately to kill an Enemy. But to explain this, we must distinguish between the Persons sent; whether they violate their Faith, given expressly or tacitly; as Subjects to their Prince, Vassals to their Lord, Soldiers to their General, Suppliants, Strangers, or Deserters to them that have entertained them; or whether the Person sent owe no Faith to him against whom he is employed. Thus *Pepin* Father of ¹ *Charlemagne*, attended with only one of his Guard, passed the *Rhine*, and killed his Enemy in his own Chamber. Which ² *Polybius* relates was attempted by *Theodotus*, an *Ætolian*, against *Ptolemy*, King of *Ægypt*, in the same Manner, calling it, *Θουκ ἀνενδρον τολμην*, *An Act of Bravery*. Such was that famed Enterprize ^a of *Q. Mutius Scævola*, which he himself thus defends, *I being an Enemy would have killed an Enemy*. ³ *Porfena* himself acknowledged this to be an Act of great Valour. ⁴ *Valerius Maximus* calls it, *A commendable and gallant Resolution*; and *Cicero* ⁵ praises it in his Oration for *P. Sextius*.

XVIII. Whether it be against the Law of Nations to employ Assassins, explained.

^a Warnesfrid, l. 6.

2. For to kill an Enemy any where is allowed, both by the Law of Nature and of Nations (as I have said already) neither is it of any Concern, how many or how few they be who kill or are killed. 600 *Lacedemonians* with *Leonidas* ^b marched through the Enemy's Camp to the King's (*Xerxes*) Pavilion; * *The same might have been done by fewer*. There were but a few that circumvented *Marcellus* ^c the Consul, and slew him; and but a few had almost killed *Petilius Cerealis* ^d in his Bed. ⁶ *St. Ambrose* commends *Elkazar*, that assaulted a mighty Elephant, higher

^b Justin, l. 2.

^c Livy, l. 27.

^d Tac. Hist. l. 5.

⁹ This the Geographer proves from a Column, upon which in his Time remained the Articles of the Conventions, those People had made with each other in Relation to Acts of Hostility. *Lib. X. p. 688. B. (448. Edit. Paris.)*

XVII. (1) By dead Bodies or Lime; as *Belisarius* did during the Siege of *Auximum* according to *PROCOPIUS*, *Gothic. Lib. II. (Cap. XXVII.) GROTIVS.*

2 The *Turks* did the same at *Diadibra*, as *NICETAS* tells us in the History of *Alexis*, Brother of *Isaac*, *Lib. I. (Cap. IX.)* See other Examples in *OTHO FRISINGENS.* and the Poet *GUNTHER*, in *Ligurin.* *GROTIVS.*

3 During the Siege of *Cirrha* or *Crissa*, a City of *Phocis*, *Solon* advised the *Amphictyones* to turn off the River *Plisus*, which ran through the City; after which he caused the Roots of *Helibore* to be thrown into it, and then ordered the Waters to be brought into their ancient Channel. The People of *Cirrha*, having drank of them, were seized immediately with a *Diarrhoea*, which obliged them to leave their Walls undefended, so that the Place was taken. This *PAUSANIAS* relates, whom our Author quotes in the Margin, *Lib. X. or Phocic. Cap. XXXVII. p. 356. Edit. Græc. Wechel.* See also *POLYEN. Strategem. Lib. VI. Cap. XIII.* Our Author quotes also in the Margin, besides *FRONTINUS*, *Strateg. Lib. III. Cap. VII. Num. 6.* the Oration *ÆSCHYNES*, *Orat. de male obita Legat.* The Passage he had in his Thoughts, was probably the Article of the Oath of the *Greeks*, by which they engaged not to destroy any City, that sent Members to the Council of the *Amphictyones*, and not to deprive them of the Use of any running Water, either in Time of Peace or War; which implies, that

otherwise it might be done against an Enemy. *p. 262. A. Edit. Basil. 1572.*

XVIII. (1) This is related after *ALBERICUS GENTILIS*, *De Jure Belli*, *Lib. II. Cap. VIII. p. 274.* who cites *BONFINIUS*, *Rerum Hungar. I. 8.* in the Margin.

2 *Lib. V. Cap. LXXXI.*

3 He wished to have such brave Men on his Side, *Juberem macte virtute esse, si pro mea patria ista virtus staret.* *LIVY, Lib. II. Cap. XII. Num. 14.*

4 *Cæterum inter molitionem pii pariter ac fortis propositi oppressus, &c.* *Lib. III. Cap. III. Num. 1.* *PLUTARCH* praises this *Scævola*, as a Man distinguished by all Virtues, and especially by his Skill in military Affairs. (*Vit. Poplicol. p. 106. B. Vol. I. Edit. Wech.*) *GROTIVS.*

5 *Mortem — ego vir consularis, tantis rebus gestis, timerem? Præsertim cum ejus essem civitatis, ex qua Q. Mutius solus in castra Porfennæ venisset, eumque interficere, proposita sibi morte, conatus esset?* *Orat. pro P. Sextia, Cap. XXI.*

* The Emperor *Valens* promised a Reward to whoever brought him the Head of a *Scythian*, upon which they made Peace with him; as *ZOSIMUS* tells us, *Lib. IV. (Cap. XXII. Edit. Cellar.) GROTIVS.*

This is not very exactly related. See the Passage in *ZOSIMUS.*

6 *Offic. Lib. I. Cap. XL.* And *JOSEPHUS*, *Antiq. Hist. XV.* There is a like Action of *Theodosius* against *Eugonius*, in *ZOSIMUS*, *B. IV.* of the *Gauls* against the King of *Persia*, in *AGATHIAS*; of ten *Persians* against *Julian*, in *AMMIANUS*, *XXIV.* and *ZOSIMUS*, *III.* of *Alexius Comnenus* against *Toruses*, in *NICETAS CHONIATAS*, *B. IV.*

^e *Livy*, l. 2.

higher than all the Rest, supposing the King had sat upon it. Neither are they only that make these Attempts, but also they that employ them, excusable by the Law of Nations. ^e Those antient Roman Senators, such religious Observers of the Laws of War, were esteemed the Authors of that gallant Attempt of *Scævola*.

3. It is to no Purpose to object, that such Men, being taken, are commonly put to exquisite Torments; for that is not because they violate the Law of Nations, but because, by the same Law of Nations, any Thing done against an Enemy is lawful, and every one is more or less severe as he judges it proper for his Interest. For so are Spies used, yet it is held lawful, by the general Consent of Nations, to send such, as *Moses* did, and such was *Josbua* himself. (ἔθος τὰς κατασπόντας ἀπέκτειναι, *It is the Custom to kill Spies*, said ⁷ *Appian*) and that justly sometimes, by such as have manifestly a lawful Cause to make War, by others with Impunity, which the Law of Arms grants. But if there be any ^f *that will not make Use of such Service when offered*, that is rather to be attributed to Magnanimity, and the Confidence of one's own Strength, than to an Opinion of its being unjust.

^f See *Cromer. Rer. Polon.* l. 5. p. 113. Edit. Basil.

4. But the Case is otherwise of those Assassins who act treacherously, for they not only transgress the Law of Nations, but also those that employ them. For tho' in other Things, they that make Use of wicked Instruments against an Enemy, may be reputed guilty before GOD, yet not before Men, that is, they have not offended against the Law of Nations; because,

⁸ *Mores leges perduxerunt in potestatem suam.*

Custom has prevailed above Laws.

And, *To deceive* (*Pliny* ⁹ *says*) *according to the Custom of the Age, is Wisdom*; yet this Custom does not reach to the killing an Enemy, for he that should thus make Use of another Man's Treachery, is held not only to ¹⁰ offend against the Law of Nature,

De Manule; of the *Bulgarians* against the Emperor *Nicephorus*, in *ZONARAS*, (*Vol.* III. in *Nicephor.*) *GROTIUS*.

It is not *Alexius Comnenus*, but *Andronicus*, that *NICETAS CHONIATES* speaks of. The Fact is in Chapter IV. of the Book referred to.

⁷ *De Bell. Punic.* (p. 33. Edit. *Amstel.* 2. H. *Steph.*)

⁸ This is a Verse from *PLAUTUS's Trinumum*. Act. IV. Scen. III. ver. 30.

⁹ Upon a different Subject; for he speaks of those that by false Hopes deceive an avaritious Person, who wanted to get their Estates. *Alii contra hoc ipsum laudibus ferunt, quod sit frustratus improbas spes hominum; quos sic decipere, pro moribus temporum, prudentia est.* *Epist.* VIII. Num. 3.

¹⁰ *ZIEGLER* accuses our Author here of contradicting himself, and what he had advanced above; at the End of the first Chapter of this Book, § 21, 22. And it must be confessed from the Manner in which our Author expresses himself in this Place, that he seems to give Room to think, either that it is always unlawful by natural Right to make use of a Traitor, for obtaining some Advantage, or committing some Act of Hostility against an Enemy; which is contrary to the Distinction he makes in the Place referred to; or that the Law of Nations, of which he speaks, as forbidding the Assassination of an Enemy by the Hand of a Traitor, regards only those who have solicited him to Treason, and not those who have taken the Advantage of the Traitor's Disposition, who voluntarily offered himself, which would be unwarrantable; for those Nations who have held the former unlawful, have also condemned the latter. However I do not think our Author has either changed his Opinion, in Regard to his Distinction, upon which he reasons again elsewhere, or that he in-

tended to restrain the Rule of his arbitrary Law of Nations. But here an Inaccuracy of Expression has slipped from him, which he has overlooked, I know not how, even in his Revisals of this Work. Wherefore when he says in this Place, that *We sin against GOD, and violate the Law of Nature, when we make use of wicked Instruments against an Enemy, and employ the Arm of a Traitor to dispatch him*; this should be understood according to the Distinction I have mentioned, of those only who themselves seek for such Means, and solicit Persons to commit Treason, that, perhaps, would never have entertained such a Design, without the Allurement of the Rewards promised, or even given them beforehand. As to the Thing itself, this in my Opinion may be said, I. There are two Points to be distinguished: The one, whether the Enemy himself be wronged, against whom the Traitors are used: The other, whether, tho' he be not wronged, something bad however be committed. It seems to me, that admitting the War to be just, no Wrong is done the Enemy, whether we take Advantage of the Opportunity of a Traitor, who freely offers himself, or whether we seek for it, and bring it about ourselves. The State of War into which the Enemy has put himself, and which it was in his own Power to prevent, permits of itself all Methods to be used against him; so that he has no Room to complain, whatever is done. Besides, we are no more obliged to regard the Right he has over his Subjects, and the Fidelity they owe him as such, than their Lives and Fortunes, of which we may deprive them by the Right of War. II. I believe, however, that a Sovereign who has the least Tendernefs of Conscience, and is convinced of the Justice of his Cause, will not endeavour to find out treasonable Methods, in order to subdue his Enemy, nor eagerly embrace such as may

Nature, but also of Nations. This is plain from what *Alexander* ¹¹ wrote to *Darius*, *Ye wage impious Wars, and tho' you carry Arms, you set a Price upon your Enemies Heads.* And again, *You do not observe towards me* ¹² *the Law of Arms.* And in another Place, *I ought to persecute him to Death,* ¹³ *not as a just Enemy, but as a Poisoner, and an Assassin.* And to this we may refer that of *Livy*, ¹⁴ concerning *Perseus*, *He does not wage a just War like a Prince, but uses all base and clandestine Villainies, like Thieves and Poisoners.* And *Marcus Philippus*, of the same *Perseus*, ¹⁵ *All which, how hateful they were to the Gods, he would find by Experience.* And also *Valerius Maximus*, *The Murder of Viriatus*, ¹⁶ *had a double Perfidiousness, the one in his Friends, who killed him; the other in Q. Servilius Cæpio, the Consul, who was the Author of it, by promising Impunity, and who thus bought the Victory, instead of gaining it by open Force.*

5. Now the Reason why this is not allowed, as in other Cases, is what we gave before in the Case of Poison, to lessen the Dangers attending those who are at War,

may offer of themselves to him. The just Confidence which he may have in the Protection of Heaven; his Horror for the Traitor's Perfidy; the Fear of making himself an Accomplice of it, and of setting a bad Example, which may fall again upon himself and others, who have not deserved it; will make him either despise, or not accept without Regret, every Advantage he might propose to himself from such a Means. III. This Means cannot even be considered as a Thing of which the Use is always innocent, in Regard to the Person who employs it. The State of Hostility, which dispenses with the Commerce of good Offices, and authorises to hurt, does not therefore dissolve all Ties of Humanity, nor remove our Obligation to avoid as much as possible, the giving Room for some bad Action of the Enemy, or his People, especially those who of themselves have had no Part in the Occasion of the War. Now every Traitor undeniably commits an Action equally infamous and criminal. For it is absurd to think, as the late Mr. TITUS has ventured to do, (*Observat. in PUFENDORF, DCCCL.*) with a *perhaps*; that admitting the War to be just on the other Side, he who betrays his Prince, does not commit a real Act of Perfidy; because, for Instance, the Party in whose Favour he assassinates him, had a Right to kill him. This, I say, is unwarrantable; for a Subject indeed ought not to serve his Prince in a War manifestly unjust; but he is not therefore authorised to side with the Enemy; and the Injustice of a Prince towards Strangers, does not discharge his Subjects from the Fidelity they owe him. So that I believe, with our Author, we can never, in Conscience, seduce, or solicit, the Subjects of an Enemy to commit Treason; because that is actually and directly inciting them to commit an abominable Crime, to which, otherwise, they might never have proceeded of themselves. IV. The Case is different when we only take Advantage of the Occasion, and the Dispositions we see in a Person, who did not want soliciting to commit Treason. Here the Infamy of the Treachery does not rebound upon him who finds it entirely formed in the Heart of the Traitor. This Traitor, from the Moment he conceives within himself the Design of committing Treason, may be deemed to be as criminal as when he has actually committed it.

*Nam scelus intra se tacitum qui cogitat ullum,
Facti crimen habet ———*

This Maxim would not be well applied in other Respects, I confess; but that is because, excepting these Cases between Enemies, there is none, in my Opinion, where the Thing, in Regard to

which we make our Advantage of the bad Dispositions of others, can be of such a Nature, that we may lawfully and innocently do it ourselves. Upon the Whole, for the Reasons alledged, we ought not to take Advantage of a Treason which offers itself, unless it be to obtain some considerable Advantage, or to avoid some great Danger; in a Word, from a Kind of Necessity. V. What I have said, regards the Law of Nature; in Respect to the Law of Nations, of which our Author speaks, and which, at Bottom, is no more than the Custom of several Nations, tho' that Custom has nothing obligatory of itself, yet, if the People with whom we are at Variance, look upon the very Acceptance of the Offers of a certain Sort of Perfidy as unlawful, as to assassinate, for Instance, one's Prince or General, we tacitly submit to it, in the Manner, and for the Reasons, mentioned above, § 15. Note 1.

11 *Impia enim bella suscipitis, &c. quum habeatis arma, licitami hostium capita.* QUINTUS CURTIUS, Lib. IV. Cap. I. Num. 12.

12 *Utpote qui ne belli quidem in me jura servaveris.* Ibid. Num. 13.

13 *Veram enimvero, quum modo milites meos literis ad proditorem, modo amicos, &c.* Lib. IV. Cap. XI. Num. 18.

14 The Passage has been quoted before, § 15. Note 3.

15 *Ea omnia quam Diis invisæ essent, sensurum in exitu rerum suarum.* LIVY, Lib. XLIV. Cap. I. Num. 11.

16 VIRIATI etiam cædes, &c. Lib. IX. Cap. VI. Num. 4. The Author *De Viris illustribus*, [who is believed to be AURELIUS VICTOR] says, that the Senate did not approve this Victory, because it had been bought, *Quæ victoria, quia emta erat, a Senatu non probata.* Cap. LXXI. in fin. According to EUTROPIUS, the Murderers of *Viriatus* having demanded a Reward of the Consul, he answered them, that the Romans had never approved the Conduct of Soldiers who killed their General. *Quum interfectores ejus præmium a Cæpione Consule peterent, responsum est, numquam Romanis placuisse, Imperatorem a suis militibus interficere.* (Lib. IV. Cap. VIII. Edit. Cellar.) There seems to be Reason for supplying a Word in this Passage, à *Cæpione Consule promissum.* AMMIANUS MARCELLINUS disapproves also the Assassination of *Sertorius*, committed at a Feast by *Perperna*, his Lieutenant. Lib. XXX. (Cap. I. in fin.) GROTIUS.

It does not appear from other Authors, that the Consul *Cæpio* had promised a Reward to those who killed *Viriatus*. So that the Text of EUTROPIUS is not faulty.

especially

especially Persons of the ¹⁷ most distinguished Rank. *Eumenes* (in *Justin*) said, *He could not believe,* ¹⁸ *that any Commander would so desire to conquer, (viz. by biring to kill his Enemy) as to set so bad an Example against himself.* And in the same Author, when ¹⁹ *Bessus* had assassinated *Darius*, it is said, *It was not to be endured for Example's Sake, and that it was the common Cause of all Kings.* And *OEdipus*, to justify the Killing of King *Laius*, says, in *Sophocles*,

²⁰ Κείνω προσαρκῶν ἐν ἑμαυτὸν ὠφελῶ.

Assisting him, I also help myself.

And in *Seneca*, on the same Subject,

²¹ *Regi tuenda est maximè Regum salus.*

Kings should, in Honour, save their fellow Kings.

And the Roman Consuls, in their Letter to ²² *Pyrrhus*, *It concerns the common Interest of Nations, that we endeavour your Safety.*

6. In a solemn War then, and among those who have a Right to denounce a solemn War, it is not allowed: But where there is no solemn War it is accounted lawful, by the same Law of Nations. So *Tacitus* ²³ declares the Plot against the Life of *Gannascus*, was not dishonest, because he was a Traitor. *Curtius* said, the Treachery of *Spitamenes* ²⁴ to *Bessus* was the less odious, because no Perfidiousness seemed unjust against a Murderer of his Prince. Thus Treachery towards Robbers and Pirates, tho' it be not altogether blameless, yet is not punished amongst Nations, in Detestation of those against whom it is committed.

XIX. Whether Ravishing of Women be against the Law of Nations.

XIX. 1. The Ravishing of Women is sometimes permitted in War, and sometimes not. They that permit it, respect only the Injury done to the Body of an Enemy, which by the Law of Arms they think should be subject to all Acts of Hostility. But others, with more Reason, look not to that Injury alone, but also to the Act of Brutality, which being neither necessary for the Security of those who commit it, nor proper for the Punishment of those against whom it is committed, should be as much punished in War as in Peace; and this last is the Law of Nations, if not all, yet of the most civilized. So *Marcellus*, before he took *Syracuse*, is recorded to have taken ¹ *particular Care to preserve the Chastity, even of his Enemies.* *Scipio* (in *Livy*) said it concerned his own Honour, and that of the People of *Rome*, ² *that nothing reputed sacred, by*

¹⁷ And indeed Traitors seldom offer their Service, or are applied to, but to assassinate Persons of a high Rank, as Princes or Generals.

¹⁸ *Nec Antigonium, nec quemquam ducum, sic velle vincere, ut ipse in se exemplum pessimum statuatur.* Lib. XIV. Cap. I. Num. 12.

¹⁹ Our Author cites *JUSTIN* again here, Lib. XII. *Apud eundem*, says he in the Text; tho' he had mentioned him before only in the Margin. In the first Edition he had said, *Apud CURTIUM*. This was from his finding afterwards in *JUSTIN* the following Words, *Reputans [Alexander] non tam hostem suum fuisse Darium, quam amicum ejus, a quo esset occisus.* Cap. I. Num. 11. But he had Reason to cite *QUINTUS CURTIUS*, who has something more express upon this Subject. *Quem quidem [Bessum] cruci adfixum videre festino, omnibus regibus Gentibusque fidei, quam violavit, meritis pœnas solventem.* Lib. VI. Cap. III. Num. 14.

²⁰ *Œdip. ver. 139.*

²¹ *Œdip. ver. 242.*

²² This Passage has been quoted above, § 15. of this Chapter, Note 6.

²³ *Nec irritæ, aut degeneres, infidiæ fuere adversus transfugam & violatorem fidei.* Annal. Lib. XI. Cap. XIX. Num. 2. *AMMIANUS MARCELINUS*, speaking of *Florentius* and *Barchalba*, who

had seized and brought the Rebel *Procopius* to the Emperor *Valens*, and were killed at the same Time, observes upon it, that if they had betrayed a lawful Prince, Justice itself would have passed Sentence of Death upon them; but that having betrayed a Rebel, and a Disturber of the publick Tranquillity, as *Procopius* was according to the general Opinion, so memorable an Action ought to have been amply rewarded. *Parique indignationis impetu Florentius, &c.* (Lib. XXVI. Cap. IX. in fin. p. 513. Edit. *Valef. Gron.*) The Historian *PROCOPIUS*, for the same Reason praises *Artabanus* for having killed *Gontharides*, Vandalic. Lib. II. in fin. (Cap. XXVIII.) See also *CROMER*, *Rer. Polon.* Lib. XXVIII. concerning the Murther of *Suchodolius*, (p. 604. Edit. *Basil.*) *GROTIUS*.

²⁴ *Quæ [perfidia] tamen jam minus, &c.* Lib. VII. Cap. V. Num. 20.

XIX. (1) *Gesset curam pudicitia, etiam in hoste, servandæ.* *AUSTIN, De Civit. Dei*, Lib. I. Cap. VI. [See *LIVY*, Lib. XXV. Cap. XXV. Num. 7.] The same Thing is related of *Lucullus*, in *DION CASSIUS*, (Lib. XXXV. p. 2. A. Edit. *H. Steph.*) See the Edict of *Gabao*, King of the Moors, in *PROCOPIUS*, *Vandalic.* Lib. I. (Cap. VIII.) *GROTIUS*.

² *Meæ, Populique Romani, disciplinae causâ, &c.* *LIVY*, Lib. XXVI. Cap. XLIX. Num. 14. the

the more civilized Nations, should be profaned by them (his Soldiers). Diodorus Siculus complains of Agathocles's Soldiers, ³ ἔτε δ' εἰς γυναῖκας ὕβρεως καὶ ἀσεβείας ἀπέχοντο, They did not abstain from that detestable Crime of violating the Chastity of Women. Ælian speaking of the victorious Sicyonians ravishing the Wives and Virgins of the Pellenæans, exclaims, ⁴ ἈΓΓράτῃα ταῦτα ὃ Θεοὶ Ἕλληνοισι, καὶ εἰς ἐν βαβάρους καλὰ καλᾶτε τ' ἐμὴν μνείαν, These, (O ye Gods of Greece!) are Acts so cruel and abominable, as were never practised among the Barbarians, as far as I can remember.

2. And certainly, this should be ⁵ observed among Christians, not only as a Part of military Discipline, but as a Part of the Law of Nations, viz. that whosoever ravishes a Woman, tho' in Time of War, deserves to be punished in every Country. For by the Hebrew Law none did it without Punishment, as we ⁶ may gather from that Part which treats of a captive Woman, Deut. xxi. 10. That the Master might marry her, but upon Dislike might not sell her. Thou shalt not take Money for her, because thou hast humbled her. Upon which Beccai, one of the Hebrew Doctors, thus comments, GOD would have the Camp of Israel to be holy, not defiled with Whoredoms, and other Abominations, like the Camp of the Gentiles. Arrian, speaking of Alexander's falling in love with Roxana, says, οὐκ ἐβελήσαι ὕβρσαι καθάπερ αἰχμάλωτον, ἀλλὰ γῆμαι γὰρ ἐκ ἀπαξιώσαι, He would not ravish her, as a Captive, but honourably married her. Which he highly ⁷ commends. And ⁸ Plutarch, of the same, οὐκ ὕβρσεν, ἀλλ' ἔγημε φιλοσόφως, He scorned to debauch her, but married her; which was an Action worthy of a Philosopher. Plutarch also mentions one Torquatus, Banished, by the ⁹ Romans, into the Island of Corfica, for ravishing his Prisoner.

³ Lib. XIX. Cap. VIII. p. 674. Edit. H. Steph. APPIANUS ALEXANDRINUS treats this as the Act of Barbarians, in speaking of the People of Chios, who were exposed to it by the Troops of Mithridates. (Bell. Mithridatic. p. 340. Edit. Amstel. 201. H. Steph.) GROTIUS.

⁴ Var. Hist. Lib. VI. Cap. I.

⁵ Belisarius always observed it, and so did Totilas, at the taking of Cumæ and Rome. PROCOPIUS, Goth. III. GROTIUS.

What our Author says here of the usual Conduct of the Roman General, is related in Chap. I. of the Book referred to, and in the twentieth Chapter we see the Care which the King of the Goths took, to prevent any Violence being done to the Wives, Maids, or Widows, when he made himself Master of Rome. As to what regards the taking of Cumæ, I find nothing upon it; and it is likely, that our Author, citing by Memory, has put Cumæ for Naples, for it was after taking of the

latter, that Totilas condemned one of his Guards to die, for having ravished the Daughter of a Roman, a Native of Calabria; upon which that Prince made a fine Speech to those who came to intercede for the Criminal. Chap. VIII.

⁶ PHILLO much commends that Law, in his Book, περὶ φιλανθρωπίας: And JOSEPHUS against APPION. The Law also takes Care of Prisoners of War, to preserve them from Reproach, especially Women. Lib. II. p. 1075. D. GROTIUS.

⁷ He, says he, praises rather than blames it: De Expedit. Alexandr. Lib. IV. Cap. XIX. Edit. Gron.

⁸ De Fortuna vel virtut. Alexandr. Orat. II. p. 332. E. Vol. II. Edit. Wech.

⁹ Cosroes, King of Persia, crucified one for ravishing a Virgin at Apamea, PROCOPIUS, Persic. Lib. II. Chap. XI. GROTIUS.

CHAP. V.

Of Spoil and Rapine in War.

I. CICERO, in the third of his Offices, declares, ¹ It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill. No wonder then if the Law of Nations allows to spoil and waste an Enemy's Lands and Goods, since

I. The Goods of an Enemy may be spoiled, or taken away.

I. (1) Neque est contra naturam, &c. (Cap. VI.) SÆTONTIUS relates, that Nero having received Advice of some Commotions in Gaul, was thought to

be very well pleased with the News, because he had an Occasion of plundering those rich Provinces by Right of War. Adæque lente ac secure tulit, gaudens

since it permits him to be killed. ² *Polybius* tells us in the fifth of his History, by the Right of War it is lawful to take away, or destroy, the Forts, Havens, Cities, Men, Ships, Fruits of the Earth, and such like Things of an Enemy. And we read in *Livy*, ³ *There are certain Rights of War, which, as we may do, so we may suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Cattle.* We may find in History, almost in every Page, the dismal Calamities of War, whole Cities destroyed, or their Walls thrown down to the Ground, Lands ravaged, and every Thing set on fire. And we may observe, these Things are lawful to be done, even to those that surrender themselves. *The Townsmen*, says *Tacitus*, ⁴ *freely set open their Gates, and yielded themselves, and all they had, to the Romans, whereby they only saved their Lives: Artaxata was burnt by the Romans.*

II. *Even those that are sacred, which how to be understood.*

II. 1. Neither does the ¹ mere Law of Nations exempt sacred Things, that are consecrated, either to the true GOD, or to false Divinities, setting aside the Consideration of other Duties, (of which we will treat hereafter) from these Insults of War. *Pomponius*, the Civilian, tells us, *When Places are taken from the Enemy, all Things therein cease to be sacred.* *Cicero*, in his fourth Oration against *Verres*, observes, ³ *The Victory made all the sacred Things of Syracuse profane.* The Reason of which is this, because those Things that are called sacred, are not of such a Nature, that the Moment they are consecrated to Religion, Men ⁴ cannot more dispose of them, and make them serve to the Uses of Life, but they ⁵ belong to the

gaudentis etiam suspicionem præberet, tamquam occasione nata spoliandarum Jure Belli opulentissimarum provinciarum. Vit. Neron. Cap. XL. St. CYPRIAN says, that when a City is taken by an Enemy, all those who are within it, are liable to be plundered. *Sic quum irruptione hostili civitas aliqua possessa est, omnes simul captivitas vastat.* De mortalitate, (p. 159. Edit. Brem.) GROTIUS.

² He says, that in taking or destroying these Kinds of Things, the Enemy is weakened, and our own Affairs advanced. Cap. XI. p. 501, 502. Edit. Amstel.

³ It is the Deputies of *Athens* who speak thus in the Assembly of the *Ætolians*, and say that is not the Subject of their Complaint. *Neque id se queri, quod hostilia ab hoste passi forent: Esse enim quædam Belli Jura, quæ ut facere, ita pati, sit fas: Sata exuri, dirui testæ, prædas hominum pecorumque agi; misera magis, quam indigna, patienti esse.* Lib. XXXI. Cap. XXX. Num. 2.

⁴ *Sed oppidani, portis sponte patefactis,* &c. Annal. Lib. XIII. Cap. XLI. Num. 3.

II. (1) *Jus Gentium merum*, says our Author, that is to say, that which not only grants Impunity, but even authorizes of itself to act, so that we do nothing in Conscience but what is just and innocent, whilst there is no other Consideration drawn from Duty, which engages us to abate of our Right.

² *Quum loca capta sunt,* &c. Digest. Lib. XI. Tit. VII. De religiosis, & sumtibus funerum, &c. Leg. XXXVI. It is upon this TERTULLIAN founds the Reproach he casts upon the Pagans, of paying little Respect to their own Divinities: "Wars, says he, generally occasion the Taking, and the Ruin of Cities; which cannot be done without Offence to the Gods; for the Victor spares the Temples no more than he does the Walls of the Place; the Priests are exposed to Slaughter as well as the Citizens; the sacred as well as the profane Goods are plundered: So that the Romans commit as many Sacrileges as they make Conquests, as often as they triumph over Men they triumph over the Gods; and the Statues of captive Divinities make Part of all the Spoils of their conquered Enemies, which are preserved to this Day." Porro bella & victoriæ,

&c. Apologetic. (Cap. XXV.) He says lower the same Thing of the destroying of Temples. *Et bene, quod si quid adversi,* &c. (Cap. XL.) GROTIUS.

³ He says *Marcellus* did not touch those Things out of a Principle of Religion. *Has tabulas [quibus interiores templi Minervæ parietes vestiebantur] &c.* In Verr. Lib. IV. Cap. LV.

⁴ *Revera non eripiuntur humanis usibus.* These are our Author's Terms, which I recite to defend him against a false Criticism, which, tho' it has no other Foundation than Want of due Attention, and a Desire to censure, is however proposed with great Confidence. The late Mr. COCCEIUS, in his Dissertation *De evocatione Sacrorum*, Sect. II. § 24. blames our Author, as pretending that sacred Things, whilst they remain such, are not entirely exempt from profane Uses. But the whole Sequel of the Discourse shews, he means only, that those Things do not acquire the Quality of holy and sacred, as an indelible Character, of which they cannot be deprived; but that the Sovereign, who made them so, by devoting them to the Uses of Religion, may make them return into Commerce, and thereby become profane again. GRONOVIVS, and Mr. VANDERMUELEN have very well explained this, in their Notes; and if the Author who made the Extract in the *Bibliotheca Germanica*, (Vol. I. p. 55.) had taken the Trouble to read the Passage in the Original, he would have had Occasion to find Fault with the inexcusable Inadvertency and Rashness of the German Civilian, who had made it his Business to criticise our Author almost every where; he would not at least have given Room to believe that he approves a Censure so ill founded.

⁵ See THUCYDIDES, Lib. IV. (Cap. XCVIII. Ed. Oxon.) And TACITUS, Annal. Lib. III. (Cap. LXXI. Num. 2.) This Custom appears also from a Passage of POLYBIUS, which we shall cite below, Chap. XII. § 7. See also MARSILIUS PATAVINUS, in his *Defensor Pacis*, &c. Cap. V. § 2. NICOLAS BOERIUS, Decif. LXIX. Num. 1. ÆGIDIUS BOSSIVS, Prætic. Criminal. De foro competente, Num. 101. CATHMANNUS, Consil. C. Num. 30. GROTIUS.

Publick, and are termed *sacred* on Account of the religious Use to which they were intended. For Instance, when one People submit themselves to another Nation, or King, they then deliver up what is called *divine*, as appears from the Form which we have ^a elsewhere quoted, out of *Livy*; to which agrees ^{a B. ii. ch. 5. § 31.} that in *Plautus's Amphitryo*,

*They deliver up their City, Fields,
Altars, Houses, and themselves.*

And again,

*They deliver up themselves, and all they have
Divine and human.*

2. *Ulpian* infers therefore, ⁶ that there is a publick Right, even in Things that are sacred. ⁷ *Pausanias* tells us, that it was a common Custom with the *Greeks* and *Barbarians*, that Things sacred should be at the Disposal of the Conqueror. So when *Troy* was taken, the Image of *Jupiter Herceus* fell to the Share of *Sthenelus*: And he brings many other Examples of the like Custom. *Thucydides*, Lib. iv. *It was a Law among the Grecians, that he who was Master of any Country, whether great or small, was also of the Temples.* To which also that in *Tacitus* agrees, *All the Ceremonies, Temples, and Images, in the Italick Towns, were at the Disposal, and under the Power of the Romans.*

3. Wherefore the People themselves changing their Minds, may turn any Thing sacred into profane, which the Civilians, ⁸ *Paulus* and ⁹ *Venulejus*, plainly intimate. And in Times of Necessity, *Sacred Things* ¹⁰ *have been converted, even* by

⁶ *Publicum jus in sacris, in sacerdotibus, in magistratibus, consistit.* Digest. Lib. I. Tit. I. *De iustitia & jure*, Leg. I. § 2. See Mr. Noodt's Comment upon this Title, p. 5. and upon Tit. VIII. *De divif. rerum.* &c. p. 27.

⁷ It is in a Place where he endeavours to shew that *Augustus* was not the first that seized, by Right of War, upon Things consecrated to the Gods. In *Arcad. seu. Lib. VIII.* p. 275. Edit. Græc. *Wech.* Cap. XLVI. Edit. *Kuhn.*

⁸ *Quamvis sacra profana fieri [possunt].* Digest. Lib. XLV. Tit. I. *De verborum obligationibus*, Leg. LXXXIII. § 5.

⁹ Where he speaks of the Nullity of conditional Stipulations, in which the Sale of Things sacred, or of such other as do not enter into Commerce, is supposed; a Condition which is considered as impossible; though the Impossibility may afterwards cease; that is, as we see, for Instance, that what is sacred may become profane. *Quum quis sub hac conditione stipulatus sit, si rem sacram aut religiosam Titius vendiderit, vel Forum aut Basilicam, & hujusmodi res, quæ publicis usibus in perpetuum relicte sunt, ubi omnino conditio jure impleri non potest, vel id facere ei non liceat: Nullius momenti fore stipulationem, proinde ac si ea conditio, quæ naturâ impossibilis est, inserta esset. Nec ad rem pertinet, quod jus mutari potest, & id, quod nunc impossibile est postea possibile fieri: Non enim secundum futuri temporis jus, sed secundum præsentis, æstimari debet Stipulatio.* Ibid. Leg. CXXXVII. § 6.

¹⁰ As by the *Syracusans*, in *Timoleon's* Time, which *PLUTARCH* informs us of, in the Life of that great Captain. (p. 247. E. Vol. I. Edit. *Wech.*) The People of the Island of *Chios*, not having Money to pay the Fine laid on them by *Mithridates*, sold the Ornaments of their Temples. *APPIAN, Bell. Mithridatic.* (p. 339. Edit. *Amstel.* 201. *H. Steph.*) *Sylla* being in Want of Money, during the War against the same *Mithridates*, took what was most valuable amongst the Things consecrated to the Gods, in the Temples of *O-*

lympia, Epidaurus, and Delphos. *PLUTARCH, in ejus Vit.* (p. 459. Vol. I.) *APPIAN, Bell. Mithridatic.* (p. 346, 347. Edit. *Amstel.* 206. *H. Steph.*) he afterwards returned the Value of them, if we may believe *DIODORUS SICULUS*, in *Excerpt. Peiresc.* (p. 406.) *Augustus*, in a like Necessity, borrowed Money out of the Treasures kept in the Temples. *APPIAN, Bell. Civil. Lib. V.* (p. 1082. Edit. *Amst.* 678. *H. Steph.*) Sacred Things were also made Use of upon other Occasions, besides War. We see in *CASSIODORUS*, that *Agapetus*, Bishop of *Rome*, had pledged the sacred Vessels. *Var. XII.* 20. The Emperor *Heraclius*, in great Necessity, coined the Church Plate into Money; but returned the Value of it afterwards, as *THEOPHANES* tells us. See also *ANNA COMNENA, Lib. V. (Cap. I.)* and *Lib. VI. (Cap. II.)* *CROMER. Rerum Polon. Lib. XXIII.* (p. 516. Edit. *Basil.* 1655.) The Discourse of *Laurentianus*, in *BEMBO, Lib. VI.* and what we shall say below, *Chap. XXI. § 23.* in the Text and Notes. *GROTIUS.*

The first of the Examples alledged here by our Author, is a little doubtful. *PLUTARCH* says only, that the *Syracusans* had so little Money, as well for the War as their other Occasions, that they sold even their Statues. And a Proof, that the Statues of their Gods are not intended, is his saying a little lower, that the *Syracusans* preserved the Statue of *Gelon*, their antient Prince, in Remembrance of the Victory obtained by him over the *Carthaginians*, at *Himera*. For the Rest, I have suppressed in this Note, where the Things were besides not sufficiently distinguished, a Passage of *PLINY*, which is not very much to the Purpose. It is where he says that *Cato* permitted the sacred Trees or Groves to be cut, having first made a certain Sacrifice. *Idem [Cato] arbores religiosas, lucosque succidi permisit, sacrificio prius facto: Cujus rei rationem quoque eodem volumine tradidit.* *Hist. Natur. Lib. XVII. Cap. XXVIII. live ult. in fin.* He does not speak there of Cutting down those

by those who consecrated them, to the Uses of War, as by ¹¹ Pericles, but with a Promise of full Restitution, by ¹² Mago, in Spain, the ¹³ Romans, in the Mithridatic War, by Sylla, Pompey, ¹⁴ Cæsar, ¹⁵ and others. Tiberius Gracchus says in Plutarch, ¹⁶ ἱερὸν καὶ ἀσυλὸν εἶναι ὅτις ἐστίν, &c. There is nothing so sacred, so inviolable, as Things consecrated to the Gods, and yet no Body hinders the People from using, changing or removing them at their Pleasure. Our Temples, says Seneca ¹⁷ in the Controversies, are stript for the State, and we melt the Vessels consecrated to the Gods to pay our Soldiers. And Trebatius ¹⁸ the Lawyer in Cæsar's Time, That is profane, which from being Sacred, or Religious, is converted to the Use of Men and into Property. Thus Germanicus used this Right of Nations against the Marssi, as Tacitus ¹⁹ relates, He destroyed all Things both sacred and profane, and levelled with the Ground that most famous Temple among those Nations which they called the Temple of Tanfanes : To this we may add that of Virgil,

If my religious Hand
Your Plant has honoured, which your Foes profan'd. Dryden.

Pausanias ²⁰ observes, that Things consecrated to the Gods used to be taken by the Conquerors; and Cicero ²¹ calls it the Law of Arms, speaking of P. Servius, He took away, says he, the Images, and the Ornaments of the Enemy's City, taken by

those Trees entirely, nor of depriving them of their Sanctity, but only of lopping them in order to render them more beautiful and venerable. *Lucum conluere, Romano more, sic oportet, &c.* See the rest of the Passage in the Book, *De re rustica*, Cap. CXXXIX. which the Naturalist had in View.

11 Our Author took this without doubt from THUCYDIDES, *Lib. II. Cap. XIII.* and from DIODORUS SICULUS, *Lib. XII. Cap. XL.* who both say, that Pericles, intending to shew the Athenians, that they had wherewithal to undertake War, represented to them, that besides the Money and Vessels of the Temples, they might take the Gold of Minerva's Statue, to whom they might restore as much after having made Use of it for the good of the Publick.

12 He plundered the Temples of the City of Cadiz, then in Alliance with Carthage. *Non ærario modo eorum, [Gaditanorum] sed etiam Templis spoliatis, &c.* LIVY, *Lib. XXVIII. Cap. XXXVI. Num. 3.*

13 Our Author had undoubtedly in his Thoughts, what APPIANUS ALEXANDRINUS informs us, that the Senate, being in want of Money to defray the Expences of the War against Mithridates, decreed, that the Things, consecrated by Numa Pompilius for the Sacrifices, should be sold. *De bell. Mithridat. p. 317.* Edit. Amstel. (185. H. Steph.)

14 I find nothing on that Head, in the Authors who have writ the Life and Actions of Pompey, except what DION CASSIUS says, near the beginning of *Lib. XLI.* of his History; which is, that Pompey got a Decree of the Senate, that the Money in the publick Treasury, and all the Presents, offered to the Gods at Rome, should be carried with him into Campania. But, as the same Historian adds a little lower, (p. 174. Edit. H. Steph.) Nothing was touched of all that, for fear of Cæsar, after the Return and Report of the Deputies, which were sent to him.

15 Our Author probably remembred what he had read in SÆTONIUS; that Cæsar when in Gaul, plundered the Temples, that were full of the Offerings, which had been made to the Gods: *In Gallia fana templaque Deum, donis referta, expilavit.* Cap. LIV. See also DION CASSIUS, *Lib. XLII.* and XLIII. Cæsar himself however, to justify the civil War in which he had engaged, complains amongst other Things, that the Money had been taken out

of the Temples by the opposite Party: *Pecuniæ a municipiis exiguntur, & a fanis tolluntur: Omnia divina & humana jura permiscetur.* De Bell. Civil. *Lib. I. Cap. VI.*

16 *Vit. Tiber. & C. Gracch. p. 832. A. Vol. I. Edit. Wech.*

17 *Pro republica plerumque templa nudantur, & in usum stipendii dona conflamus, Lib. IV. Excerpt. Controv. IV.*

18 *Eo accedit, quod TREBATIUS, &c. Apud MACROB. Saturnal. Lib. III. (Cap. III.)* The Grammarian SERVIUS, speaking of the Temple of Ceres, which flood without the Gates of Troy, says, that Æneas, who appointed that Place for the Rendezvous of his People, well knew, that it had been profaned before: *Nam Æneas scit ante esse profanatum.* In *Æneid. II. (Ver. 713.)* He makes the same Remark upon III. IX. and XII. Books. And he says on Eclogue VII. that Presents, offered to the Gods, are sacred so long as they have not been rendered profane: *Dona autem oblata numinibus, tamdiu sacra sunt, & dona possunt dici, quamdiu non fuerint profanata.* (In *Ver. 31.*) GROTIUS.

19 *Profana simul & sacra, &c. Annal. Lib. I. Cap. LI. Num. 2.*

20 In the Passage cited above upon Paragraph II. of this Chapter, Note 7.

21 *P. Servilius quæ signa atque ornamenta ex urbe hostium vi & virtute capta, BELLIGERE atque imperatorio jure sustulit, &c.* In *Var. Lib. I. (Cap. XXI.)* VIRGIL mentions a Shield, which the Greeks had taken out of the Temple of Neptune, where it had been consecrated

*Et clipeum efferrî jussit, Didymæonis artes
Neptuni sacro Danaïdes de poste reflexum.*

Æneid. Lib. V. (Ver. 359, 360.) Fabius Maximus, as PLUTARCH relates, after having taken Tarentum, caused a Statue of Hercules of an extraordinary Bigness to be carried to Rome, leaving the Tarentines the rest of their Gods, because offended against them for their Crimes. *Vit. Fab. Max. (p. 187. C. Vol. I.)* To this may be referred the Passage of TERTULLIAN, which we have cited above, § 2. Note 2. and another from the same Father, where he says the same Thing: *Tot deinde deis, quot de gentibus triumphî: Manent & simulacra captiva: Et utique sentiunt, quos non amant.* Ad Nationes, *Lib. II. (Cap. XVII.)* GROTIUS.

Force

Force and Valour, by the Law of Arms, and Right of Conquest. So ²² Livy concerning the Ornaments taken out of the Temples at Syracuse by Marcellus, and brought to Rome, said they were got by the Right of War. And ²³ C. Flaminius in his Oration for M. Fulvius, *The Images were carried away, which is commonly done at the taking of Cities.* Also Fulvius ²⁴ calls this very Thing the Right of War. And Cæsar ²⁵ in Sallust relating the Miseries that usually fall on the Conquer'd, mentions *the robbing of the Temples.*

4. It is true however that, if it be believed, that there is any Deity in this or that Image, then to break or spoil it, is to them that are of that Opinion, a great Impiety. And upon this Supposition they that commit such Things are so often accused of Wickedness, and even of violating the Law of Nations; but if the Enemy be of another Opinion, then it is not so. As it was not only permitted, but commanded the Jews, (*Deut. vii. 5.*) utterly to abolish the Idols of the Gentiles; for that they were forbid to take them to themselves, the Reason was, to create in the Hebrews the greater Detestation of their Superstitions, by supposing that the very Touch of them was polluting: And not that what was consecrated to strange Gods should be spared, as Josephus ²⁶ expounds it; doubtless in Flattery to the Romans, as he does in the Exposition of another Precept, of not naming the Gods of the Heathen, which he explains by ²⁷ not speaking reproachfully of them; whereas the true Sense is that they should not name them with any Honour and Reverence, or without testifying an Abhorrence. For the Hebrews knew certainly, by the immediate Instruction of GOD himself, that there resided in those Image neither the Spirit of GOD, nor good Angels, or any Virtue of the Stars, as the deluded Gentiles imagined; but wicked Demons, and such as are destructive to Mankind. Therefore Tacitus justly said, in describing the Rites and Ceremonies of the Jews, ²⁸ *All Things sacred to us, are profane to them.* No wonder then if we read of so many Idol-Temples burnt by the Macchabees. So also Xerxes, when he destroyed the Images of the Grecians, did nothing against the Law of Nations, tho' the Grecian Writers ²⁹ cry out upon it as a heinous Crime, to render their Enemy odious. For the Persians ³⁰ did not believe there was any Divinity in them; but they

1 Mac. v.
and 10.

²² *Ornamenta urbis, signa, tabulasque, &c.* Lib. XXV. Cap. XL. Num. 2.

²³ *Ambraciam oppugnatam & captam, &c.* Idem, Lib. XXXVIII.

²⁴ *Fulvius*, in the Speech he made to justify his Conduct, asks whether this was the only City exempt from the Rights of War: *Nisi Syracusarum, &c.* Idem, (Lib. XXXI. Cap. IV. Num. 12.) See also POLYBIUS, *Excerpt. Legat.* XXVI. GROTIUS.

²⁵ *Quæ belli sævitia esset, quæ victis acciderent, &c.* (Bell. Catilen. Cap. L. p. 156. Edit. Waff.) Cosroez plundered a Church in Antioch, as PROCOPIUS relates, *Persic.* Lib. II. [Cap. IX. but preserved the Building for a certain Sum paid him.] See CROMER, *Rerum Polon.* Lib. XVII. (p. 402.) GROTIUS.

²⁶ The two Laws ill explained, are in the same Place of that Author: Let no one speak ill of the Gods, held by other States to be such. Let no one plunder the Temples of Strangers, nor take away any Thing consecrated to any God. *Antiq. Jud.* Lib. IV. Cap. VIII.

²⁷ See the foregoing Note. He says elsewhere, that their Law forbids them to scoff at, or speak ill of, those whom Strangers hold for Gods; because of the Name of GOD, which they bear. *Contra Apion.* Lib. II. p. 1077. D. Others believe, and with more Reason, that the Jewish Historian intended hereby to explain another Law, namely, that of EXODUS xxii. 28. where the Original says in so many Words, *Thou shalt not revile the Gods.* By the Gods, the Legislator manifestly understands the Magistrates, as appears from the following Words, which are a Comment upon those that go before: *Nor curse the Rulers of thy People.* But JOSEPHUS has taken the Word Gods in the literal

Sense; and if he did so sincerely, the Motive our Author mentions, no doubt contributed to his falling into that Error.

²⁸ *Profana illic omnia, quæ apud nos sacra.* Histor. Lib. V. Cap. IV. Num. 1.

²⁹ TROGUS POMPEIUS, imitating without doubt the Language of the Greek Authors, from whom he composed his History, says, in JUSTIN'S Abridgment, which we have, that Xerxes seemed to have designed to make War upon the Gods as well as upon Men: *Ante navalis prelii congressionem miserat Xerxes quatuor millia armatorum Delphos, ad templum Apollinis diripiendum: Prorsus quasi non cum Græcis tantum, sed & cum Diis immortalibus bellum gereret.* Lib. II. Cap. XII. Num. 8, 9. See the Passage of CICERO cited in the following Note.

³⁰ This is the Reason given for it by ASCONIUS PEDIANUS, whom our Author cites in the Margin. CICERO, to aggravate the Crime of Verres, who had plundered amongst others the Temple of Delos, sacred to Apollo, says that even the Persians, who, when they carried the War into Greece, had declared it against both the Gods and Men, (the Roman Orator here speaks the Language of the Greek Authors) being arrived at Delos, with a Fleet of a thousand Sail, did not violate or touch the Temple in question. *Tantaque ejus auctoritas religionis & est, & semper fuit, ut ne Persæ quidem, &c.* In Verr. Lib. I. Cap. XVIII. The antient Commentator observes upon that, that the Persians made no Scruple to destroy Temples and Statues, because, according to the Ideas of their Nation, they believed, that no Temples ought to be built to the Gods; and the rather, because the whole World would scarce suffice for the Temple of the Sun alone, which those People adored: *DIIS HOMINIBUSQUE quia non solum hostes erant, utpote Barbari; verum etiam, more gentis*

they imagined the Sun was the only true GOD, ³¹ and Fire one of his Parts. By the Hebrew Law, as the same Tacitus rightly observes, ³² none were allowed to enter the Temple but the Priests only.

5. But Pompey, ³³ says the same Author, entered the Temple by the Right of Conquest; or as St. Augustine relates it, ³⁴ none with the Devotion of a Suppliant, but by the Right of a Conqueror. He did well to spare the Temple, and the Treasures of it, tho' as Cicero ³⁵ expressly said, out of meer Shame, and to avoid Occasions of Reproach, not out of any Reverence; but he did ill to enter it again, as in Contempt of the true GOD, which the Prophets so highly blame the Chaldeans for; (Daniel v. 23.) for which Cause some think it was so ordered by the Divine Providence, that the same Pompey should be killed at Casius, a Promontory of Egypt, as it were in sight of Judea; but if we consider the Opinion of the Romans, ³⁶ there was nothing done by him against the Law of Nations. So Josephus mentioning the Destruction of the same Temple by Titus; adds that it was done, τῷ τῆς πολέμου νόμῳ, by the Right of War

III. Yea, and Sepulchres, adding a Caution.

III. What we have said of Things sacred, may also be understood of Things religious, (or Sepulchres) for these also do not belong to the Dead, but to the Living, whether a People, or a Family. Wherefore Pomponius observes, in the abovementioned Place, that as sacred Things, so likewise Sepulchres cease to be such, when taken by the Enemy; and ² Paulus the Lawyer says, *The Sepulchres of our Enemies are not religious to us, and therefore we may take the Stones thereof, and put them to any Use.* Which yet is so to be understood, that no Violence be offered to the Bodies of the Dead, which ³ we have shewed in another Place, to be contrary to the Rights of Burial established by the Law of Nations.

IV. How far Fraud may be used in this Case.

IV. This I shall also here repeat, that the Goods of our Enemies may be taken away from them, not only by plain Force, by the Law of Nations, but even by Fraud, so it be without Treachery; nay, in this Case, ¹ we may solicit others to betray our Enemy. For, in regard to such Sort of Actions, less vicious and very common, the Law of Nations now uses a Kind of Connivance, as the civil Laws do with respect to Prostitution and Usury.

gentis suæ, nulla Diis in terris templa condenda esse credebant; præsertim, quum uni Soli, quem venerarentur, vix mundus ipse sufficeret. Our Author cites also in a little Note, what DIOGENES LAERTIUS says, that the Magi condemned the Use of Statues. Lib. I. § 6. Edit. Amstel. See MENAGE upon it, and the Index Philologicus of Mr. LE CLERC upon STANLEY's History of the Eastern Philosophy, at the Word Statuæ.

³¹ The Reader may see upon this Head the History of the antient Persians, writ in Latin by the late Mr. HYDE, a learned Englishman, who has endeavoured to prove, that those People of old adored neither Fire, nor the Sun, but the true GOD; which, he believes, is to this Day the Religion of some of their Descendants.

³² *Ad fores [Templi Hierosolymitani] tantum Judæo aditus: limine, præter Sacerdotes, arcebantur.* Hist. Lib. V. Cap. VIII. Num. 2.

³³ *Romanorum primus, Cn. Pompeius Judæos domuit. Templumque JURE VICTORIÆ ingressus est.* Hist. Lib. V. Cap. IX. Num. 1.

³⁴ *Pompeius ergo, Populi Romani præclarissimus Princeps, Judæam cum exercitu ingressus, civitatem capit, templumque reseat, non devotione supplicis, sed JURE VICTORIS, De Civit. Dei, Lib. XVIII. Cap. XLV.*

³⁵ *At Cn. Pompeius, captis Hierosolymis, &c.*

Orat. pro L. FLACCO, Cap. XXVIII.

³⁶ There is besides another Reason, which might justify the Pagans against the Reproach of Sacrilege, even when they plundered the Temples of the Gods whom they acknowledged as such. And that is, because they imagined, that when a City was taken, the Gods, who were adored in it, abandoned their Temples and Altars at the same Time; especially after they had been called out, they and all the sacred Things, with certain Ceremonies. See the learned GRONOVIIUS's Note upon § 2. of this Chapter, and the Dissertation of Mr. COCCEIUS, *De evocatione Sacrorum.*

³⁷ *De bell. Jud. Lib. VII. Cap. XXIV. p. 56. G. Titus* says elsewhere, that he was desirous of saving the Temple, and so to forget the Right of War. *Cap. XXXIV. p. 963. F.*

III. (1) Sepulchres were consecrated to the infernal Gods, whereas sacred Things were for the other Gods. See Mr. NODD upon the Digest, Lib. I. Tit. VIII. p. 58.

² *Sepulcra hostium, &c. Digest, Lib. XLVII. Tit. XII. De sepulcro violato, Leg. IV.*

³ It suffices to say, that this is of no Use either for our Defence, the Support of our Rights, or in a Word for any lawful End of War.

IV. (1) See what is said upon the foregoing Chapter, § 18. Note 10.

C H A P. VI.

Of the Right to the Things taken in War.

I. 1. **B**ESIDES the Impunity of some Acts allowed to be used against our Enemies, of which we have treated hitherto; there is also another Effect, which¹ by the Law of Nations is proper to a solemn War. And indeed by the Law of Nature those Things may be acquired by a just War, *which are^a either equivalent to that, which tho' due to us, we cannot otherwise get, or which damns the Injurer, but within the Bounds of a just Punishment,* as has been said^b elsewhere. By Virtue of his Right *Abraham² offered unto GOD the Tenth of his Spoil he took from the five Kings,* Gen. xiv. as the Author to the *Hebrews* expounds it, *Heb. vii. 4.* and thus did the³ *Grecians, Carthaginians and Romans* make the same Offering to their Gods, as to *Apollo, to Hercules, to⁴ Jupiter Feretrius.* The Patriarch *Jacob* leaving an especial Legacy to *Joseph* above his Brethren, *I give to thee (says he) one Part above thy Brethren which I took out of the Hand of the Amorite, with my Sword and with my Bow,* Gen. xlviii. 22. where⁵ *the Word, I took,* seems to be taken prophetically for *I shall surely take,* and this attributed to *Jacob,* which was done after by his Posterity, who were called by his Name, as if the Ancestor and his Children were but one and the same Person. Which is much better than to wrest these Words, as the *Jews* do, to that plundering of the *Sichemites*, which had been done before by the Sons of *Jacob*; for that, as being done treacherously, *Jacob* a just and religious Man did ever condemn, as we may see, *Gen. xxxiv. 30.* and *xlix. 6.*

2. Now that this Right to the Spoils taken in a just War, was approved of by GOD, within the natural Bounds prescribed, (as I said) will appear, by other Places also of Scripture. GOD in his Law, *Deut. xx. 14.* concerning a City, which upon Refusal of Surrender was afterwards taken by the Sword, thus orders, *Thou shalt take the Spoil of it to thy self, and shalt enjoy the Prey of thine Enemies, which the LORD hath given thee.* Also the *Reubenites and Gadites,* and half the Tribe of *Manasseh* are said to have conquered the *Ituræans* and their Neighbours, and to have taken much Spoil from them, *1 Chron. v. 20, 21, 22.* This being added as a Reason, because in the War they called upon GOD, and he was propitious to them. It is also said of good King *Asa,* that having called upon GOD, he obtained the Victory over the *Ethiopians⁶* that had unjustly warred against him, and carried away much Spoil, *2 Chron. xiv. 13.* which is the more remarkable, because those Wars had been undertaken not by the special Command of GOD, but by Virtue of the common Right of all Mankind.

I. (1) See what we say upon the last Paragraph of this Chapter.

2 "We should add, (says Mr. LE CLERC in his Comment upon this Passage) that the Effects of others become ours, when having raised an Army at our own Expence, we carry off such Effects from those, who had taken them, whilst the Persons, to whom they had belonged, remained in quiet. For it was not of the Spoils only of the Kings, that came from beyond the *Euphrates*, that *Abraham* offered the Tenth, but of the recovered Goods also of the People of *Sodom*, and other Neighbours; the remainder of which that Patriarch returned to their antient Proprietors, after having offered the Tenth." This is what the learned and judicious Commentator says, and is agreeable to what our Author himself lays down below, § 7. where however he has forgot this Example. It appears also from the last Verse of the Chapter of *GENESIS*, from which this History is taken, that the Patriarch kept out of the Booty recovered, besides the Provisions, consumed by his People, the Part which was due to his Allies, *Ha-*

ner, Eschol, and Mamre, as our Author observes in a small Note, where he refers to what *JOSEPHUS* says on this History, *Antiq. Jud. (Lib. I. Cap. XI.)* and what he says himself below, *Chap. XVI. § 3.* For the rest, we must suppose here, that those, who do not attempt to recover their Effects, have both an Opportunity and the Means of doing it. See what we say below upon *Chap. XVI. § 3. Note 2.*

3 See *SELDEN's* Dissertation upon *Tithes*, Sect. III. translated into *Latin* by Mr. LE CLERC, and inserted at the End of his Commentary upon the *Pentateuch.*

4 Our Author, as *GRONOVIVS* observes, con-founds here the Tenth, with what the *Romans* called *Spolia opima*, which were dedicated to *Jupiter Feretrius.*

5 The *Chaldee Paraphrase* expounds it done by his Prayers to GOD, who by his special Favour preserved *Sichem* for *Jacob* and his Posterity. *GROTIUS.*

6 Or rather over the *Madianites*; for they are meant by the *Chusites.* See *BOCHART's Phaleg. Lib. IV. Cap. II.*

f. What the Law of Nature is, concerning Things taken in War. ^a B. 2. ch. 7. ^b Ibid. ch. 20.

3. *Joshua* also blessing the *Reubenites*, *Gadites*, and half the Tribe of *Manasseh* before mentioned, said, *Divide the Spoil of your Enemies with your Brethren*, *Jos. xxii. 8.* And when *David* sent to the Elders of *Israel* the Spoil taken from the *Amalekites*, he gave it this honourable Title, *a Spoil taken from the Enemies of the Lord*, *1 Sam. xxx. 26.* For, as *Seneca* says, *7 Military Persons think it most honourable to enrich Men with the Spoils of their Enemies.* We have also divine Laws for dividing such Spoils, *Num. xxxi. 27.* And *Philo* ⁸ reckons among the Curses of the Law, that their Fields should be reaped by their Enemies, whence must follow, *Famine to their Friends, and Plenty to their Enemies.*

II. *What the Law of Nations is in this Case, of which Examples are given.*

II. 1. Moreover, by the Law of Nations, not only he that makes War for a just Cause, but every Man in a solemn War acquires the Property of what he takes from the Enemy, and that without Rule or Measure; so that both he and his Assigns are to be defended in Possession of them ¹ by all Nations; which, as to the external Effects of it, may be called the Right of Property. Thus said *Cyrus* in *Xenophon*, ² *It is an eternal Law with all Men, when a City is taken by Force, the Goods all belong to the Conqueror.* And so *Plato*, ³ *All that belonged to the Conquered, now belong to the Conqueror.* And in other Places, among several, as it were, Kinds of ⁴ natural Acquisitions, he places *πολεμικὴν*, that got by War, which he also calls *ληϊστικὴν* by plundering, and *χαρῶσικὴν* by superior Force. To which agrees *Xenophon*, ⁵ in whom *Socrates* brings *Euthydemus* by divers Interrogatories to this Confession, that it was not always unjust to spoil, when against an Enemy.

2. And in *Aristotle*, ⁶ *The Law, which is a Kind of general Agreement, has allowed, that the Goods and Effects of the Conquered should become the Conquerors.* As also that of *Antiphanes*, ⁷ *ὅτι τοῖς πολέμοις, &c. We ought to wish our Enemies abundance of Riches without Valour, for in that Case they belong, not to the present Possessors, but their Conquerors.* ⁸ And *Plutarch* observes in the Life of *Alexander*,

What

⁷ *Et, quod est militibus viris speciosissimum, &c. De Benef. Lib. III. Cap. XXXIII.*

⁸ *Lib. De Diris & Execrat. init. p. 930. A. Edit. Paris.*

II. (1) See what we have said upon Chapter IV. of this Book, § 4. Note 1. It may be proper to relate here, what Mr. CARMICHAEL, Professor at *Glasgow*, says in his Notes upon the Abridgment of PUFENDORF, *De Officio Hom. & Civ. Lib. II. Cap. XVI. p. 303. & seqq.* He distinguishes between moveable and immoveable Things. The Acquisition of the first ought to be regarded as valid and lawful, because if the antient Proprietors could reclaim them from neutral People, where they are transported in consequence of Commerce, every State would see itself thereby exposed to enter into the War against its Will, as it would be obliged to examine, whether the Things reclaimed be good Prize, and consequently which Side has the best Cause. But as to Things immoveable, I do not find (adds this Author) that it is established by the common Consent of Nations, that the antient Owner ought to have less Right against the Third, who holds them of the Enemy, by what Title soever, than against the Enemy himself; unless that antient Owner has declared, in some manner or other, that he abandons his Right. All that can be said is, if the neutral People owe any real Servitude to the Lands, which an Enemy has taken from his Enemy, they may discharge it to the new Possessor, without the antient Proprietors having just Room to complain. I approve this Distinction in the main. But as I do not acknowledge that common Consent of States, upon which he founds the Law of Nations after our Author, it suffices for me to say, that moveable Things, being easily transferred by Commerce into the Hands of the Subjects of a neutral State, often without their knowing that they were taken in War, the Tranquillity of Nations, and the State of Neutrality require, that they should always be reputed lawful Prize. But

the Case is not the same in regard to Immoveables. They are immoveable in their Nature: And those, to whom a State, which has taken them from an Enemy, would resign them, can hardly be ignorant of the manner, in which it possesses them.

² He speaks both of Things and Men. *De Institut. Cyri, Lib. VII. Cap. V. § 26. Edit. Oxon.*

³ *De Legib. Lib. I. p. 626. B. Vol. II. Edit. H. Steph.*

⁴ *Sophist. p. 219. D. E. Vol. I. and Ibid. p. 222. C.*

⁵ *Memorab. Socrat. Lib. IV. Cap. II. § 15.*

⁶ *De Republ. Lib. I. Cap. VI. p. 301. D.*

⁷ This does not belong to *Antiphanes*, but ANTI-*STHENES*, the Cynick Philosopher; and I find the Passage so expressed in *STOBÆUS, Florileg. Tit. LIV. De Imperat.* under the Name of the latter. I have observed a like Error either of our Author, or his Copists, in his Commentary upon the second Commandment of the *Decalogue*, where *Antiphanes* is cited in the same manner for *Antisthenes*, in Reference to the Invisibleness of GOD; a Passage, which is recited above, *B. II. Chap. XX. § 45. Num. 2.* in a Note, and ascribed to the true Author of it. For the rest, *STOBÆUS* took this Saying from *PLUTARCH*, who gives it also to *Antisthenes*, *De Fortun. Alexandr. Orat. II. p. 336. A. Vol. II. Edit. Wechel.* From whence it appears, that there was no Reason to suspect the Error to be in *STOBÆUS*, where the Names of the Authors cited, are sometimes confounded. Let me also observe, that this Apophthegm of the antient Philosopher is omitted in *STANLEY's* philosophical History, and even in the *Latin* Version of the late Mr. *OLEARIUS*, who had taken upon him to supply what was wanting in the Original.

⁸ It is one of *Alexander's* Courtiers, who makes this Reflection upon that Conqueror's Saying, when he took the Tent of *Darius*, that he would go and bathe also in the Bath of the conquered King, in order to cleanse himself from the Dust of the Battle:

SIRE,

What did belong to the Vanquished, is and ought to be esteemed the Vanquishers. And in another Place, ⁹ *The Goods of those overcome in War are the Reward of the Victors.* Which are the Words of *Xenophon*, in his second Book of his Institution of *Cyrus*. And *Philip* in his Letter to the *Athenians* says, ¹⁰ *All of us enjoy Cities, which were either left us by our Ancestors, or we became Masters of by the Right of War.* Also *Æschines*, ¹¹ *If you fight with us, and take our City by Arms, you justly possess the Rule over it by the Law of War.*

3. *Marcellus* ¹² in *Livy* declares, that what he took from the *Syracusans* he did it by the Right of War. The Roman Embassadors told *Philip*, ¹³ concerning the Cities of *Thrace*, and some others, if he had taken them by War, he might enjoy them by the Right of War, as the Reward of his Victory. And *Masinissa* ¹⁴ pleads, the Land which his Father conquered from the *Carthaginians* he held by the Law of Nations. So ¹⁵ *Mithridates* in *Justin*, he had not called his Son out of *Cappadocia*, which as a Conqueror he possess by the Law of Nations. *Cicero* ¹⁶ tells us, that *Mitylene* became the Romans by Right of War and Victory. He likewise says, ¹⁷ that some Things may become a private Property, either by Seizure, where they are without an Owner, or by War, when one Party proves victorious over the other. And *Dion Cassius*, ¹⁸ *What was the Conquered's, becomes the Conquerors.* And *Clemens Alexandrinus* ¹⁹ informs us, that the Goods of Enemies are plundered and acquired by the Right of War.

4. *What is taken from the Enemy, by the Law of Nations, immediately becomes the Captors*, ²⁰ is the Opinion of *Cajus* the Lawyer. *Theophilus* the Greek Paraphrast on the Institutes, calls it *φυσικὴν κτήσιν*, ²¹ a natural Acquisition, as ²² *Aristotle* had called it, *πολεμικὴν φύσει κτήσιν*; because the Right here acquired arises from the bare Fact, or taking Possession, without any other Title; as ²³ *Nerva* the Son, by the Testimony of *Paulus* the Lawyer, declared the Property of Things begun from a natural Possession, and some Footsteps of it remain still in regard to those Animals that are taken, whether on the Earth, in the Sea, or in the Air; as also in regard to Things taken in War, all which are the Right of those who are the first Possessors of them.

5. It must be observed here that those Things are supposed to be taken from an Enemy, which are taken from the Subjects of an Enemy. So *Dercyllides* argues in *Xenophon*, ²⁴ since *Pharnabazus* was an Enemy to the *Lacedemonians*, and *Mania* a Subject to *Pharnabazus*, therefore the Goods of *Mania* were just Prize by the Law of Nations.

SIRE, said the Courtier to him, *say the Bath of Alexander, and not the Bath of Darius; for what belonged to the vanquished, &c.* Vit. Alexandr. (p. 676. A. Vol. I. Edit. Wech.) *Alexander* says himself upon another Occasion, that he had forgot that the Goods of the vanquished were the Victor's. [P. 684. A.] GROTIUS.

⁹ *Cyrop.* Lib. II. (Cap. III. § 2. Edit. Oxon.) These Words which our Author gives us as taken by PLUTARCH from XENOPHON, I do not find any where.

¹⁰ *Epist. ad Athenien.* apud DEMOSTHEN. p. 64. B. Edit. Basil 1572.

¹¹ *Orat. de male obita legat.* (p. 251. B.) DIODORUS SICULUS says, That we ought not to give up what we acquire by the Right of War. Excerpt. Peiresk. (p. 406.) See a Passage of AGATHIAS, cited below, Chap. VIII. § 1. Note 10. GROTIUS.

¹² The Passage has been already cited upon Chap. IV. of this Book, § 5. Note 3.

¹³ *Si Philippus bello cepisset, &c.* LIVY, Lib. XXXIX. Cap. XXIX. Num. 2.

¹⁴ *Ceperat eum [Agrum] ab Carthaginiensibus, &c.* LIVY, Lib. XL. Cap. XVII. Num. 2, 4.

¹⁵ *Non Cappadocia filium, &c.* Lib. XXXVIII. Cap. V. Num. 6.

¹⁶ *Quid Mitylenæ? quæ certè vestræ, QUIRITES, belli lege ac victoriæ, jure, factæ sunt.* Orat. De Lege Agrar. contra Rull. Cap. XVI.

¹⁷ *Sunt autem privata, &c.* De Offic. Lib. I. Cap. VII.

¹⁸ This Passage is in Lib. XLI. towards the End.

¹⁹ It is upon the Occasion of the *Israelites* carrying away the Vessels of Gold and Silver of the *Egyptians*, when they quitted *Egypt*. That Father says, they did so, either by way of Amends for what the *Egyptians* owed them, for the severe Labour they had forced them to undergo, or by Right of War, against a People, who had reduced them against their Will to a cruel Slavery. *Stromat.* Lib. I. Cap. XXIII. p. 416. Edit. Oxon. In which he only copies PHILO the Jew, as appears by the Passage, which the learned Bishop of Oxford cites in his Notes, and our Author gives below at length upon Chap. VII. of this Book. § 6. Num. 8.

²⁰ *Item quæ ex hostibus capiuntur, Jure Gentium statim capiuntur sunt.* Digest, Lib. XLI. Tit. I. De acquirendo rerum dominio. Leg. V. § 7. See also the Institutes, Lib. II. Tit. I. De divisione rerum, § 17.

²¹ Lib. II. Tit. I. § 17.

²² *Polit.* Lib. I. Cap. VIII. p. 304. D. Vol. II. Edit. Paris.

²³ *Dominiumque rerum ex naturali, &c.* Digest, Lib. XLI. Tit. II. De adquir. vel amittenda possess. Leg. I. § 1.

²⁴ *Hist. Græc.* Lib. III. Cap. I. § 23.

¹II. When moveable Goods are said to be taken by the Right of Nations.

III. 1. Moreover, by the Consent of Nations, Things are then said to be taken in War, when they are so detained, that the first Owner has lost all probable Hopes of recovering them, and cannot pursue them, as¹ *Pomponius* determines a like Question. This takes Place, in Regard to moveable Things, when they are carried home, that is, into Places whereof the Enemy is Master. For in the same Manner a Thing is lost it is recovered by Postliminy; but it² returns to its antient Proprietor, as soon as it comes again into the Dominions of the Sovereign on whom he depends; which is explained elsewhere,³ by *Places whereof he is Master*. And *Paulus*⁴ the Lawyer affirms, that Man to be taken that is carried out of our Bounds. And *Pomponius*⁵ declares, that Man to be taken in War, whom the Enemy has taken from us, and carried into Places whereof they are Masters; for till then he is reputed our Subject.

2. And by this Law of Nations the Case is the same with Respect to Goods as Persons, whereby we may easily perceive, that when in other Places Things taken are said immediately to be the Captors,⁶ it ought to be understood upon Condition that they continue so long in their Possession; whence it seems, by Consequence, that at Sea, Ships, and other Things are then only said to be taken, when they are brought into the Enemy's Harbours, or the Place where their whole Fleet rides, for then there is no Hope of Recovery. But by a new Law of Nations⁷, established among the States of *Europe*, they are accounted lost,⁷ if they continue twenty-four Hours in the Enemy's Possession.

IV. 1. But

¹*Consulat. Maris*. c. 283. & 287. *Consult. Gall.* l. 20. tit. 13. art. 24.

III. (1) It is where he speaks of Things taken away by some Beast; for in his Opinion, they are deemed lost to the Person from whom they are taken, when the Beast is secured from his pursuit: *Ita ex bonis quoque nostris capta a bestiis marinis & terrestribus, &c.* Digest, *Lib. XLI. Tit. I. De acquir. rerum domin.* Leg. XLIV. See above, *B. II. Chap. IV. § 5. Num. 2.* But there is a Difference between this and the Case, to which our Author compares it, that will not permit us to form the same Judgment of it; because according to the Lawyer, it is presumed, that the Owner has abandoned his Goods, when he can pursue the Beast no longer that took them away; whereas between two Enemies there is no room for such a Presumption. Every Enemy, as such, and whilst he continues such, retains the Will to recover what the other has taken from him. His present Inability only reduces him to wait for a more favourable Opportunity, which he still seeks and desires. So that, in regard to him, the Thing ought no more to be deemed taken, when in a Place of Safety, than whilst he is still in a Condition to pursue it: All that can be said is, that in the latter Case the Possession of the Enemy is not so secure as in the former. The Truth is, this Distinction has been invented to establish the Rules of the Right of Postliminy, or the manner in which the Subjects of the State, from whom something has been taken, re-enter upon their Rights, rather than to determine the Time of the Acquisition of Things taken between Enemies. See *TITII, Observ. in Compend. Lauterbach.* Obs. 1446. and what we say below, upon *Chap. IX. § 16.*

2 *Postliminio rediisse videtur, quum, &c.* Digest. *Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c.* Leg. XIX. § 3. *Si id, quod nostrum hostes ceperunt, ejus generis est, ut postliminio redire possit; simul atque ad nos redeundi caussa, profugit ab hostibus, & intra fines imperii nostri esse cepit, postliminio rediisse existimandum est.* Ibid. Leg. XXX.

3 *In bello* [Postliminii jus competit] *quum hi, qui nobis hostes sunt, aliquem ex nostris ceperunt, & intra præsidia sua perduxerunt. — Antequam in præsidia perducatur hostium, manet civis.* Ibid. Leg. V. § 1.

4 In the first of the two Laws cited above on this Paragraph, *Note 2.* See below, *Chap. IX. § 5. and 16.*

5 In the Law cited above, *Note 3.*

6 See the Law cited in *Note 20.* upon the foregoing Paragraph. *ZIEGLER* is for having the Word *Statim* of the Roman Lawyers taken literally. But *OBRICHT* defends our Author's Explanation; and founds his Opinion upon this Example, chosen from many others, which, says he, might have been alledged. We call a Thief taken in the Fact, (*Fur manifestus*, or ἐπ' ἀποδείξει, *deprehen-sus*) not only him whom we seize the Moment he has stolen something, but even him whom we find carrying away the Thing stolen, before he arrives at Home, or where he designed to put it. See *Institutes*, *Lib. IV. Tit. I. § 3.* The following is a more express Example. When a Person is adjudged to pay a certain Sum immediately, that, say the Lawyers, is to be understood with some Modification; for it is not meant that the Person must go that Moment with the Money, to his House to whom it is to be paid. *Quod dicimus — debere STATIM solvere, cum aliquo scilicet temperamento temporis intelligendum est: Nec enim cum sacco adire debet.* Digest. *Lib. XLVI. Tit. III. De solution. & liberat. &c.* Leg. XC.

7 This is observed by Land also, as appears from *THUANUS's* History, on the Year 1595, *Lib. CXIII.* where we find, that the Town of *Liere* in *Brabant*, having been taken and retaken the same Day, the Plunder taken from the Inhabitants was returned them, because it had not been twenty-four Hours in the Enemy's Hands. This Custom is derived from the antient Laws of Germany, and was established in Imitation of the four and twenty Hours, which, not without Reason, was the limited Time, in Respect to the Permission of taking a Beast wounded by another. See *Lex Longobard.* *Lib. I. Tit. XXII. § 6.* The same Thing is observed in *England*, and in the Kingdom of *Castile*, as *ALBERICUS GENTILIS* informs us, *Hispanic. Advoc. l. 3. GROTIUS.*

It has been observed, that this Rule of twenty-four Hours was changed in Part, in Regard to the *United Provinces*, since the Publication of our Author's

IV. 1. But ^a Lands are not said to be taken as soon as they are seized on; for tho' it be true, that that Part of the Country, (as ¹ *Celsus* observes) which the Enemy with a strong Army has entered, is for that Time possessed by them; yet every Possession is not sufficient for the Effect which we are now treating of, but such a one as is durable only: Therefore the *Romans* were so far from thinking that Part of Land without the Gate to be entirely lost, whereon *Hannibal* encamped, ² that at that very Time they sold it as dear as before. That Land then is reputed lost, which is so secured with Fortifications, which without being forced cannot be repofsest by the first Owner.

2. And this Derivation of the Word *Territory* given by *Siculus Flaccus*, ³ à *terrendis Hostibus*, from terrifying the Enemy, seems as probable as that of *Varro* ⁴, à *terendo*, from treading upon; or that of ⁵ *Frontinus*, à *terrâ*, from the Earth; or that of *Pomponius* the Lawyer, à *terrendi jure*, from that Power to terrify which the Magistrates have. Thus *Xenophon*, in his Book concerning Tributes, says, that the Possession of Lands is held in Time of War by Fortifications, which he himself calls ⁶ *τείχη, καὶ ἐρύματα*, *Walls and Retrenchments*.

V. This is also plain, that before the Right of War can entitle us to any Thing taken, it is requisite that our Enemy had first the true Propriety of it; for what Things may be within the Enemy's Towns, or other Places whereof he is Master, the Owners thereof being neither Subjects to our Enemy, nor animated with the same Spirit ¹ as he against us, cannot be acquired by the Right of War; as is proved,

IV. When Lands are said to be acquired.
^a Com. a Lapid. in Gen. c. 14. Molina, disp. 118.

V. Things not our Enemy's are not to be acquired by War.

thor's Work; and a Placart (of *March 11, 1632.*) is cited, which, abrogating the antient Laws, adjudges to those who retake a Ship from the Enemy, two Thirds of it, and of the Cargo, without any Regard had to the Time that the Vessel was in the Enemy's Hands; provided it was not carried into any Place under their Dominion. See *SIMON DE GROENEWEGEN*, *De Legibus abrogatis & inusitatis in Hollandia vicinisque regionibus*, upon Law II. of the Title, *De Captivis & Postliminio*, of the *Digest*. p. 301. Edit. *Noviomag.* 1664.

IV. (1) *Rursum, si cum magna vi, &c.* Digest. Lib. XLI. Tit. II. *De adquir. vel amittenda possessione*, Leg. XVIII.

2 *Hannibal* was informed of this by a Prisoner, and thought it such a Piece of Assurance, that to brave the *Romans* in his Turn, he caused the Goldsmiths Shops round the *Forum* of *Rome* to be sold by Auction: *Parva autem [res minuit spem Annibalis] quod per eos, &c.* *LIVY*, Lib. XXVI. Cap. XI. Num. 6. The Remark upon the preceding Paragraph, Note 1. is also applicable in this Place.

3 The Sense of *FLACCUS* is, that the People, who went out to settle in some Country, called the Extent of Land, which they had seized for their Use, after having terrified and expelled the Inhabitants, *Territory: Præmensumque quod universis, &c.* p. 3. Edit. *Goes*.

4 *VARRO* says, (*Ab eo colonis locus communis, qui prope oppidum, relinquitur, Territorium, quod maxime teritur.* Lib. IV. p. 9. Edit. *H. Steph.* The Lawyer *POMPONIUS* derives it from the same Word as *SICULUS FLACCUS*, but for a different Reason; that is, says he, the Power of the Magistrates to awe the People. [*Territorium est universitas agrorum intra fines cujusque civitatis: Quod ab eo dictum quidam aiunt, quod Magistratus ejus loci intra eos fines terrendi, id est, submovendi, jus habent.* Digest. Lib. L. Tit. XVI. *De verborum significat.* Leg. CCXXXIX. § 8.] *GROTIUS*.

5 *FRONTINUS* does not derive the Etymology of the Word *Territory* from *Terra*, but from *Terre*, with *SICULUS FLACCUS*, and that in a Manner more conformable to the Sense and End of our Author. *Territorium*, says he, *est quidquid hostes terrendi causa constitutum est*; or, as Mr. VAN-

DER GOES conjectures, *Quo quid hostis, &c.* De limitibus agrorum, p. 42. But it is a modern Civilian, the great *CUJAS*, who says in a Note upon the *Codex*, Lib. X. Tit. XXXI. *De Decurionib. &c.* Leg. LIII. *Territorium a terra malo deducere, quam a terrendo*: And gives for his Reason, that *Territorium* is sometimes taken for a private Possession, and to the Laws he cites, a Passage from *SICULUS FLACCUS* himself may be added, p. 42. which Mr. *VANDER GOES* notes in his Index. This Etymology, as it is the most simple, seems to me the best; tho' the learned *GRONOVIVS* approves that of *POMPONIUS*, in a Note upon this Passage of our Author, which the Reader may see. For the Rest, the Thing is not very material, and the Arguments deduced from the Etymology of Words are often very slender. But it is not improper to apprize my Reader, that I find here another Instance of what I have remarked in several other Places, that our Author sometimes quoted upon the Authority of others; for if he here ascribes to an antient Author the Conjecture of a modern Civilian, that undoubtedly proceeds from his having read in *DENNIS GODEFROY's* Note upon the Law of the *Digest*, cited in the foregoing Note, the following Words, *A terrendis hostibus* [etymon deducit] *Frontinus in libro de agrorum qualitat. a terra, Cujac. ad L. 53. C. de Decurion.* he believed, through Mistake, that the Words *a terra* related to the Author first spoken of, and not to the latter. We have seen above, in B. II. Chap. XVIII. § 1. Note 2. a like Oversight into which he fell on Occasion of a Note of the same *DENNIS GODEFROY*.

6 He speaks of two fortified Places that the *Athenians* had near their Silver-Mines, by the Means of which, with the Addition of a third Fort, which they might build upon an Eminence, it would not be difficult for them to preserve their Mines in Time of War. Lib. *De Reditibus*, Cap. IV. 43, 44. Edit. *Oxon.*

V. (1) That is to say, if neutral Strangers supply our Enemy with any Thing, and that with Design to put him into a Condition to distress us, they may then be considered as being of our Enemy's Party, and, in Consequence, their Effects are liable to be taken by the Right of War. Now as this can

proved, among others, by the Saying of ² *Æschines*, that *Amphipolis* being a City belonging to the *Athenians*, could not be appropriated by King *Philip* to himself, in a War which he made with the *Amphipolitans*. And indeed there is no Reason that ³ authorises us to take the Goods of those who are not of our Enemy's Party, under Pretence that they are found in his Country; and the Change of Master by Force, is too odious to admit any Extension.

VI. *What of Things found in Enemies Ships.*

VI. Wherefore the common Saying, ¹ that Goods found in our Enemies Ships are reputed theirs, is not so to be understood, as if it were a constant and inviolable Law of the Right of Nations, but a Maxim, the Sense of which amounts only to this, that it is commonly presumed, in such a Case, the Whole belongs to one and the same Master: A Presumption however, which, by evident Proofs to the contrary, may be taken off. And so it was formerly adjudged in *Holland*, in a full Assembly of the sovereign Court, during the War with the *Hanse Towns*, in the Year 1338, and from thence hath passed into a Law.

VII. *Things taken from our Enemies are ours by the Law of Nations, tho' they took them from others.*

VII. 1. But this is certain, if we only respect the Law of Nations, what we take from our Enemies, cannot be claimed by those from whom our Enemies before had taken them by Right of War; because the Law of Nations ¹ had first made our Enemies Proprietors of them by an outward Right, and then us. By which Right, among others, *Jephtha* defends himself against the *Ammonites*, (Judges xi. 23, 24, 27.) because the Land in Dispute was taken from the *Ammonites*; as also another Part of the Land from the *Moabites*, by the *Amorites*, by the Right of War; and from them by the same Right, by the *Hebrews*. ² So *David* challenges, and divides as his own, the Spoils which he had taken from the *Amalekites*, and they before from the *Philistines*. (1 Sam. xxx. 18. & seq.)

2. *Titus Largius*, (as *Dionysius* ³ *Halicarnassensis* relates it) thus gave his Opinion in the Roman Senate, ⁴ when the *Volscians* laid Claim to some Lands which the Romans had won by the Right of War, because they had been formerly theirs, *We Romans account the Possessions won by the Sword most just and honest; neither can we be persuaded by a foolish Easiness, to destroy the Monuments of our Valour,*

can scarce take Place but in Relation to moveable Things, as the late Mr. *Cocceius* observes, in his Dissertation, *De jure belli in amicos*, § 36. that Civilian might have spared himself the Trouble of criticising our Author, as not having distinguished in this Place between immoveable and moveable Things. The Distinction follows from the very Nature of the Thing which our Author lays down.

2 *Orat. de male obita Legat.* p. 251. B.

3 A Commentator upon our Author opposes him here with an Argument *ad hominem*. If, according to your Opinion, says he, it is lawful to kill the Strangers we find upon an Enemy's Lands, there is much more Reason to hold it lawful to seize their Effects. And as he rightly foresaw, that he might be answered from what has been said above, (*Chap. IV.* of this Book, § 6.) that there is something to be feared from the Persons, but nothing from the Effects, of Strangers, who are not in the Enemy's Country; he replies, that the Effects of Strangers serve to encourage the Enemy, and confirm him in his Designs. But some have answered, that Effects being only the Accessory of Persons, cannot be taken by the Right of War, unless when those they belong to, are, or may be, deemed our Enemies. So that the Use which the Enemy may make of the Effects of others in his Territories against us, authorises us to repute them good Prize, only when they have been sent thither on Purpose to succour him, or when the Proprietors, tho' timely warned, have omitted to withdraw them. See *HENNIGES* and *OBRECHT*.

VI. (1) Neither do the Ships of Friends become lawful Prize, on the Account of the Enemies Goods, unless it is done by the Consent of the Owners of the Ship, *L. Cotem. D. De publicanis.*

RODERICUS ZUARIUS, *Lib. De usu Maris*, *Confil. II.* Num. 6. And so I take the Laws of *France* should be understood, which made Prize of the Ships on Account of the Goods, and of the Goods on Account of the Ships; such as those of *Francis I.* made in the Year 1543. *Cap. XLII.* *Henry III.* in the Year 1584. in the Month of *March*, *Cap. LXIX.* the Law of *Portugal*, *B. I.* *Tit. XVIII.* otherwise the Goods only are made Prize. *Meursius Danic.* *B. II.* So in the War between the *Venetians* and *Genoese*, the Ships of the *Grecians* were searched, and the Enemies taken out, if any were there. *GREGORAS*, *B. IX.* See also *CRANTZIUS*, *Saxon. II.* and *ALBERICK GENTILIS*, *Advocat. Hispan.* *I. 20.* *GROTIUS*.

VII. (1) See Note 2. upon Paragraph I. of this Chapter.

2 So *Rezin*, King of *Syria*, having taken the City *Eloth*, which had belonged to the *Idumæans*, gave it to be inhabited, not by the *Idumæans* but the *Syrians*, according to the Reading of the *Masoreths*. 2 Kings xvi. 6. *GROTIUS*.

But that Reading is faulty. See Mr. *LE CLERC*'s Commentary upon the Text.

3 *Lib. VI. Cap. XXXVI.* p. 355. *Edit. Oxon.* 369. *Sylburg.*

4 *PLUTARCH* relating in what Manner the *Veii* had commenced Hostilities against the *Romans*, under Pretext that the latter had refused to restore the City of *Fidenæ*, to which they pretended to have a Right; observes, that this was both unjust and ridiculous, because the *Veii* had not defended *Fidenæ*, and had suffered the *Romans* to make a Conquest of it. *Vit. Romul.* (p. 33. *B. Vol. I. Edit. Wech.*) *GROTIUS*.

by returning them to those that lost them. Nay, those very Lands we ought not only to communicate to those Citizens now alive, but to leave them to our Posterity, instead of parting with what we have, and treating ourselves like Enemies. This also is plain from the Answer the Romans gave the *Aurunci*, ⁵ We Romans think it just, that whatsoever a Man wins by his Valour from his Enemies, he may leave to his Children, as being his own by a very good Title. In another Place, the Romans answer the ⁶ *Volsci* thus, But we account those our best Estates which we conquer from our Enemy; since they are ours, not by our own Laws, but a Law derived rather from the Gods than Men, and allowed by the constant Practice of all Nations, both Greeks and Barbarians; we shall therefore yield up nothing cowardly of what we have purchased valiantly; for it would be a great Disgrace to us, if either through Fear or Folly we should quit what we have won by Bravery and Valour. So in the Answer of the *Samnites*, ⁷ We have gained this by War, which Law of Acquisition is the justest.

3. *Livy*, speaking of Land near *Luna*, divided by the Romans, says, ⁸ That Land had been taken from the *Ligurians*, and it had been the *Hetrurians* before it was the *Ligurians*. By this Right the Romans held *Syria*, as ⁹ *Appian* observes, not restoring it to *Antiochus Pius*, from whom *Tigranes*, an Enemy to the Romans, had taken it; and *Justin*, out of *Trogus*, brings in *Pompey* returning this Answer to the same *Antiochus*, ¹⁰ As he took not the Kingdom from him whilst he was in Possession of it, so neither would he, after he had yielded up his Right to *Tigranes*, restore to him a Kingdom which he could not keep. So those Parts of *Gallia* which the *Cimbri* had taken from the *Gauls*, ¹¹ the Romans afterwards taking, ¹² held as their own.

VIII. But here is a more difficult Question, to whom do the Spoils taken from the Enemy in a publick and solemn War belong, whether to the People in general, or to private Persons, of and among ¹ the People? The modern Expositors of the Law here vary very much in their Opinions; for most of them finding ² in the Roman Law, ³ that the Things taken become the Captors; and in the Canon Law, ⁴ that the Spoils are to be divided by publick Determination, do say, one after another, (as is usual) that tho' principally, and by original Right, the Captor has the best Title to them, yet they are to be brought to the General, and he is to

VIII. That Things taken from the Enemy are not always theirs that take them.

² Bart. ad leg. 28. Dig. de Captiv. & Postlim. *Alexand.* & *Tafon* ad leg. 1. Dig. de adquir. possess. *Angel.* ad Inst. de rerum divis. § 17. *Panorm.* ad Decret. de Jurejur. c. 29. *Thom. Gramm.* Decif. Neapol. 71. n. 17. *Martin. Laud.* de bello, quæst. 4.

⁵ *DIONYSIUS HALICARNASSENSIS*, *Antiq. Rom.* Lib. VI. Cap. XXXII. (p. 352. Edit. Oxon. 366. Sylb.) This Example is not to the Purpose. The Romans having overcome the *Volsci Ecetrani*, and deprived them of their Lands, the *Volsci Aurunci* demanded their being restored to them.

⁶ *DIONYSIUS HALICARNASSENSIS*, *Lib.* VIII. Cap. X. p. 470. Edit. Oxon. (488. Sylb.) The *Volsci* demanded only the Lands and Towns which the Romans themselves had taken from them. So that this is also an Example extra oleas.

⁷ Excerpt. Legat. (Cap. II. p. 705.)

Of all these Examples there is not one which agrees with the Case in Question. The *Volsci* demanded Restitution of Lands, which the Romans had taken from themselves. *DIONYSIUS HALICARNASSENSIS*, *Lib.* VI. Cap. XXXIV. *Fregellæ* was a City of the *Volscians* which had been taken and demolished by the *Samnites*. The Romans rebuilt it, and settled a Colony in it. See *LIVY*, *Lib.* VIII. Cap. XXIII. Num. 6. This occasioned the Complaint of the *Samnites*. The Affair of *Fidenæ* is evidently foreign to the Subject. We do not find in all these Instances any Thing taken from an Enemy, who had before taken it from others by the Right of War.

⁸ Et *Lunam* coloniam eodem anno, &c. *LIVY*, *Lib.* XLI. Cap. XVII. Num. 4, 5, 6.

⁹ *Bell. Mithridatic.* (p. 404. Edit. Amstel. 244. Edit. H. Steph.) The same Historian says in another Place, that *Pompey* made this the Pretext for depriving a Prince of his Dominions, of whom

the Roman People had no Reason to complain. *Bell. Syriac.* (p. 190, 191. Edit. Amstel. 119. H. Steph.) *Antiochus* himself acknowledges in *POLYBIUS*, That Conquest is the best of Acquisitions. Excerpt. Legat. Cap. LXXII. *GROTIUS*.

Our Author confounds here two *Antiochus's*; for he of whom he speaks in the latter Part of this Note, is not *Antiochus Pius*, but *Antiochus*, surnamed the Great.

¹⁰ Igitur ut habenti regnum non ademerit, &c. *Lib.* XL. Cap. II. Num. 4.

¹¹ It was after *Marius* had defeated the *Cimbri*, that *Apuleius*, Tribune of the People, proposed the Distribution of those conquered Lands. *APPIAN.* *Bell. Civil.* p. 625. Edit. Amstel. (367. H. Steph.)

¹² The antient *Franks* did not restore to the Romans the Lands in *Italy*, surrendered to them by the *Goths*. *PROCOPIUS*, *Gotthic.* Lib. IV. See also what the King of *Sweden* says, in Relation to his Dispute with the *Poles* about *Livonia*. *THUANUS*, *Lib.* LXXVI. upon the Year 1582. *GROTIUS*.

VIII. (1) As Strangers in the Service of the State.

² The Law is cited above, § 2. Note 20.

³ The Canons on which this is founded, consist of two Passages; the one from *ISIDORUS*, whom we shall cite below after our Author, § 17. Note 13. the other from St. *AMBROSE*, who will be also cited, § 23. Num. 2. Note 8.

distribute them among the Soldiers. Which Opinion, not less common than false, I shall take the more Care to confute, that we may see how unsafe it is in such Controversies to rely upon the Authority of those Doctors. There is no Doubt, but the Consent of Nations might have established the one or the other of these two Rules, either, that the Things taken should belong to the People that bear the Charge of the Wars, or to the first-Captor; ⁴ but the Question is, what Nations really intended to establish in this Case? And I affirm, that their Intention was, that the Goods of one Enemy, with Respect to another, should be considered as Things ⁵ without a Proprietor; as we have before ⁶ explained, from the Words of *Nerva* the Son.

IX. That naturally both Possession and Property may be acquired by another.

IX. 1. The Things that are Nobody's, indeed become the Captor's; but they may be called Captors, who employ others to take them, as well as they who take them themselves. So they who are employed by others to catch Fish, Fowl, Deer, or Pearls; as Slaves, Children not emancipated, and sometimes Freemen, take them for those that employ them. *Modestinus* ¹ the Lawyer said well, *Whatsoever is naturally gained, as Possession is, we may gain by any one whom we will appoint to do it for us.* And also *Paulus*, ² *We acquire Possession by the Mind, and by the Body; the Mind, I mean our own, but the Body may be either our own or another's.* And in another Place, ³ *Possession may be taken by an Attorney, Guardian, or Trustee; provided it be done with the Design of doing it for us, and in our Name.* So among the *Greeks*, they that overcame in the ⁴ *Olympick Games*, gained the Prizes, not for themselves, but for them that sent them. The Reason is, because one Man may make Use of another, as his Instrument, if both are willing, as we have declared in another Place. (*B. i. Chap. v. § 3.*)

2. Wherefore the Difference put between Freemen ⁵ and Slaves, in Respect to Acquisitions, regards only the Civil Law, and properly belongs to Civil Acquisitions, as appears from the afore-quoted Place of ⁶ *Modestinus*. And yet the Emperor *Severus* ⁷ brought these afterwards nearer to the Pattern of natural ones;

4 Our Author confounds here different Things: The Question does not relate to the Law of Nations, properly so called; for in whatever Manner that Law is understood, and whatever it be founded on, it ought to regard the Affairs in Dispute between State and State. Now, whether the Booty belongs to the Sovereign who makes War, or the Generals of Armies, or the Troops, or other Persons, that take any Thing from the Enemy, it signifies nothing either to the Enemy or other States. What is taken is taken; and if it be good Prize, it is of very small Consequence to those who have lost it, in whose Hands it remains. As to neutral People, it suffices, that those of them who have bought, or any other Way acquired, a moveable Thing taken in War, cannot be molested, or prosecuted, upon that Account. See above, § 1. Note 1. The Truth is, the Regulations and Customs upon this Head are of publick Right. And their Conformity in many Countries implies no more than a civil Right common to several States separately, which our Author distinguishes elsewhere from his Law of Nations. See *B. II. Chap. III. § 5. Num. 2. and Chap. VIII. § 26.*

5 Without supposing any general Consent of Nations in this Place, it suffices to say, that the State of Hostility gives a Right of taking the Things which belong to an Enemy, in the same Manner as if they had no Proprietor, and as if the first Occupant were entitled to them; because the Law which forbids the taking away the Effects of others, ceases between Enemies, merely on Account of their being Enemies.

6 In Paragraph II. of this Chapter, *Num. 3. Note 23.*

IX. (1) *Quod naturaliter acquiritur, &c.* Digest. Lib. XLI. Tit. I. *De adquir. rerum domin. Leg. LIII.*

2 *Possessionem adquirimus, &c.* Recept. Sentent. Lib. V. Tit. II. *De Usucap. § 1.*

3 *Per Procuratorem, Tutorem, &c.* Digest. Lib. XLI. Tit. II. *De adquir. vel amitt. possess. Leg. I. § 20.*

4 See PETER DU FAURE'S *Agonisticon*. Lib. I. Cap. III. p. 14, 15. and Cap. XXVI. p. 170. *Ed. Ludg.* 1595. The Example which the learned GRONOVIVS alledges here, does not seem well applied. It is likely that *Alexander*, the Son of *Amynias*, King of *Macedon*, entered himself as a Combatant in the *Olympick Games*, since *Justin*, who is quoted, gives this Circumstance as a Proof that Nature had adorned that Prince with every excellent Quality. *Cui [Alexandro] tanta omnium virtutum, &c.* Lib. VII. Cap. II. Num. 14. But the same Commentator adds another Example, very proper here, taken from the *Romans*, amongst whom a Person might obtain the Prize in the Games of the *Circus*, either by himself, or the Slaves he sent thither: *Namque ad certamina in Circum per ludos & ipsi descendebant, & servos suos quique mittebant, &c.* PLINY, *Hist. Natur.* Lib. XXI. Cap. III.

5 Because, according to the Roman Law, Acquisitions were not made for a Man by another, unless that other was under his Power as a Slave, real or supposed, or a Son not emancipated. *Ex his itaque apparet, per liberos homines, &c.* Institut. Lib. II. Cap. IX. *Per quas personas, &c.* § 5.

6 See Note 1. on this Paragraph. The Words there recited are preceded by the following, *Ea, quæ civiliter adquiruntur, per eos, qui in potestate nostra sunt, adquirimus, veluti stipulationem: Quod naturaliter, &c.*

7 He decreed, that the Possession of a Thing might be acquired by the Means of any free Person, even tho' we did not know that he had taken Possession of it in our Name; so that the Moment we come to know it, the Time of Prescription

ones; not only for the Good of the Publick, as he himself acknowledges, but also to follow the Rules of Right and Equity; therefore, setting aside the civil Right, that Saying holds true, that what a Man does himself, for himself, he may also do by another, and it is the same Thing^s to do it by another as by himself.

X. We must then here distinguish between the Acts which in a War are truly publick, and private Acts, that are done by the Occasion of a publick War. By these private Acts the Goods of an Enemy principally and directly belong to the private Persons, by the other to the People. Upon this Principle of the Right of Nations *Scipio* argues with² *Masinissa*, in *Livy*, *Syphax has been vanquished and taken, by the Conduct of the Romans; therefore he, his Wife, Kingdom, Lands, Towns, and their Inhabitants, and, in a Word, whatsoever belonged to Syphax, is become lawful Prize to the People of Rome.* And thus did *Antiochus* the Great plead, that *Cælo-Syria* did of Right belong to *Seleucus*, and not to *Ptolemy*, for that *Seleucus* maintained the War, to whom *Ptolemy* was but an Assistant, according to *Polybius*, in the fifth Book.

X. A Distinction of Actions done in War into publick and private.

XI. 1. Immoveable Goods are not usually taken, but by some publick Act, as by bringing in an Army, or by planting of Garrisons; therefore, as *Pomponius* decided, *Lands taken from the Enemy fall to the State*, that is, as he explains it, *Is not Part of the Booty*,² strictly taken. Thus *Salomo*, a Lieutenant-General, in *Procopius*,³ *That Prisoners, and all other Moveables, should be a Booty to the Soldiers, is not unreasonable*, (so it be done by publick Grant, as we shall hereafter explain it) *but that the Lands should belong to the Emperor, and the Roman Empire.*

XI. The Land taken is the People's, or his that maintains the War.

2. So among the⁴ *Hebrews* and *Lacedæmonians*,⁵ Land taken in War was divided by Lot: Thus the *Romans* either kept the Lands taken in War to let out, (a small Part of it sometimes being left out of Civility to the former Owners) or sold them, or assigned them to Colonies, or made them tributary; whereof you may find many Testimonies in Laws, Histories, and Treatises on Surveying.⁶ *Appian*

tion commenced. *Per liberam personam ignorantique, &c.* Code, Lib. VII. Tit. XXXII. *De adquir. & retin. possess.* Leg. I. See *Cujas* upon this Law, Vol. IX. Opp. p. 1049, 1050. and the *Receptæ Sententiæ* of *Julius Paulus*, Lib. V. Tit. II. § 2. with Mr. *Schulting's* Note, *Jurisp. Ante-Just.* p. 434. This had been established before *Severus*, by the Decisions of the Civilians. See *Janus a Costa*, upon the *Institutes*, Lib. II. Tit. IX. § 6. Our Author cited here one Title in the *Codex* for another.

8 These are two Rules in the *Canon Law* quoted in the Margin by our Author, *Potest quis per alium, quod potest facere per seipsum.* Decretal. in VI. *De Reg. Juris*, Reg. LXVIII. *Qui facit per alium, est perinde, ac si faciat per seipsum.* Reg. LXXII.

X. (1) This Decision has been criticised not without Reason in my Opinion. Every publick War being made by the Authority of the People, or their supreme Magistrate, all the Right private Persons can have to Things taken from the Enemy, is originally derived from them: The Sovereign's Consent, either express or tacit, is always necessary in this Case. See *Ziegler* upon this Place, and *Pufendorf's Law of Nature and Nations*, Lib. VIII. Cap. VI. § 18.

2 *Syphax Populi Romani auspiciis, &c.* Lib. XXX. Cap. XIV. Num. 9. Neither this Example, nor the following, have any Thing in them, that tends to establish the Distinction of our Author.

XI. (1) *Verum est, expulsis hostibus, &c.* Digest. Lib. XLIX. Tit. XV. *De Captivis & Postlimin.* &c. Leg. XX.

2 That is, for a Thing which belongs to him who has taken it.

3 *Vandal.* II. See what follows there. Also (the Emperor) *Severus* gave the Lands conquered from the Enemies to the Captains and Soldiers of the Frontier Garrisons, as *Lampridius* observes. In the *Helvetic League* it was stipulated, that the Towns and Forts taken, should belong to the whole Body, as we find in many Places of *Simlar*, *De Repub. Helvetiorum.* *Grotius.*

4 This is inferred from the Manner, in which the Land of *Canaan* was divided among the *Israelites*, according to the Order which *GOD* himself had given in the Book of *Numbers* xxvi. 55. xxxiii. 54. xxxvi. 2. Our Author observed here in a Note, that among the same *Hebrews*, the King had for his Share of the Lands taken in War, as much as a whole Tribe, and refers to the Title, *De Rege*, of the *Talmud.* See *Selden*, *De jure Natur. & Gent. secund. Hebr.* Lib. VI. Cap. XVI. p. 785.

5 I am very much deceived, if our Author, trusting to his Memory, has not confounded the *Lacedæmonians* with the *Athenians*, in this Place. The Scholiast upon *Aristophanes* says, that it was the Custom with the *Athenians*, when they had taken an Enemy's City, and expelled the ancient Inhabitants, to distribute the Lands by Lot amongst the Victors. *In Nub.* ver. 203. See the late Baron *Spanheim* upon that Passage. Long before him, *Thomas Gataker* had cited this Passage, amongst many others, in his *Historical and Theological Treatise upon the Nature and Use of Lots*, writ in *English*, Chap. IV. p. 76. But neither the one nor the other mention the *Lacedæmonians*; tho' the latter, who was a Man of very extensive Reading, made it his Business to collect all he could find upon that Head, in the Customs of the *Greeks*, *Romans*, and other Nations.

6 Page 604. Edit. *Amstel.* (353. *H. Steph.*)

in his first Book of the Civil War tells us, *When the Romans had conquered Italy, they took away Part of their Lands.* And in his ⁷ second Book, *Having subdued their Enemies, they did not take away all their Lands, but a Part.* And Cicero ⁸ observes, that their Generals having conquered an Enemy, sometimes consecrated his Lands, but by the Decree of the People.

XII. Things moveable, either with or without Life, taken by a private Act, are the Captor's.

XII. 1. But Things moveable, whether with or without Life, are either taken in publick Service, or out of it. If they are not taken in publick Service, ¹ they are the private Captor's. And hither we may refer that of *Celsus*, ² *Whatever among us was the Enemy's, belongs not to the State, but to the prior Occupant.* Whatever is among us, that is, is found with us in the Beginning of the War. For the same was observed of Persons, when they were in this Case considered as Goods taken. There is a remarkable Passage in *Tryphoninus*, to this Purpose, ³ *But they who in Times of Peace came to dwell in another Country, upon the sudden breaking out of a War, unfortunately become the Slaves of those who are become their Enemies;* where we may observe, that the Lawyer attributes this to Fate, because they fell into Bondage, *without any Merit of their own.* For it is common to ascribe such Things to Fate. So that of *Nævius*, *The Metelli were made Consuls of Rome by Fate,* that is, without any Merit of their own.

2. Thus it is, when Soldiers take any Thing from their Enemies when they are not upon Duty, or executing the Commands of their Captain, but doing what any other Person might do, or by a bare Permission, what is thus taken, is lawful Prize to the Captors, because they do not take them as Servants of the Publick. Such are the Spoils taken in a single Combat, and in Excursions, made freely, without Command, into an Enemy's Country, at a Distance from the Army, (ten Miles, according to the *Roman Law*, as we shall see presently) which the *Italians* call *Correria*, and distinguish it from *Bottino*, Booty.

XIII. Unless the Civil Law otherwise ordain.

XIII. And whereas we say, that by the Law of Nations, whatsoever is thus gained, becomes directly the Captor's, it is to be so understood, that this was the ¹ Law of Nations, before any Thing was decreed in this Case by the Civil Law. For every State or People may otherwise determine of it among themselves, and prevent the Right of private Men, as we see done in many Places concerning wild Beasts and Fowl. So it may be ordained by Law, that whatsoever Goods of the Enemies are found among us, should be confiscated to the State.

XIV. What is taken by a publick Act is the Publick's, or his that maintains the War.

XIV. 1. But as to those Things that a Man takes in a military Expedition, the Case is very different. For here every Soldier represents the Body of the State, and executes the Business of the whole political Body: Wherefore (if the Civil Law does not otherwise provide) the State acquires both the Possession and Property of Things taken, which it may transfer to whom it pleases; and because this directly contradicts the common Opinion, I find myself obliged to enlarge upon it more than usual, and to prove it from the Examples of the most celebrated Nations.

⁷ Page 840. (516. Edit. H. Steph.)

⁸ *Consecrabantur agri, &c.* Orat. de domo sua ad Pontifices, Cap. XLIX.

XII. (1) Admitting the Sovereign's express or tacit Consent.

² *Et quæ res hostiles apud nos sunt, &c.* Digest. Lib. XLII. Tit. I. De acquir. rerum Domin. Leg. LI.

³ *Verum in pace, qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur, apud quos jam hostes suo fato* [as it must be read and not *facto* or *pacto*, as the Editions have it] *deprehenduntur.* Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin. &c. Leg. XII. princ. The Grammarian *Servius* opposes Destiny to Merit, when he says, that *VIRGIL* takes Care, in relating the Adventures of the *Trojans*, to attribute every Thing to the Destinies, and nothing to the Faults of the Exiles. *ACTI FATIS, Si satis, nulla Junonis invidia est: Si odio Junonis, quomodo acti satis?*

Sed hoc ipsum Junonis odium fatale est: Laborat enim VIRGILIUS nil Trojanorum meritis, sed omnia fati adscribere. In *Æneid.* (ver. 32.) *GROTIUS.*

The Passage of *NÆVIUS*, which our Author alleges here, by Way of Example, is cited, as *GRONOVIVS* informs us, by the Grammarian *TERENTIANUS*, 2439. Edit. *Putsch.* As to the Correction of the Word *Fato*, it is exactly according to the ancient Editions of the Body of Law, and some of the modern ones. Mr. *BYNCKERSHOEK*, who makes the Remark, prefers *facto* however, upon the Authority of the *Florence Manuscript*, and explains the Passage with some small Difference, by changing the Punctuation. *Observ. Jur. Roman.* Lib. IV. Cap. XIV. He confesses at the same Time, that *Fato* makes a very good Sense, and indeed the Thing is little important at Bottom.

XIII. (1) See above, § 8. Note 4.

2. I shall begin with the *Greeks*, whose Custom *Homer*¹ describes in several Places.

Ἄλλα τὰ μὲν πολίων ἐξεπράθομεν, τὰ δέδαται.

The Cities sack'd, the Spoils we did divide.

Achilles, in the same Poet, recounting the Cities which he had taken himself, says,

Ἐτάων ἐν πάσῃων, &c.

*The worthiest Spoils with our own Hands we took,
And rich they were: We bore them instantly
To Agamemnon: He behind the Ships
Divided some; but far the most reserv'd.*

For here we must look upon *Agamemnon*, partly as Head of all *Greece* at that Time, and so representing the whole Body of the People, by which Right he divided the Spoil, but with the Advice of his Council; and partly as General, and so out of that which was publick, he claimed a greater Share than others to himself. Therefore *Achilles* thus addresses *Agamemnon*,

Οὐ μὲν σοὶ πῶς ἴσον ἔχω γέρας, &c.

*I don't pretend to equal Share with you,
When any Trojan Town we do subdue.*

And in another Place *Agamemnon*, by the Advice of his Council,⁴ offers to *Achilles*, a Ship laden with Gold and Silver, and twenty Women, as his Share of the Spoil. When *Troy* was taken, as *Virgil* relates, *Æneid* ii. 5.

*There Phœnix and Ulysses watch the Prey,
And thither all the Wealth of Troy convey:
The Spoils which they from ransack'd Houses brought,
And golden Bowls from burning Altars caught:
The Tables of the Gods, the purple Vests,
The People's Treasure, and the Pomp of Priests.* Dryden.

So, long after, ^a *Aristides* faithfully watched the Booty taken at the Battle of *Marathon*.^a *Plut.* in ejus vit. And after the Battle at *Platææ*, it was strictly forbidden, that any Man should take to himself any Part of the Spoil; and ^b afterwards it was distributed among the People, according to every one's Deserts.^b *Herod.* l. 9. The *Athenians* being subdued, ^c *Lysander* brought the Spoil into the publick Domain. And the *Spartans*^c *Plut.* in ejus vit. had publick Offices, called *Λαφυροπῶλαι*,⁶ appointed to make Portsale of all the Prizes taken in War.

XIV. (1) *Iliad*. Lib. I. ver. 125.

2 *Lib.* IX. ver. 330, &c. seq.

I cannot help observing here, that *Madam Dacier* has manifestly changed the Sense of *HOMER*, in ver. 334, 335. of this Passage, by translating them thus, *Retenoit le reste pour lui, & en faisoit, comme il lui plaisoit, des presents aux Generaux, & aux Princes*. "Reserved the Rest for himself, and made Presents out of it, as he thought fit, to the Princes and Generals." Upon which she supposes, without other Proof, that the King distributed to such as he thought fit to distinguish, all the Booty he had reserved for himself. But the Poet evidently distinguishes the Part *Agamemnon* kept for himself, from that which he took for Presents to the Generals, and the Leaders of the Army; which makes that Portion he left for the Soldiers still the less.

3 *Lib.* I. ver. 163, 164.

4 *Lib.* IX. ver. 279, &c. seq.

5 *Et jam porticibus vacuis, &c.*
Æneid. Lib. II. ver. 761. &c. seq.

6 See *XENOPHON*, in his Treatise upon the *Lacedemonian Government*, Cap. XIII. Num. 11. *Edit.* Oxon. Our Author observed here, that whilst *Agésilas* was in *Asia*, *Spithridates*, who had come over to his Party, having taken the Camp of *Pharnabazus*, converted the Booty to his own Use; but *Eriepides*, the *Lacedemonian*, having caused strict Search to be made on that Account, obliged *Spithridates* to run away. This *PLUTARCH* relates in the Life of *Agésilas*, p. 601. E.

^a Homer, Iliad
10.

^c Plin. 1. 23.

^d Plut. in ejus

Vit. Curt. 1. 4.

Diod. 1. 17.

Strabo, 1. 15.

^e Diod. 1. 13.

^f Livy, 1. 23.

3. If we pass to *Asia*, *Virgil* tells us, that the *Trojans* used to divide the Spoil by Lot; as is usual where Things held in common are to be divided among many. Otherwise the General had the dividing the Spoil, by which Right *Hector*, upon *Dolon's* Request, ^d promised to give him *Achilles's* Horses; whereby we may perceive that this Right of gaining Property was not in the sole taking of the Thing. The Spoil taken in *Asia* was brought to ^e *Cyrus*, being Conqueror, and so afterwards to ^f *Alexander*. If we look into *Africk* we there find the same Custom; so the Things taken at ^g *Agrigentum*, and at the Battle of ^h *Cannæ*, and elsewhere, were sent to *Carthage*. Among the old *Franks*, as we find in the History of *Gregorius Turonensis*, whatsoever was taken in War ⁸ was divided by Lot. Neither had the King any other Share than what the Lot gave him.

4. But by how much the *Romans* exceeded all other Nations in the military Art, so much the more do they deserve our Consideration of the Examples they furnish us with, in Regard to the Subject we are now upon. *Dionysius Halicarnassensis*, a most exact Observer of the *Roman* Customs, thus instructs in this Case, ⁹ *Τὰ ἐκ τῶν πολεμίων λάφυρα, &c.* *Whatsoever their Valour has taken from the Enemy in War, the Law has decreed to be publick, so that not only the private Soldiers are not Proprietors thereof, but not even the General himself; the Quæstor causes the whole to be sold, and brings the Produce of it into the publick Treasury.* These are the Words of those that accused *Coriolanus*, who, to render him odious, do not express themselves altogether exactly.

XV. Yet in such Things some Power was left to the Will of the General.

^a See Simler, De Rep. Helvetior.

XV. For it is true that the People are the Right ^a Owners of the Spoil. ¹ Yet it is as true, that the Power of disposing of it was, in the Times of the Republick, left ² to the General; yet so that he was to give an Account of it to the People. *L. Æmilius* says, in *Livy*, ³ that *Cities taken by the Sword, not those that surrendered, were pillaged; but this at the Will of the General, not of the Soldiers.* Yet this Power, which Custom had bestowed on the Generals, they themselves have sometimes, to take away all Suspicion, referred to the Senate, as *Camillus* ⁴ did; and they that have retained it, are found to have disposed it to several Uses, either for Religion, Reputation, or Ambition.

XVI. Who either brings 'em to the publick Treasury;

XVI. 1. But they who desired to be, or be thought most upright, ¹ would not at all meddle with the Prey; but whether it were in Money, they ordered the Quæstor

⁷ *Si vero capere Italiam, sceptrisque potiri Contigerit victori, & prædæ ducere sortem, &c.*
Æneid. Lib. IX. ver. 267, 268.

⁸ You have this in *TURONENSIS, B. II. Chap. XXVII.* *AYMON, Lib. I. Cap. XII.* and in the *Epitome* published by *FREHER, Cap. IX.* This was also an antient Custom of other Nations. *SERVIVS*, upon the third *Æneid.* *Sortitus non pertulit ullos. Because the Prisoners and Spoil were divided among the Conquerors by Lot.* And upon *prædæ ducere sortem.* See *JOHANNES MAGNUS*, of bestowing the Prey in common, and of clearing by Oath, among the *Swedes* and *Goths*, *Lib. XI. Cap. II. GROTIVS.*

In the Passage of the History of *JOHANNES MAGNUS*, referred to by our Author, there is not a Word upon the Subject for which he quotes it. Nor do I find any Thing said of it, in any other Part of that History, or in that of *OLAUS MAGNUS* his Brother, and Successor in the Archbishoprick of *Upsal*, intitled *Historiæ Septentrionalium Gentium Breviarium*; or in the *Historia Suecorum Gothorumque*, of another Historian of the same Name, *ERICUS OLAUS*. I am afraid our Author has mistaken one Name for another in this Place.

⁹ *Antiq. Roman. Lib. VII. Cap. LXIII. p. 450. Edit. Oxon. (467, 468. Sylburg.)*

XV. (1) The learned *RHABOD HERMAN SCHELIUS*, in his Tract *De Præda*, which is amongst those that follow his Commentary upon

HYGINUS and *POLYBIUS, De Castris Romanorum*, (p. 253. & seq. Edit. Amstel. 1660.) refutes *DIONYSIVS HALICARNASSENSIS* in this Place, without mentioning our Author, who long before him had made the same Criticism, and treated historically the Point of Antiquity in Question, better than any Body else, even since, has done.

² *POLYBIUS* very much commends the Disinterestedness of *Paulus Æmilius*, who, when he had made himself Master of the whole Kingdom of *Macedonia*, by the Defeat of King *Perseus*, and had full Power to dispose of every Thing as he thought fit, coveted nothing in the least. *Excerpt. Peiresc. De Virtut. & Vit. (p. 1454. Edit. Amstel.) GROTIVS.*

³ *Æmilius primo resistere, &c. Lib. XXXVII. Cap. XXXII. Num. 12.*

⁴ *Nec duci [Camillo] qui ad Senatum, &c. Livy, Lib. V. Cap. XXII. Num. 1.*

XVI. (1) Thus *Lucius Mummius* filled all *Italy* with the Statues and Pictures he had taken in the Plunder of *Corinth*, none of which were carried to his own House; as the anonymous Author of the *Lives of illustrious Men*, (supposed to be *AURELIUS VICTOR*) informs us. *Mummius Corinthum signis tabulisque spoliavit, quibus quum totam implevit Italiam, in domum suam nihil contulit.* (Cap. LX. Num. 3.) *PLUTARCH*, in the Life of *Paulus Æmilius*, of whom we have spoken, (Note 2. upon the preceding Paragraph) says, that his Generosity and Greatness of Soul was highly extolled, because he would not so much as see the Gold

Quæstor of the People to receive it, or other Goods, the Quæstor was commanded to sell them publickly, and the Money arising from thence (called *Manubiæ*, ² Spoils, as *Favorinus* observes, in *Gellius*) was, by the Quæstor, brought into the Treasury; but if the Expedition was such as deserved the Honours of a Triumph, it was first publickly shewed. And ³ *Livy* says of *C. Valerius* the Consul, *There was but a little Spoil (because they had been often plundered, and had secured most of their Goods in Places of Safety); this being publickly sold, the Consul ordered the Quæstors to put the Money into the Treasury.* *Pompey* did the same, of whom *Velleius* ⁴ records, *He gave the Money that he had taken from Tigranes, as his Custom was, to the Quæstor, and had it registred.* And so *M. Tully*, ⁵ in his Letter to *Salust*, writes of himself, *Besides the Quæstors of the City, that is, the People of Rome, no Man has or shall touch the Prey that I have taken.* And this was generally done in the antient and best Times of the Commonwealth, to which *Plautus* alluding, says thus,

⁶ *Nunc hanc prædam omnem jam ad Quæstorem deferam.*

Now all this Spoil I'll to the Quæstor bring.

And likewise of Prisoners,

⁷ *Quos emi de præda de Quæstoribus.*

Whom from the Quæstors of the Spoil I bought.

2. But other Generals did without a Quæstor sell the Spoil, and put the Money into the Treasury, as we may gather from ⁸ what follows in the Passage of *Dionysius Halicarnassensis*, whom we have cited a little above. So King *Tarquin*, when he had conquered the *Sabins*, ^a sent the Prey and Prisoners to Rome. So *Romulus* ^a *Livy*, l. 1. and *Veturius* the Consuls ^b sold the Spoil to supply the Treasury, the Army repining ^b *Livy*, l. 3. at it. But there is nothing more common, than to find in History an Account of the Riches that such or such a General, either by himself or the Quæstor, brought into the Treasury from the Triumphs over *Italy*, *Africk*, *Asia*, *Gaul* and *Spain*: So that it would be needless to heap together a great many Examples. But this is more remarkable, that the Spoil, or Part of it, was sometimes given to the Gods, sometimes to the Soldiers, and sometimes to others. To the Gods were given either the Spoils themselves, as those which *Romulus* ^c hung up to *Jupiter Feretrius*, ^c *Dion. Hal.* or turned into Money, as ^d *Tarquin the Proud* built the Temple of *Jupiter* on the ^d *Livy*, l. 1. *Tarpeian Hill*, with the Money raised from the Spoils of the City *Pometia*.

XVII. 1. To give the Spoil to the Soldiers, the old Romans thought a Sign of Ambition. So *Sextus* the Son of *Tarquin the Proud*, when retired to *Gabii*, is said to have distributed the Prey among the Soldiers, ¹ to make himself the more powerful. ² *Appius Claudius* in the Senate, declared such Largeesses to be new, prodigal, and inconsiderate.

But the Spoil given to the Soldiers is either divided, or left to be pillaged. It may be divided, either instead of Pay, ³ or to reward Merit. *Appius Claudius* ⁴ was

Gold and Silver that had been taken from King *Perseus*, but ordered it all to be paid to the Treasurers of the Republick, [the Quæstors.] (p. 270. Vol. I. Edit. *Wichel*.) GROTIVS.

2 *Præda dicitur corpora ipsa rerum, quæ capta sunt: Manubiæ vero adpellatæ sunt Pecunia a Quæstore ex venditione prædæ redacta.* Noct. Attic. Lib. XIII. Cap. XXIV. GROTIVS.

3 *Prædæ ex assiduâ populationibus, &c.* Lib. IV. Cap. LVII. Num. 10.

4 *Quæ omnis [pecunia Tigranis] scuti Pompejo moris erat, &c.* VELLEJUS PATERCULUS, Lib. II. (Cap. XXXVII.) *Pompey* generally acted in that Manner, but not always. See the Passage of LUCAN, cited in the next Paragraph. (Num. 7.) GROTIVS.

5 *De præda mea, præter Quæstores urbanos, &c.* Lib. II. Epist. ad Famil. XVII. p. 113. Edit. *Græv. maj.*

6 *Bacchid.* Act. IV. Scen. IX. ver. 152.

7 *Captiv.* Act. I. Scen. II. ver. 1, 2.

8 Where *Decius* says, in accusing *Coriolanus*, that he had neither delivered the Booty to the Quæstor, nor sold it himself, in Order that the Money might be laid up in the publick Treasury: *Antiq. Roman.* Lib. VII. Cap. LXIII.

XVII. (1) *Apud milites vero, obeundo pericula, &c.* Lib. I. Cap. LIV. Num. 4.

2 *Alterâ [sententiâ] Appii, &c.* Idem. Lib. V. Cap. XX. Num. 5.

3 JOSEPHUS tells us this was practised among the Hebrews, B. III. *Antiq. Histor.* GROTIVS.

Our

^a Lib. 10.

⁴ was for giving it in lieu of Pay; if it could not be sold, and the Money brought into the Treasury. ^a Polybius describes exactly the Manner of this Distribution, namely, that one Part of the Army, the Half at the most, was sent out in the Day-Time, ⁵ or in the Night, to fetch in the Spoil, who were ordered to bring all they found into the Camp, that it might be equally divided by the Tribunes, Shares being likewise allowed to them who staid in the Camp (which King David ⁶ made a Law among the Hebrews, 1 Sam. xxx. 24, 25.) and also to those, who either by Sickness, or because they were sent elsewhere, were then absent.

^b Livy, l. 45.

2. Sometimes the Spoil was turned into Money, and that, in lieu of it, ^b was given to the Soldiers, which was often done in Triumphs. The Proportions I find thus, a single Share to a Foot Soldier; a double Share to a ⁷ Centurion or Captain; a treble to a Trooper; sometimes a single ⁸ one to a Foot Soldier, and double to a Trooper; at other Times a Centurion had double the Share of a Foot Soldier, and the Tribune, as also ⁹ a Trooper, quadruple. There was also sometimes Regard had to their Merit, as Marcius, because he had behaved himself gallantly, was particularly rewarded by Posthumius, out of the Spoils taken at ¹⁰ Corioli.

^c See Leunclav. Hist. Turc.

3. Which Way soever the Spoil was divided, ^c the General ¹¹ was allowed to take to himself ἐξαιρέσιον, A choice Part, what he pleased; that is, what he thought was just and reasonable, ¹² which also was sometimes granted to others for their Valour.

Our Author probably infers this from the Jewish Historian's saying, that after the Defeat of the Amalekites, MOSES gave Rewards to those who had distinguished themselves by their Bravery. Cap. II. p. 76. Edit. Lips. He had just spoken of the great Booty made by the Israelites in this Victory; but all these Circumstances are not mentioned in that Part of Holy Writ, where the Defeat of the Amalekites is related. Exod. xvii.

4 In the Words of LIVY, which follow those quoted Note 2. upon this Paragraph, Si semel nefas ducerent, &c. Lib. V. Cap. XX. Num. 5.

5 In dies aut vigiliis, says our Author. This is not very conformable to his Original. It is not likely, that after the taking of a City the Soldiers should be sent out to plunder, during the whole Night. POLYBIUS only says, that every Day were drawn out, sometimes a certain Number of Soldiers from the whole Army, in Proportion to the Bigness of the City, and sometimes only so many Standards or Companies. Lib. X. Cap. XVI. p. 821. Edit. Amstel. He informs us a little before, that when Scipio had taken New-Carthage in Spain, upon the Approach of Night, he caused the Troops to desist from plundering, and to carry all the Booty already taken into the midst of the publick Market-Place; where a good Guard was posted during the Night. So that this is very contrary to the Manner in which our Author expresses himself in this Place.

6 See SELDEN, De Jure Nat. & Gent. secund. Hebr. Lib. VI. Cap. XVI. p. 784, 785.

7 Pediti in singulos, &c. LIVY, Lib. XLV. Cap. XL. Num. 5.

8 Tantaque præda fuit, &c. Idem. ibid. Cap. XXXIV. Num. 5.

9 APPIANUS ALEXANDRINUS says a Tribune and Colonel of Horse. Bell. Civil. Lib. II. (p. 803. Edit. Amst. 491. Edit. H. Steph.) GROTIUS.

This was the real Partition. I do not know where our Author had what he speaks of in the Text. It is very probable that it arose from a Mistake. He had in View this very Passage, of which his Memory altered the Sense; and he did not remember afterwards, that it had been the Foundation of what he had advanced. He cites also in the Margin, a Passage from SUETONIUS, in CÆSAR, Cap. XXXVIII. init. where accord-

ing to the best Editions, the Proportion observed in the Distribution of the Spoils, is not mentioned; and admitting the Gloss which had long remained in the Text, the Proportion would be different from all those our Author speaks of. See the last Commentators upon the Place.

10 See LIVY, (Lib. II. Cap. XXXIII.) and PLUTARCH, in the Life of Coriolanus, (p. 218. A. B. Vol. II. Edit. Wech.) GROTIUS.

There is nothing of this in LIVY. But the Reader may see DIONYSIUS HALICARNASSENSIS, Antiq. Roman. Lib. VI. Cap. XCIV.

11 There are Authors, who pretend that this Portion of the General's was most commonly called Manubiæ. The Grammarian ASCONIUS PEDIANUS is of that Number, who says, Manubiæ autem sunt præda Imperatoris, pro portione de hostibus capta. (In CICERO, Verr. Lib. I. Cap. LIX.) GROTIUS.

See GRONOVIVS's Note upon this Question of Grammar.

12 So Nestor had a Woman for his Share.

————— ὅτι οἱ Ἀχαιοὶ
ἐξέλεον —————

Whom without Lots the Greeks a Present made
To him. Iliad. Lib. XI. ver. 625, 626.

Ulysses says,

τῶν ἐξαίρεσθην Μενεσικέα, πολλὰ δ' ὀπίσσω
λάσχαον —————

I chose the fair Menecce first; the Rest
I took by Lot. ———

Odyss. Lib. XIV. ver. 232, & seq.

GROTIUS.

I know not by what Authority our Author, without taking the least Notice, has changed the last Passage, and found the proper Name of a Woman in it, instead of an Adjective, very common in HOMER, Μενεσικέα, for μενομένηα: This would rather be the Name of a Man; and there is not the least Necessity for any Alteration. Ulysses had said, that before the Trojan War he had commanded in chief in nine Expeditions by Sea, wherein he had taken to himself by Right of Preciput, what

Valour. Euripides, speaking of the Trojan Ladies, says, ¹³

Τοῖς πρῶτοις ἐξηρημέναι
Στεφῆ.

The fairest were given to the Princes.

And of *Andromache*, ¹⁴

Καὶ τῷ Ἀχιλλέως ἔλαχε πᾶσις ἐξαίρετον.

She was a Prize for great Achilles' Son.

Ascanius, in *Virgil*, ¹⁵

*Ipsū illum clypeum cristasque rubentes,
Excipiam sorti.*

*His Arms and nodding Crest,
And Shield, from Chance exempt, shall be thy Share.* Dryden.

Herodotus relates that noble Presents were given to *Pausanias* ¹⁶ after the Battle of *Plataeæ*, Women, Horses, Camels, &c. So King *Tullius* ¹⁷ chose *Ocrisia Corniculana* for himself; and *Fabricius*, ¹⁸ in his Oration to *Pyrrhus*, in *Dionysius Halicarnassensis*, speaks thus, *Of the Spoils taken in War, I might have chosen what I pleased for myself.* *Isidore*, ¹⁹ treating of the Right of War, refers to it, *The Distribution of the Spoil, according to the Quality and Services of Persons*; to which he adds, *The Portion of the General.* *Tarquin the Proud*, according to *Livy* ²⁰, would both enrich himself and gain the Affections of the People with the Spoil. *Servilius*, ²¹ in his Oration for *L. Paulus*, said, he might have made himself rich by dividing the Spoil. And some think, that only the General's Part was called *Manubiæ*, as *Asconius Pedianus* ²² for one.

4. But those Generals are more worthy of Commendation, who, quitting their own Right, have taken nothing of the Prey to themselves, as ²⁴ *Fabricius* just mentioned, *Preferring Glory even to Riches justly acquired*, which he said he did in Imitation of *Valerius Publicola*, and a few others; whom *M. Portius Cato* ²⁴ imitated in his *Spanish* Victory, saying, that he would take nothing to himself of the Prey, but barely what he eat and drunk; yet adding, that he did not blame those Generals who made Use of the Advantages allowed them; but as for himself, he had rather rival the best of Men in Virtue, than the richest in Wealth. Next to these are those Generals to be commended, who take to themselves some of the Prey, but moderately, as *Pompey* is praised by *Cato* in *Lucan*, ²⁵ who,

he thought fit, after which he had by Lot a further considerable Share.

Πεῖν μὲν τῷ Τροίης, &c.

¹³ *Troad.* ver. 32. & seq.

¹⁴ *Ibid.* (ver. 274.)

¹⁵ (*Æneid.* IX. ver. 270, 271.)

¹⁶ He had the tenth Part of the whole Booty. *Lib.* IX. *Cap.* LXXX. King *Agamemnon* had *Cassandra* by this Right of Preciput, according to *EURIPIDES*,

Ἐξαίρετόν νιν ἔλαβεν Ἀλαμίνων ἀναξ.

(*Troad.* ver. 249.) See *THUCYDIDES* upon the Portion of the Booty given in particular to *Demofthenes*, General of the *Athenians*. *Lib.* III. (*Cap.* CXIV. *Edit.* *Oxon.*) *GROTIUS*.

¹⁷ It was not *Servius Tullius*, but *Tarquinius Superbus*, for *Ocrisia* was the Mother of the former; as *GRONOVIVS* observes upon this Place. He might have added that our Author's Mistake arose from *Ocrisia's* Husband's being called *Tullius*. See *DIONYSIVS HALICARNASSENSIS*, *Antiq. Rom.* *Lib.* IV. *Cap.* I.

¹⁸ *Excerpt.* p. 714. *Edit.* *Oxon.*

¹⁹ *Item prædæ decisio*, &c. (*ORIGEN. Lib.* V. *Cap.* VII.)

²⁰ *Eaque ipsa causa belli*, &c. *Lib.* I. *Cap.* LVII. *Num.* I.

²¹ It is not of the General that *SERVILIUS* speaks, but of *Servius Galba*, who complained, that *Paulus Æmilius* had not rewarded his Army by the Distribution of the Spoils, *Quum te præda partienda*, &c. *LIVY, Lib.* XLV. *Cap.* XXXVII. *Num.* 10.

²² See *Note* II. upon this Paragraph.

²³ This follows the Passage of *DIONYSIVS HALICARNASSENSIS*, cited above, *Note* 18. of this Paragraph. The Emperor *Julian*, as our Author observes in a short Note, proposed the Example of *Fabricius* to himself and his Soldiers, as appears by a Speech ascribed to him by *AMMIANVS MARCELLINVS*, *Lib.* XXIV. *Cap.* III. p. 429. *Edit.* *Valef. Gron.*

²⁴ *PLUTARCH, in Vit. M. Caton.* p. 342. A. Vol. I. *Edit.* *Wech.*

²⁵ *Pharjal.* *Lib.* IX. ver. 197, 198. See above, § 16. *Note* 4.

— *Plura retentis*
Intulit —

Brought into the Treasury more than he kept.

5. In dividing the Spoil, they sometimes considered those that were absent, as *Fabius Ambustus*^a ordered, at the taking of *Anxur*; and sometimes for certain Reasons they were omitted that were present, as the Army commanded by²⁶ *Minutius*, when *Cincinnatus* was Dictator.

6. But what Right the Generals, called *Imperatores*, in the Time of the Commonwealth had, was transferred, after it had been seized on by those who governed absolutely under that Name, to the Lieutenants, (*Magistri Militum*) who, by their Order commanded the Armies. This appears by *Justinian's Code*,²⁷ where it is enacted, that the Commanders of the Army shall not be obliged to put into the List of military Affairs, for which they were accountable, the Donations of Moveables, either with or without Life, which they gave the Soldiers out of the Spoils of the Enemies, whether at the Time and Place of Pillage, or elsewhere.

7. But this Division proved often the Occasion of Slander, as if the Generals by that Means proposed to gain Favour to themselves; with which they charged *Servilius*, *Coriolanus*, and²⁸ *Camillus*, as if they had enriched their Friends and Clients out of the publick Stock. They, on the other Side, alledged, that they had done it for the publick Good,²⁹ *That the Persons who took the Pains being rewarded for their Labour, might with more Courage undertake other Exploits*; which are the Words of *Dionysius Halicarnassensis* on this Subject.

XVIII. Or
suffers them to
be plundered.

^a Dion. l. 4.

^b Livy, l. 4.

^c Dion. l. 10.

^d Livy, l. 45.

XVIII. 1. I now come to Plundering, which was granted to the Soldiers, either when they went to ravage the Enemy's Country, or after a Battle, or after the taking of a Town, so that upon a Signal given, they might run in immediately, which was rarely granted of old, and yet not without some Examples in those Times. For *Tarquin*^a gave the City *Suessa Pometia* to be plundered by his Soldiers. So did *Q. Servilius*,^b the Dictator, the Camp of the *Æqui*. *Camillus*,^c the City of the *Veii*: *Servilius*, the Consul, the Camp of the *Volsci*. Also *L. Valerius*³ gave License to plunder in the Country of the *Æqui*. So did *Q. Fabius*,^c having routed the *Volsci*, and taken the City *Ecetra*, and several others afterwards. *Paulus*,^d the Consul, having conquered *Perseus*, gave the Spoil of that Prince's Army to his Foot, and that of the Country round about to his Horse. And, by the Decree of the Senate, he gave the Plunder of the⁴ Cities of *Epirus* to his Soldiers.⁵ *Lucullus* having vanquished *Tigranes*, a long while forbade his Soldiers plundering,

²⁶ This was because it had been upon the Point of being defeated, through the Consul's ill Conduct who commanded, and who, upon that Account became Lieutenant, from Commander in chief. *Carrebis*, inquit, [Dictator *L. Quintius Cincinnatus*] *prædæ parte miles, ex eo hoste, cui prope prædæ fuisti*; & tu, *L. Minutius, donec Consularem animum incipias habere, legatus his legionibus præeris*. *Livy*, *Lib. III. Cap. XXIX. Num. 2.*

²⁷ *Simili etiam modo a gestorum absolvimus ordinatione, &c. Lib. VIII. Tit. LIV. De Donation. Leg. XXXVI. § 1.*

²⁸ This Example is not well applied. The Accusation of *Camillus* had another Foundation. See *Livy*, whom our Author cites in the Margin, *Lib. V. Cap. XX. XXII. XXIII. XXXII.* and *PLUTARCH*, in *Camill.* p. 132, 133.

²⁹ *Lib. VII. Cap. LXIV. Edit. Oxon.* I read *σεγλειας*, instead of *σεγλιας*, in this Passage; according to the Conjecture of *SYLBURG*, which the Authority of a good Manuscript in the Vatican, that Mr. HUDSON had good Reason to follow, renders indisputable.

XVIII. (1) This was in Consequence of a Resolution of the Senate; for *Camillus* was averse to

granting that Permission, as *Livy* tells us, *Lib. V. Cap. XX.*

² That Consul did not suffer it to be plundered in the Manner now under Consideration, that is, that every one might keep what he should take; for *DIONYSIUS HALICARNASSENSIS* expressly says, that he caused the Booty to be divided. *Antiq. Rom. Lib. VI. Cap. XXIX.*

³ This Example is dubious. It does not appear that the Army was permitted to plunder in the Manner our Author understands it. See *DIONYSIUS HALICARNASSENSIS*, *Lib. IX. Cap. LV.*

⁴ Our Author forgot that he had himself cited this Example above, where he speaks of the Distribution of the Booty in certain Proportions, § 17. Note 8. For the Fact he relates here is in the same Chapter of *Livy*, *Senatum prædam Epiri civitatum, quæ ad Persea defecissent exercitui dedisse*. *Lib. XLV. Cap. XXXIV. Num. 1.* The Example, which he adds here in a little Note, is more to the Purpose; it is that of the Plundering of *Athens* by *Sylla's* Army, as *APPIANUS ALEXANDRINUS* informs us, *De Bell. Mithridat.* p. 331. *Edit. Amstel. (195. H. Steph.)*

⁵ See *APPIANUS ALEXANDRINUS*, *De Bell. Mithrid.*

ing, but at last, being assured of the Victory, he gave them Leave to do it. Cicero,⁶ in his first Book of Invention, among the Methods of⁷ acquiring a Right of Propriety, puts the taking of the Enemies Effects, which have not been publickly sold.

2. They who do not like this Custom, say, that by this License to plunder, the greedy Soldiers often hinder the truly Valiant of the just Reward of their Bravery; and that *We frequently see the backwardest to fight the most forward to plunder; whilst the most courageous expect only the largest Share of Labour and Danger*, which are the Words of Appian, in Livy.⁸ To which let us add, that of Cyrus, in Xenophon,⁹ ἐν τῇ ἀρπαγῇ εὖ οἶδ' ὅτε οἱ πονηρότατοι πλεονεκλήσειαν ἄν. *In plundering I know the worst, Soldiers get most.* To this it is alledged, on the other Side, what a Man takes from the Enemy with his own Hand, is more dear¹⁰ and pleasing to him than much more bestowed upon him by the Order of another.

3. Sometimes also Plundering is granted, because it cannot well be hindered; as it was at the taking of Cortuosa, a Town of the *Hetrurians*, according to Livy¹¹: *The Tribunes ordered the Spoil to be sold, but the Command was too late for the Purpose, for the Soldiers had already seized on it, and it could not be taken away without Envy.* We also read, that the Camp of the *Gallo-Greeks*¹² was plundered by the Army of C. Helvius, against the Will of the General.

XIX. What I said, that sometimes others who were no Soldiers partook of the Spoil, or of the Money arising from the Sale of it; this happened commonly when some had contributed to the Maintenance of the War, and were to be¹ reimbursed. And sometimes Plays were instituted out of the Money of the Spoil.

Mitbrid. PLUTARCH relates, that he gave the Plunder of *Tigranocerta* to his Soldiers; besides, out of the Spoils, 800 Drachmas given to each. Severus gave the Spoil of *Ctesiphon* to his Army: He also ordered the Tribunes and Captains, and the very Soldiers to keep to themselves what they got in the Streets, according to ÆLIUS SPARTIANUS. Mahomet II. promised both the Spoil of *Constantinople*, and the Slaves, to his Soldiers. GROTIUS.

Our Author confounds here two Roman Emperors, through the Resemblance of their Names. The first Thing he says of Severus; that is to say, of *Septimius Severus*, does really agree to him, and is related by the Historian he quotes; tho' it does not appear very clearly, whether this Emperor left to every Soldier what he had taken, or divided the Booty according to Custom. *Harum adpellationum causa donativum militibus largissimum dedit, concessa omni præda oppidi Parthici, quod milites quærebant.* SPARTIANUS, in *Septim. Sever.* Cap. XVI. But the other Circumstance is told of *Alexander Severus*, by LAMPRIDIUS, who speaks of the Spoils taken from the *Persians*: *Et de Præda, quam Persis diripuit, suum ditavit exercitum; quum & Tribunos ea quæ per viros diripuerant, & duces, & ipsos milites, habere jussisset.* Cap. LV.

6 He gives the Omission of this Manner of acquiring Property, as an Example of an imperfect Enumeration, which an Orator would make in saying to a Person, "As you possess this Horse, you must either have bought, inherited, had him given you, bred him yourself, or stolen him. Now you neither bought, inherited, had him given you, &c. therefore you stole him." He should have added, says CICERO, that this Horse might have been taken from the Enemy, and left out of the Number of Things to be sold for the Benefit of the Publick. *Præteritur quiddam in ejusmodi enumerationibus: Quoniam habes istum equum, aut emeris oportet, &c.* De Invention. Lib. I. Cap. XLIX.

7 VARRO reckons six Ways by which one may become a lawful Master. 1. Entrance on a just Inheritance. 2. Selling before Witnesses. 3. Gi-

ving up Right. 4. Long Possession, or Prescription. 5. Selling for Slaves out of a Booty. 6. By a publick Auction of the Goods of any one. *De re Rust.* Lib. II. Cap. X. GROTIUS.

See upon this Passage WILHELMII GOESII, *Vindicia pro recepta de mutui alienatione sententia*, p. 66. & seq. and Mr. SCHULTING's Notes upon the *Institutions* of CAJUS, Lib. I. Tit. VI. § 3. p. 53. Col. A. De *Jurisprud. Ante-Justinianea*.

8 *Non avidas in direptiones manus otiosorum urbanorum prærepturas fortium bellatorum præmia esse: Quum ita ferme eveniat, ut qui segnior sit, prædetur, at fortissimus quisque labores periculique præcipuam petere partem soleat.* Lib. V. Cap. XX. Num. 6. I recite the Passage after our Author, who corrects without saying any Thing, and as he understands it, the Editions published in his Time; whereas, in the most antient Editions, and the best Manuscripts, which J. FREDERICK GRONOVIVS follows, there is, *Ut segnior sit prædator, ut quisque laboris, &c.* The Sense however is not very different; for those Words, read in this Manner, signify, that the Soldiers who endeavour to have the greatest Share in Fatigues and Dangers, are the last in running after Plunder; which sufficiently implies, that the least brave are, on the contrary, the most keen in Quest of Spoils. See the Note of that great Critick.

9 *De Instit.* Cyr. Lib. VII. Cap. XI. § 4. *Edit. Oxon.*

10 *Gratius id fore, lætiusque, &c.* LIVY, Lib. V. Cap. XX. Num. 8.

11 *Publicari prædam Tribunis placebat, &c.* Lib. VI. Cap. IV. Num. 11.

12 *Nec continere suos, &c.* Idem. Lib. XXXVIII. Cap. XXIII. Num. 4.

XIX. (1) Thus the Consuls *Menenius Agrippa*, and *Postumius Tubertus*, having overthrown the *Sabines*, sold the Prisoners, and out of the Money raised in that Manner, reimbursed those who had contributed to the Support of the Army. DIONYSIUS HALICARNASSENSIS, *Antiq. Rom.* Lib. V. Cap. XLVII. p. 300. *Edit. Oxon.* (313. Sylb.) Which Passage our Author had in View in the marginal Citation, where he quoted only the Book.

XX. 1. Neither

XX. Or dividing them into Parts, disposing of some one way, some another, and how.
^a Livy, l. 5.

XX. 1. Neither is the Spoil diversly disposed of, only when the Wars are divers; but the same Prey, in the same War, is often appropriated to several Uses, distinguished either by its Parts or its Kinds. So *Camillus*^a dedicated the Tenth of the Spoil to *Apollon Pythius*, in Imitation of the *Greeks*, who first learnt it of the *Hebrews*; at which Time, under the Vow of tithing the Spoil, the Chief-Priests adjudged, that not only Moveables, but also Towns and Fields, were included. The same *Camillus* having vanquished the *Falisci*, delivered the greatest Part of the Spoil to the *Quæstor*, and ^b reserved a small Part for the Soldiers. So did also *L. Manlius*, ² Either sell the Spoil which he brought into the publick Treasury, or divided it among the Soldiers, as equally as possible: Which are the Words of *Livy*.

^b Ibid.

2. The Kinds into which a Prey may be divided are these: Prisoners of War, Herds, Flocks, (called properly in *Greek* *λαία*, the Prey) Money, and other Moveables, both rich and ordinary. ³ *Q. Fabius* having overcome the *Volsi*, ordered the Prey and Spoils to be sold by the *Quæstor*; but the Silver he brought himself

^c Dion. l. 10.

into the publick Treasury. And when he had subdued the *Volsi* and *Æqui*,^c he gave the Prisoners, excepting those of *Tusculum*, to the Soldiers; and in the Lands of *Ecetra*, he left the Persons and Cattle to be plundered. When *L. Cornelius* took *Antium*,^d he brought all the Gold, Silver, and Brass into the Treasury; sold the Prisoners, and the Prey, by the *Quæstor*, and left to the Soldiers the Provisions and Cloaths. Not unlike to this was that of *Cincinnatus*,^e who having taken *Corbio*, a Town of the *Æqui*, sent the richest of the Spoil to *Rome*, the Rest he divided to the Soldiers by Companies. *Camillus*, upon taking *Veii*,^f brought nothing into the Treasury, but the Money arising from the Sale of the Prisoners, and having

^d Ibid.

^e Ibid.

^f Livy, l. 5.

conquered the *Hetrurians*, he sold the Prisoners, and out of that Money repaid^g the *Roman* Ladies what they had contributed to the War, and laid up three golden Cups in the Capitol. And when *Cossus* was Dictator, all the Prey from the *Volsi*, except free Persons, was given^h to the Soldiers.

^g Id. l. 6.

^h Id. ibid.

3. *Fabricius* having conquered the *Lucans*, the *Bruttii*, and the *Samnites*,⁴ enriched his Soldiers, restored to the Citizens what they had contributed to the War, and brought 400 Talents into the Treasury. *Q. Fabius* and *Appius Claudius* havingⁱ taken *Hanno's* Camp, sold the Prey, and divided it, rewarding those that had done signal Services. *Scipio* at the taking of *Carthage*,^k gave his Soldiers the Plunder of the City, except the Gold, the Silver, and the Things consecrated to the Gods. *Acilius* having taken *Lamia*,¹ divided Part of the Spoil (among his Soldiers) and sold the Rest. *Cn. Manlius* having vanquished the *Gallo-Greeks*, and according to the Superstition of *Rome*, burnt their Arms, he ordered every one to bring in what he had taken; of which he sold a Part, that is, what was to come to the Publick; and divided the Rest amongst the Soldiers as equally as possible.

ⁱ Id. l. 25.

^k App. Pun.

¹ Livy, l. 37.

XXI. Sometimes the Publick cheated of the Spoil.

XXI. 1. From what we have said, it appears, that no less among the *Romans*, than other Nations, the Spoil belonged to the People; but the Disposing of it was sometimes left to the Generals; yet so, (as I said before) they were to give an Account of it to the People; which we may learn among others, from the Example of *L. Scipio*, who, according to *Valerius Maximus*, was condemned of wronging the Publick, as having received six Pounds of Gold, and 480 Pounds of Silver, more than he had brought into the Treasury; and of others whom I have mentioned before.

2. *M. Cato*, in his Oration concerning the Spoil, did (as *Gellius* observes) in strong and noble Terms complain of the Licence granted to their Generals, and

XX. (1) See above, § 1. Note. 3.

² Consul (Cnæus Manlius) armis hostium, &c. Livy, Lib. XXXVIII. Cap. XXIII. Num. 10.

³ DIONYSIUS HALICARNASSENSIS, Antiq. Rom. Lib. VIII. Cap. LXXXII. p. 526. Edit. Oxon. (549. Edit. Sylb.) The Word *λαία* in this Passage, includes only Cattle; since the Prisoners are distinguished from it.

⁴ Which DIONYSIUS HALICARNASSENSIS makes *Fabricius* himself say, Excerpt. p. 714. Edit. Oxon. Our Author added here, in a Note, that *Fabius Maximus*, after having taken *Tarentum*, distributed the whole Booty to his Soldiers, and

brought only the Money that arose from the Sale of Prisoners, to the publick Treasury. But LIVY, Lib. XXVII. Cap. XVI. Num. 7. And PLUTARCH, Vit. Fab. p. 187. C. relate the Fact in a different Manner. I suspect that our Author has confounded what the first of those Historians says of *Fabius*, with what he relates a little lower of *Scipio*, the Conqueror of *Asdrubal*. *Scipio, castris hostium potitus, quum præter libera capita, omnem prædam militibus concessisset, &c.* Cap. XIX. Num. 2.

XXI. (1) *Scipio & A. Hostilius* legatus, &c. Livy, Lib. XXXVIII. Cap. LV. Num. 6.

their

their Impunity for cheating the Publick. Of which Oration there remains this Fragment, ² *Those who rob a private Person are condemned to be laid in Irons for Life; but the Robbers of the Publick live in Magnificence, we see nothing but Gold and Purple in their Houses.* And again, ³ *That he admired how any Man durst set up in his House Statues taken in War, as if they were so much Furniture.* Thus did Cicero ⁴ exaggerate the Crime of Verres, in defrauding the Publick, because he had stoln a Statue, and that taken out of the Prey of the Enemy.

3. Neither were Generals only, but also private Soldiers, accused of this Crime of robbing the Publick, if they did not produce what they had taken. For they were all, as Polybius ⁵ says, bound by an Oath, *That they should carry off nothing of the Prey, but honestly keep their Faith, as they had sworn.* To which we may refer the Form of the Oath in Gellius, ⁶ by which the Soldier is obliged to take away nothing within the Army, or ten Miles round, that was of more Value than two Pence Halfpeny; or if he took it, to bring it to the Consul, or within three Days declare it publicly. Hence we may understand the Meaning of Modestinus, ⁷ *He that hath stolen away the Spoil taken from the Enemy, is guilty of wronging the Publick.* Which one Passage is enough to convince the modern Interpreters, that the Spoils taken from the Enemy do not peculiarly belong to the Captors; for it is plain there can be no robbing the State, but in Things publick, sacred, or religious. The Design of all this is to shew, (as I said before) that setting aside the Civil Law, and primarily, whatsoever is taken from the Enemy, in any military Expedition, belongs to the Prince or People who maintain the War.

XXII. 1. We added, *Setting aside the Civil Law, and primarily, or directly:* The first, because the Law, whether made by the People, as among the Romans, or by the King, as among the Hebrews and others, may dispose of Things not actually possesst, to the Benefit of the State. And here, under the Notion of Law, we comprehend also Custom, if duly established. And the other, that we may know, that it is in the Power of the People to grant the Spoils to others, as well as other Things; and that not only after Acquisition, but also before it; so that the Capture following, the Donation and the taking Possession are united, ¹ *Brevi manu*, as the Lawyers term it. Which Grant may be made, not only by Name, but also in general; as part of the Spoil was given in the Time of the Maccabees, to Widows, aged People, and poor Orphans; or to uncertain Persons, as the Gifts thrown ² among the People, which the Roman Consuls allowed to them that could catch them.

XXII. That something may be changed of this common Right by any Law, or Act of the Will.

2. Neither is the transferring this Right, either by Law, or Grant, always a mere free Gift, but sometimes the Payment of a Debt, or Satisfaction for Loss received, or by Way of Reimbursement of Charges in the War, or Recompence for Services, as when Allies or Subjects serve without Pay, or for less than their Labours deserve. For in these Cases it is usual to grant either the Whole, or some Part of the Spoil, to others.

XXIII. And our Lawyers observe, that silent Custom has so prevailed almost every where, that our Allies, or Subjects, who serve without Pay, and at their own Cost and Hazard, should enjoy what they take. ¹ The Reason, as to our Allies, is plain, because by the Law of Nature one Confederate is obliged to repair

XXIII. Some of the Spoil may be given to our Allies.

² *Sed enim M. Cato, in oratione — Fures, inquit, privatorum furtorum in nervo atque in compedibus ætatem agunt; fures publici, in auro atque in purpura.* Noct. Attic. Lib. XI. Cap. XVIII.

³ *Cato Censorius — Miror audere, &c.* Apud PRISCIANUM, Lib. VII. in fin. p. 275. Edit. Basil. 1568.

⁴ It was a Statue of Mercury, which Scipio had found long before, amongst the Spoils of the City of Carthage, and had made a Present to the City of Tyndaris. *Est peculatus [crimen] quod publice Populi Romani signum, &c.* In Verr. Lib. IV. Cap. XLI.

⁵ Lib. X. Cap. XVI. p. 822. Edit. Amstel.

⁶ Item in Libro ejusdem CINCII, de Re Militari, &c. Noct. Attic. Lib. XVI. Cap. IV. See the

Dissertation of SCHELIUS, *De Sacramentis militum*, annexed to his Commentary, *De Castris Romanorum*, p. 184. & seqq.

⁷ *Is, qui prædam ab hostibus captam subripuit, peculatus tenetur, & in quadruplum damnatur.* Digest. Lib. XLVIII. Tit. XIII. Ad. Leg. Jul. peculatus, &c. Leg. XIII.

XXII. (1) See PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. IX. § 9. Note 1.

² *Missilia.* See PUFENDORF, where cited in the preceding Note, Note 9.

XXIII. (1) Queen Amalasontha makes Use of this Reason, in her Letter to the Emperor Justinian, which PROCOPIUS relates, *Gotthic. Lib. I. (Cap. III.)* GROTIUS.

the Losses of another, suffered on Account of the common or publick Affairs. Besides, few will take Pains for nothing; *Therefore*, (*Seneca* ² observes) *we pay Physicians, because we call them away from their own Affairs to serve us.* *Quintilian* ³ says the same, in Regard to Advocates, because they spend their Time and Study to defend other Mens Estates, and neglect all other Means of improving their own. As *Tacitus* also remarks, *They neglect their own Affairs, to mind those of other Men.* It is therefore to be presumed, (unless some other Cause appears, as pure Kindness, or some previous Contract) that the Hope ⁴ of gaining the Enemies Spoils, as a Reward to their Pains and Hazard, made them undertake it.

XIV. Sometimes also Subjects; illustrated by Examples.

XXIV. 1. The Thing is not so plain as to Subjects, because they owe their Service to the State; but since not all, but some only, hazard themselves; therefore it is but just, that a Retribution be made by the whole Body, to those, who more than the Rest, undergo the Fatigues and Charges of the War, but much more the Damages attending it; in Return of which, the Hopes of the whole Prey, or of an uncertain Part, is readily granted to them, and not without Reason. Thus thought the Poet.

Præda fit hæc illis quorum meruere labores.

Prop. Lib. 3. Eleg. 3. Ver. 21.

Let them enjoy the Prey, who took the Pains.

2. As to our Allies, we have an Example in the *Roman League*, whereby the *Latins* ¹ were admitted to an equal Share ² of the Spoils taken from the Enemy in the Wars that should be made under the Conduct of the *Roman People*. So in the Wars wherein the *Ætolians* were assisted by the *Romans*, it was agreed, that the Towns and Lands should be the *Ætolians*, ³ but the *Romans* have the Prisoners and Moveables. After the Victory over King *Ptolemy*, ⁴ *Demetrius* gave Part of the Prey to the *Athenians*. *St. Ambrose*, ⁵ treating of *Abraham's Expedition*, shews the Equity of this Custom, *He thought it just, that they who assisted him in that Expedition, and were perhaps in Alliance with him, should partake of the Spoils, as a Reward of their Labour.*

* Plut. Demet.

3. As to Subjects, we have an Example in the *Hebrews*, among whom half the Prey was given ⁵ to them who went out to Battle, *Num.* xxxi. 27, 47. and *1 Sam.*

xxx. 22.

2 He speaks also of those who teach the Sciences. *Itaque his [Medico, & bonarum artium præceptor] &c.* *De Benefic. Lib. VI. Cap. XV.*

3 *Neque enim video, quæ justior acquirendi ratio, &c.* *Instit. Orator. (Lib. XII. Cap. VII. p. 735. Edit. Obrecht.)* Which *TACITUS* calls, *Omitti curas familiares, ut quis se alienis negotiis intendat.* *Annal. (Lib. XI. Cap. VII.)*

4 See *PLUTARCH*, in his Life of *Marcellus*. *GROTIUS.*

I find nothing in the Life of *Marcellus*, that can be applied here, except where he says, speaking of that *Roman General*, that after the Defeat of the *Gauls*, the *Roman People* were so pleased with that Victory, that they sent a fine Present to the Temple of *Delphos* for *Apollo*, and gave, moreover, a Part of the Spoils to the Cities of their Allies, as also to *Hiero*, King of *Syracuse*, the Friend and Ally of the *Romans*, p. 302. Vol. I. *Edit. Wech.*

XXIV. (1) Our Author does not express himself sufficiently upon the Clause of this Treaty. It took Place as well with Regard to the Wars made by the *Latins*, as those made by the *Romans*; for they mutually engaged to aid each other, in Case of being attacked, βοηθῆσαι τε πῶς πολέμῳ ἀπάσῃ δυνάμει, λαφύρων τε καὶ λείας τῆς ἐκ τῶν πολέμων κοινῶν [it must be read so, according to the *Vatican Manuscript*, instead of τῶν πολέμων κοινῶν] τὸ ἴσον λαβῆσαντες μέρει ἀμφοτέρω. *DIONYSIUS HALICARNASSENSIS, Lib. VI. Cap. XCV. p. 400. Edit. Oxon. (415. Sylburg.)* *LIVY*, who was cited

in the Margin, but erroneously in all the Editions before mine, says indeed, that the *Romans* made a Treaty of Alliance with the *Latins*, *Lib. II. Cap. XXXIII. Num. 4.* but mentions no Article of that Treaty.

2 *PLINY* tells us that the *Roman People* gave the *Latins* a third Part of the Spoils. *Quibus [priscis Latinis] ex fœdere tertias prædæ Romanus populus præstabat.* *Hist. Natur. Lib. XXXIV. Cap. V.* The *Swiss Cantons*, as *SIMLER* informs us, divide the Booty according to the Number of Troops they severally furnish. The Pope, the Emperor, and the *Venetians* made their Division in Proportion to what each of them had contributed towards the Expences of the War; as *PARUTA* observes, *Lib. VIII. Pompey the Great* gave *Armenia Minor* to King *Dejotarus*, because he had aided the *Romans* in the *Mithridatick War*. *GROTIUS.*

Our Author took this last Fact from *EUTROPIUS*, for which he gives no Authority. *Armeniam minorem Dejotaro, &c. Lib. VI. Cap. XI. Num. 5. Edit. Cellar.* See also *STRABO, Geogr. Lib. XII. p. 823. A. Edit. Amst. (547. Edit. Paris.)*

3 *Et ita in fœdere primo, &c. LIVY, Lib. XXXIII. Cap. XIII. Num. 10.* See also *POLYBIUS, Lib. XI. Cap. V.*

4 *Sane iis qui secum fuissent, &c. Lib. I. De Abraham. Cap. III.* This Passage is cited in the *Canon Law, Cauf. XXIII. Quæst. V. Can. XXV.*

5 The *Pisidians* gave Part of the Booty to those who

xxx. 22. 2 *Macc.* viii. 28, 29. So the Soldiers of *Alexander* claimed the Spoil taken from private Men to themselves, but any that was very valuable, they presented to the King; whence we find them accused at *Arbela*,^b who conspired to rob the Publick, by appropriating the Prey to themselves, and to bring none into the Treas-
fury. ^{b Plut. Apoph.}

4. But what publick Things belonged to the Enemies, or their King, were exempted from this Licence. Thus the *Macedonians* having forced *Darius's* Camp, near the River *Pyramus*, carried away an infinite Mass of Gold and Silver, and left nothing untouched, ⁶ besides the Royal Pavilion; *It being an antient Custom among them*, (says *Curtius*) *to receive the Conqueror in the Pavilion of the conquered King*. Not unlike the Custom of the *Hebrews*, who set the Crown of the conquered King on the Head of the Conqueror, 2 *Sam.* xii. 30. assigning to him (as we find in the ^c *Talmud*) all the Royal Baggage taken in War. We read of *Charles the Great*, when he had conquered the *Hungarians*, he gave the private Spoils to the Soldiers, but what belonged to the vanquished King he brought into the Treas-
fury. The *Greeks*⁷ called the publick Spoils *Λάφυρα*, as we shewed before, the private *Σκῦλα*; their *Σκῦλα* were such as were taken in the Heat of Battle; and *Λάφυρα* when the Battle was over. A Distinction likewise allowed by other Na-
tions. ^{c Tit. DeRege.}

5. It is plain, by what I have said already, that the *Romans*, in the early Days of their State, did not allow so much to their Soldiers, but the civil Wars indulged them with more Liberty. Thus ⁸ *Equulanum* was given to be plundered by the Soldiers, by *Sylla*. And *Cæsar*, after the Battle of *Pharsalia*, gave *Pompey's* Camp to be pillaged by the Soldiers; and *Lucan*⁹ introduces him speaking thus,

—*Super est pro sanguine merces,*
Quam monstrare meum est; nec enim donare vocabo,
Quod sibi quisque dabit.

Let each reward himself, there lie the Spoils,
The Claim of War, and of illustrious Toils.

So the Soldiers of *Octavius* and *Anthony*^a plundered the Camp of *Brutus* and *Cassius*. In another civil War the Soldiers of *Vespasian* being led against *Cremona*, tho' it was now near Night, made haste to storm the City, fearing lest otherwise the Wealth of the *Cremonese* should fall to the Share of their Commanders, and Lieutenant-Generals; for they knew well, says *Tacitus*, that ¹⁰ *The Plunder of a City taken by Storm belonged to the Soldiers, of one surrendered, to the Generals*. ^{a App. Civil.}

6. But upon the Decay of Discipline, the Soldiers had greater Licence of Plundering granted them, upon this Account, lest, before the Danger was over, the Soldiers should leave the Enemy, and fall to plunder,¹¹ which has often caused the Victory to be lost. When *Corbulo* had taken *Volandum*, a Castle in *Armenia*, *Tacitus*¹² tells us, *The common People, who did not bear Arms, were publickly sold, the Rest of the Spoil fell to the Conquerors*. In the same Author, *Suetonius*¹³ encouraged his Soldiers, in a Battle against the *Britons*, to continue the Slaught-
ter of the Enemy, without any Regard to the Spoil, assuring them, that when

who looked after their Houses, as *CHALCOCON-
DYLAS* relates, *Lib.* V. *GROTIUS*.

⁶ *Namque id solum* [tabernaculum] *intactum*, &c. *Lib.* III. *Cap.* XI. *Num.* 23. See *DIO-
DORUS SICULUS*, *Lib.* XVII. (*Cap.* XXXV.) And *PLUTARCH*, in *Vit. Alexandr.* (p. 676. A. *Edit.* *Wechel.*) There is something of the same Kind in *XENOPHON*, *Cyropæd.* *Lib.* IV. (*Cap.* VI. § 6. *Edit.* *Oxon.*) and *Expedit. Cyri*, *Lib.* IV. (*Cap.* IV. § 13.) *GROTIUS*.

⁷ The Grammarians understand by *Σκῦλα*, the Spoils of the Dead, and by *Λάφυρα*, the Plunder taken from the Living. See *SUIDAS* upon the first of these Words.

⁸ The Historian whom our Author cites in the Margin, says only, that *Sylla* plundered that City. *APPIAN ALEXANDRINUS*, *De Bell. Civil.* *Lib.* I. p. 643. *Edit. Amstel.* (380. H. *Steph.*)

⁹ *Pharsal.* *Lib.* VII. ver. 736. & seqq.

¹⁰ *Expugnata Urbis*, &c. *Hist. Lib.* III. *Cap.* XIX. *Num.* 4.

¹¹ *POLYBIUS* uses this Argument, to prove the Wisdom of the *Romans*, in dividing the Spoils equally among the Soldiers, after an Expedition. *Hist. Lib.* X. *Cap.* XVI. XVII.

¹² *Et imbelle vulgus*, &c. *Annal. Lib.* XIII. *Cap.* XXXIX. *Num.* 7.

¹³ *Conferri tantum & pilis emissis*, &c. *Idem.* *Annal. Lib.* XIV. *Cap.* XXXVI. *Num.* 4.

the

the Victory was fully gained, they should enjoy the whole. Such like Examples we frequently meet with, besides what we have above quoted ¹⁴ out of *Procopius*.

7. There are some Things of so small a Value, that they do not deserve to be reserved for the Publick, these generally belong to the Captors, by the Consent of the People: Such, in the old *Roman* State, were a Spear, a Javelin, Wood, Fodder, Casks, Leather Bags, Torches, and any Thing else below the Value of two Pence Halfpeny. For, as *Gellius* ¹⁵ informs us, these Things were expressly excepted in the military Oath. Like to this is the Allowance to Seamen that serve even for Pay. The *French* call it *Dépouille*, or Pillage, and under it they include Apparel, Gold and Silver, within ten Crowns. In other Places, a certain Part is given to the Soldiers, as in *Spain*, one While ¹⁶ the fifth, another Time the third, and sometimes half the Booty, falls to the King; and the seventh; sometimes the tenth, to the General; the Rest belongs to the Captors, ¹⁷ except Ships of War, which are all the King's.

8. Sometimes the Spoil is bestowed with Regard to the Labour, Hazard, and Charge; as in *Italy*, the third Part of a Ship taken belongs to the Proprietor of the victorious Ship, a third to those who had Merchandizes in the Ship, and the other to those that fought against the Enemy. Sometimes it happens, that they who at their own Charge and Danger go upon military Enterprises, do not carry away all the Prize, but some Part is owing to the State, or to him who derives his Right from the State. So in *Spain*, if any Ship be fitted out upon a private Charge, part of the Prize comes to the King, and part to the Admiral. So likewise by the Custom of *France* and *Holland*, the tenth Part belongs to the Admiral, the fifth Part of the Prize being first laid aside for the State. But now it is customary at Land, in the taking of Towns, and in Battles, that every one keep what he takes; but in Excursions, whatsoever is taken, is divided among them that take it, according to the Merit and Dignity of each Person.

XXV. What Use may be made of what has been here said.

XXV. What has been said may serve to let us understand, that if in any Nation, not engaged in War, a Dispute arise concerning any Thing taken in War, the Things shall be adjudged to him, whom the Laws or Customs of the People on whose Side he is, and by whose Authority the Things were taken, shall favour. But if nothing can thereby be proved, then by the common Right of Nations, the Thing taken shall be adjudged to the People; if at least it were taken in the Act of War. For it is plain from what we have already said, that what *Quintilian* alleges for the *Thebans*, ¹ does not always prove true, that the Right of War has no Power on that which is reducible to a Trial of Law, and that what is got by Arms can only be kept by Arms.

XXVI. Whether Things taken out of the Dominions of either Party be lawful Prize.
^a Ch. 4. § 7.

XXVI. 1. But whatsoever Things do not belong to the Enemy, tho' found among the Enemies, shall not be the Captor's. For this (as I said ^a before) is neither agreeable to the Law of Nature, nor was introduced by the Law of Nations. So the *Romans*, in *Livy*, tell *Prusias*, ¹ *If that Land had not been Antiochus's, it could*

¹⁴ See the Passage of *PROCOPIUS* quoted above, (§ 11. Num. 1.) That Historian farther observes, that the Soldiers of the same *Salomon*, in an Expedition against the *Levatae*, (a Kind of *Moors*) murmured upon his keeping the Booty from them; but that he represented to them, he only did so in order to distribute it according to each Man's Merit, when the War was concluded. *Vandalic. Lib. II. (Cap. XXI.)* All the Spoils taken at *Picenum* were brought to *Belisarius*, who divided it in that Manner; giving for his Reason, that it was not just that whilst some were at great Pains to kill the Drones, others, who had no Share in the Labour, should eat the Honey. *Gothic. Lib. II. (Cap. VII.)* GROTIUS.

¹⁵ See the Passage above, § 21. Note 6.

¹⁶ The *Turks* have the same Custom, according to *LEUNCLAVIUS, Lib. III. and Lib. V.* GROTIUS.

¹⁷ Amongst the *Goths*, the Engines of War were excepted, as *JOHANNES MAGNUS* informs us, *Hist. Sued. Lib. XI. Cap. XI.* GROTIUS.

I must say the same Thing of this Quotation as I have done of that above, upon § 14. Note 8. There is nothing of that Kind, either in the Place referred to, or in any other of *JOHANNES MAGNUS's*. Our Author having probably added, at the same Time, these two Particularities, from the Customs of the antient *Goths*, to his Examples, which he had taken from the same Place, has confounded in both the Paragraphs, to which he refers them, the Name of one Historian with that of another.

XXV. (1) *Dicamus in primis, &c. Instit. Orat. Lib. V. Cap. X. p. 432. Edit. Burman.*

XXVI. (1) *Si autem Antiochi, &c. Livy, Lib. XLV. (Cap. XLIV. Num. 15.)* So after the Defeat of *Jugurtha*, King *Bocchus*, his Son in Law, did

could not by Conquest belong to the Romans themselves. But if the Enemy had any Right annexed to the Possession of the Things, as of Pledge, or ² Retention, or Servitude, that is no Hindrance that it should not be the Captors.

2. This is also disputed, whether Things or Persons taken without the Territories of either Party engaged in the War, belong to the Captors. If we only respect the Right of Nations, I think the Place here can be no Security, as we have said, we may lawfully kill an Enemy any where. But the Sovereign of that Place may, by his Laws, prohibit it; and, if they will not obey him, may demand Satisfaction, as for an Insult on his Authority: Just as, according to the Roman Lawyers, ³ the Proprietor of a Ground may hinder any one from coming to hunt there, tho', when one does so, the Beasts taken belong to the Hunter.

XXVII. But this external Right of acquiring Things taken in War, is by the Law of Nations so peculiar to a ¹ solemn War, that it has no Force in other Wars. For in other Wars between Foreigners, a Thing is not acquired by Vertue of the War, but in Satisfaction of some Debt, which otherwise could not be recovered. But in civil Wars, whether they be great or small, there is no Change of Property but by the ² Sentence of a Judge.

XXVII. How proper is this Right to a solemn War.

did not obtain the Lands he pretended to, because they were not *Jugurtha's*, but belonged to the Children of *Masinissa*, as we find in APPIANUS ALEXANDRINUS, *Excerpt. Legat.* XXVIII. There is something of a like Nature in ALBERTUS CRANTZIUS, *Saxonic. Lib. XII. (Cap. VII.)* GROTIUS.

Our Author said here by Mistake, *The Children of Bocchus*, instead of the Children of *Masinissa*.

² See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XI. § 6. Note 3. (*Retention*).

³ *Plane qui alienum fundum, &c. Digest. Lib. XLI. Tit. I. De acquir. rerum Domin. Leg. III. See also Lib. VIII. Tit. III. De Servit. prædior. rustice. Leg. XVI.*

XXVII. (1) But see what I have said upon Chap. IV. § 4. Note 1.

2. In most civil Wars no common Judge is admitted. If the State be monarchical, the Dispute turns either upon the Succession to the Kingdom, or upon a considerable Party of the State's, pretending, that the King has abused his Power, in a Manner that authorizes the Subject to take up Arms against him. In the first Case, the Nature itself of the Cause for which the War is undertaken, occasions the two Parties of the State to form, as it were, two distinct Bodies, till they come to agree upon an Head by some Treaty, made either by Consent, or in Consequence of the Superiority of one of the Parties. Upon this Treaty depends the Right Persons may have, or not have, to what has been taken on any Side; and nothing hinders that Right from being admitted to take Place in the same Manner, as in publick Wars between two States always distinct. Other Nations which have not been involved in the War, have no Authority here to examine into the Validity of the Acquisitions; and the two Parties, by reuniting, may as well discharge themselves from the Damages they have mutually occasioned each other. The other Case, I mean the Rising of a considerable Part of the State against the Prince upon the Throne, can hardly happen, unless when that Prince has given Room for it, either by Tyranny, or the Violation of the fundamental Laws of the Nation. Thus then the Government is dissolved, and the State also divided into two distinct and independent Bodies; so that we are to form the same Judgment here, as in the first Case. And much more does that take Place in the civil Wars of a republican State; in which the War immediately, of itself, dissolves the Sovereignty, that subsists solely in the Union

of its Members. And if the Roman Laws decreed that the Prisoners taken in a civil War could not be made Slaves, that was, as the Civilian ULPIAN says, according to the celebrated Mr. NOODT's Explanation, (in his *Comment. in Digest. Lib. I. Tit. V. p. 30, 31.*) because a civil War was considered, not properly as a War, but as a civil Dissention. For, adds he, a real War is made between those who are Enemies, and animated with the Spirit of Enemies, which prompts them to endeavour the Ruin of each other's State. Whereas, in a civil War, however pernicious it often proves to a State, both Parties are supposed to intend the Preservation of the State; the one is only for saving it in one Manner, and the other in another: So that they are not Enemies, and every Person of the two Parties continues always a Citizen of the State, so divided. These are the antient Lawyer's Words, *In civilibus dissentionibus, quamvis sæpe per eas Respublica lædatur, non tamen in exitium Reipublicæ contenditur; qui in alterutras partes discedunt, vice hostium non sunt eorum, inter quos jura captivitatum, aut postliminiorum fuerunt, &c. Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin. Leg. XXI. § 1.* Mr. NOODT adds to this two Passages from CICERO, *Orat. pro Ligar. Cap. VI. & in Catilin. Orat. III. Cap. X.* But that is a Supposition or Fiction of Right, which does not hinder all I have been saying from being true, and from taking Place in general. The State, of which the Preservation is intended, is not, in the Cases I have spoke of, a Body of Citizens, united under the same Government; it is an Assemblage of People, who having been in Subjection to the same Government, within a certain Extent of Country, are willing indeed to continue for the future in a common Dependence, but do not agree amongst themselves upon the Person, or Body of Men, in whose Hands the supreme Authority ought to be lodged. And as, after their Reunion, the Sovereign acknowledged by all, commonly suffers the antient Laws to subsist, either by an express or tacit Consent, which always takes Place, when there appears no express Will by which he abrogates those Laws, either in Whole or in Part: Hence it was that amongst the antient Romans, one could not appropriate to one's self the Prisoners taken in a civil War, as real Slaves; and not upon Account of any Defect of Conditions or Formalities required, according to our Author, by the Law of Nations, in a publick or solemn War.

C H A P. VII.

Of the Right over Prisoners.

I. All Prisoners
in a solemn War
are, by the Law
of Nations,
Slaves.

^a B. ii. ch. 22.

§ 11.

^b B. ii. ch. 5.

§ 27.

I. 1. **T**HERE is no Man by Nature Slave to another, that is, in his primitive State considered, independently of any human Fact, as I have ^a said in another Place; in which Sense we may take the Lawyers, when they say that Slavery is ¹ against Nature; but it is not repugnant to natural Justice, that Men should become Slaves by a human Fact, that is, by Vertue of some Agreement, or in Consequence of some Crime, ^b as we have also said already.

2. But by the Law of Nations, which I am now treating of, Slavery is of a more large Extent, both as to Persons and Effects. For if we consider the Persons, not only they who surrender themselves, or submit by Promise to Slavery, are reputed Slaves; but all Persons ² whatsoever taken in a solemn War, as soon as they shall be brought into a Place whereof the Enemy is Master; as *Pomponius* ³ tells us. Neither is there any previous Crime required, for here every one's Condition is alike, even of those who have unhappily been found among the Enemies, upon the sudden breaking out of the War, ⁴ as I have said already. *Polybius*, of the Perfidy of the *Mantineans*, speaks thus, ⁵ *What must these Men suffer, to make their Punishment just? If any one say, they should be sold, with their Wives and Children, as Prisoners of War; but so may they be, by the Law of Arms, who are most innocent.* And hence it is, as *Philo* ⁶ observes, *Many good Men lose their natural Liberty by divers Accidents.*

3. *Dion Prusænsis*, recounting the several Ways of acquiring Property, says, ⁷ *The third is, when a Man has taken a Prisoner in War, by that Means he makes him his Slave.* So *Oppian* calls the carrying away of Children taken in War, *Πολέμους νόμον*, the Law of Arms. *Halient. Lib. 2.*

I. (1) *Servitus est constitutio Juris Gentium, qua quis dominio alieno contra naturam subicitur.* Digest. Lib. I. Tit. IV. *De statu hominum*, Leg. IV. § 1.

² That is to say, where it is customary to make Slaves of all such as are taken in War; for our Author says below, that this is not now practised amongst Christians, and that even formerly it was not a received Custom with all Nations. But in this Case, as in other Things, which our Author refers to his arbitrary Law of Nations, the Power of a Master over his Slaves, made such in this Manner, is not derived solely from Custom. If a Prisoner of War found the Condition of a Slave too hard, it was in his own Power to avoid it, by declaring that he would not acknowledge him for his Master, who had taken him. He did not thereby commit any Offence, nor violate any Law to which he was obliged to submit; he only exposed himself to the Effects of the Enemy's Resentment, and to the Loss of Life, from the Fear of losing his Liberty. But if the Prisoner made no Declaration of his Will, contrary to the received Custom of States at War, he was, and might be deemed tacitly to submit to it, after the Victor had declared on his Side, his being contented to give him his Life, upon Condition, that he would acknowledge him for his Master, which he did by not keeping the Prisoner in Bonds, or narrowly watched; for neither was he in Rigour obliged, by Vertue of the Custom, to give the Prisoner Life, even tho' the latter was willing at that Price to become his Slave: It was only necessary for him to make known sufficiently his not being willing to accept the Prisoner's Offers. So that the Force of the received Custom was on-

ly founded upon the mutual Consent, express or tacit, of the Victor and Prisoner; from whence resulted an Engagement, which was presumed, and might easily be presumed, from the good Reasons for which this Custom was introduced, and of which our Author will speak below.

³ See the Law cited in the preceding Chapter, § 3. Note 3.

⁴ See also the preceding Chapter, § 12. Num. 1.

⁵ *Histor. Lib. II. (Cap. LVIII. p. 200. Edit. Amstel.)* The Grammarian *SERVIVS* says, that *Hesione*, the Daughter of *Laomedon*, King of *Troy*, was made a Captive by Right of War, *A cujus portu [Trojæ] quum, &c.* In *Æneid. Lib. I. (ver. 619.)* He observes elsewhere, in relating the same Fact, that the *Greeks* refused to restore *Hesione* to the *Trojans*, because she was theirs by the Right of War. *Hesionem Græci Trojanis reddere noluerunt, decentes, se eam habere Jure Bellorum.* In *Lib. X.* *JOSEPHUS* speaks of some *Jews*, whom *Cassius* had taken Prisoners, but not according to the Laws of War; for which Reason, upon *Hyrchanus's* demanding them in the Name of the Nation, *Mark Anthony* ordered them to be restored. *Antiq. Jud. Lib. XIV. (Cap. XXII. p. 492. A.)* He mentions the Law relating to Prisoners of War in another Place, *τῶν δολωμάτων νόμῳ*, which *MENANDER the Protektor* expresses thus, *Δουληπταῖν Θεσμῶν*. Many Things upon this Subject are said in the preceding Chapter; for Authors join together, or put in the same Class, Prisoners of War, and Things taken from Enemies. *GROTIUS.*

⁶ *Lib. omnem virum bonum esse liberum*, p. 866. Edit. *Parif.*

⁷ *Orat. XV.*

II. Neither

II. Neither do only they themselves become Slaves, but their Posterity for ever; for whosoever is born of a Woman after she is a Slave, is born a Slave: And this is what ¹ *Martian* said, that by the Law of Nations those that were born of Bond-Women are accounted Slaves. And *Tacitus*, ² speaking of the Wife of a German Prince (taken Prisoner) said, she had *Servitio subjectum uterum, a Womb subjected to Bondage*, that is, her Child would be a Bondslave.

II. And their Posterity.

III. 1. But the Effects of this Right are infinite, so that there is nothing that the Lord may not do to his Slave, as *Seneca* ¹ the Father said, no Torment but what may be inflicted on him with Impunity, ² nothing commanded him but what may be exacted with the utmost Rigour and Severity; so that all manner of Cruelty may be exercised by the Lords upon their Slaves; unless this Licence is somewhat restrained by the civil Law. *It is allowed by all Nations to the Lord, to have Power of Life and Death over his Slave*, we are told by *Caius*, ³ (the Lawyer.) He also adds, that this large Power had been limited by the Roman Laws, that is, in Countries which are under the Dominion of the Romans. Hither we may refer that of *Donatus* upon *Teren*. *What may not a Lord lawfully do to his Slave?*

III. Any Thing done to them is unpunishable.

2. Not only the Person, but all Things taken with him, become lawful Prize. A Slave that is in the Power of another, ⁴ *Justinian* says, can call nothing his own.

IV. Hence the Opinion may be confuted, or at least restrained, which maintains that Things incorporeal ¹ cannot be acquired by the Law of Arms. It is true, that primarily, and directly, they cannot, but they may be acquired by means of the Person whose they had been. But we must except those Rights that are founded on a particular Relation of Persons, which renders them unalienable, such as paternal Power. For if these Rights are capable of remaining, they remain with the Person, ² if not, they are extinct.

IV. The incorporeal Goods of the Slave become the Lord's.

V. 1. Now this large Power is granted by the Law of Nations for no other Reason, than that the Captors being tempted by so many Advantages might be in-

V. The Reason why this was ordained.

II. (1) *Jure Gentium servi nostri sunt qui ab hostibus capiuntur, aut qui ex ancillis nostris nascuntur.* Digest, Lib. I. Tit. V. De Statu Hominum, Leg. V. § 1. See above B. II. Chap. V. § 29.

2 He speaks of the Wife of *Arminius*, who was taken by the Romans, being with Child: *Arminius, super insitam violentiam, &c.* Annal. Lib. I. Cap. LIX. Num. 2.

III. (1) Our Author cites here in the Margin of his first Edition, X. *Controv.* V. The others have I. *Controv.* V. but there is nothing of this Kind in either of those Places. The Passage is in Lib. V. *Controv.* XXXIV. wherein the Rhetorician calls this absolute Power of Masters over their Slaves, a Right known to all the World: *Qui [Pictor] hæc tantum, &c.* p. 391. Edit. Gron. Var. The fifth *Declamation* of the tenth Book of *Excerpta Controv.* treating this same Subject occasioned this Mistake: For the latter is extracted, *Ex Controv.* V. Lib. X. This we observe by the by as an Example of the Origin of these Mistakes, into which our Author pretty often falls. I find also a Passage very like this in *SENECA* the Philosopher: *Quum in servum omnia liceant, est aliquid, quod in hominem licere commune jus animantium vetet.* De Clement. Lib. I. Cap. XVIII.

2 This Restriction is to be well observed; for if the Master treats the Slave, acquired by the Right of War, with excessive Cruelty, whatever Impunity he may promise himself, either from the civil Laws of his Country, or from neutral People; the Prisoner, who only submitted to Slavery upon the tacit Condition, that the Victor should behave to him in such a manner as not to make him think his Fate more insupportable than Death itself, is then discharged from his Engagements, and re-enters into a State of War with his Master, who has violated his.

Lib. I. Tit. VI. De his qui sui vel alieni Juris sunt, Leg. I. § 1. See also the *Institutes*, at the same Title, I. 8. The Grammarian *DONATUS* says, [JUSTA & CLEMENS] *Ita dixit justa, ut alibi. Non necesse habeo omnia pro meo jure agere. Quod enim non justum domino in servum?* In Andr. Terent. Act I. Scen. I. (Ver. 9.)

4 *Ipse enim servus, qui, &c.* Institut. Lib. II. Tit. IX. § 3. *VALERIUS MAXIMUS*, speaking of a Consul, who had been taken by the *Carthaginians*, says, that he had lost every Thing by Right of War; but he recovered all and was even made a Consul again: *Quo* [Cn. Cornelius Scipio Asina] Consul, &c. Lib. VI. Cap. IX. Num. 11. *PHILO* Judæus says that a Slave can call nothing his own, not even his Person. Lib. Omnem virum bonum esse liberum, (p. 871. C.) *GROTIUS*.

IV. (1) See what *PUFENDORF* says upon this Question, B. VIII. Chap. VI. § 11. *Law of Nature and Nations*.

2 Thus according to the Roman Laws, a Father who had been made Prisoner, if he returned into his Country, still retained the Rights of his paternal Power: But if he died in Captivity, his Children were deemed free from the Moment he had been taken, so that those Rights were then immediately extinct. *Si ab hostibus captus fuit parens, &c.* Institut. Lib. I. Tit. III. *Quibus modis jus patriæ potestatis solvitur*, § 5. So, those who had surrendered themselves to the Enemy, not having any Claim to the Right of *Postliminy*; if a Father had fallen in this manner into the Hands of the Enemy, his Children from thenceforth were no longer in his Power, whether he did or did not return into his Country: *Postliminio carent, qui armis victi hostibus se dederunt.* Digest, Lib. XLIX. Tit. XV. De Captivis, &c. Leg. XVII. See below, Chap. IX. § 8.

3 *Igitur in potestate sunt servi, &c.* Digest,

^a Chap. iv.

clined to forbear that Rigour allowed them by the Law, of killing their Prisoners, either in the Fight, or some Time after. As ^a I said before: ¹ *The Name of Slaves, Servi, (Pomponius tells us) arose from this, that Generals sold their Prisoners, thereby preserving them from Death.* I said that they might be inclined to forbear; for there is no Sort of Agreement to engage them to it, if we only respect this Law of Nations, but a Motive drawn from Interest.

2. And for the same Reason he has Power to transfer this Right to another, in the same manner as the Property of Goods. This Power also reaches to the Children born in Captivity, because if the Captor had been pleased to have used his utmost Power, he might have prevented their being born; and consequently those born before the Captivity of the Mother, (if they are not personally taken) do not become Slaves. And the Reason that by the Law of Nations Children followed the Mother's Condition, without regard to that of their Father, is because the Cohabitation of Slaves was neither regulated by the Laws, nor maintained in such a manner, that the Mother should be always under the Eye and Guard of the Father, so that it would have been a very difficult Thing to prove who was the Father. And thus we must understand that of Ulpian, ² *The Law of Nature is this, that he that is born without lawful Marriage should follow the Mother's Quality*, that is, general Custom founded on some natural Reason; for so the Expression *Natural Right* is sometimes taken in an improper Sense, as we have shewed ^b in another Place.

^b B. 2. ch. 13. § 26.

3. But that this Custom of Nations was not admitted without Reason, we may gather from the Practice of civil Wars, wherein Prisoners are generally put to the Sword, because they cannot be made Slaves, which ³ *Plutarch* well observed in the Life of *Otho*, and ⁴ *Tacitus* in the second Book of his History.

4 But whether Prisoners should belong to the People, or to the private Persons who took them, must be determined from what we have said already of the Spoil; for the Law of Nations has in this Case put Men in the same Rank with Goods. So ⁵ *Cajus* the Lawyer, *Those Things which are taken from the Enemy, by the Law of Nations are instantly the Captors, so also free Men are made Slaves.*

VI. Whether Prisoners may make their Escape.

VI. 1. I cannot agree with those Divines, who maintain that Prisoners taken in an unjust War, or their Children, may not lawfully make their Escape, unless it be to their own Country. Here is the Difference, ¹ *If they can escape to their own*

V. (1) SERVORUM adpellatio, &c. Digest, Lib. L. Tit. XVI. De verborum significatione, Leg. CCXXXIX. § 1. See also the Grammarian SERVIUS, where he gives the Etymology of the Word Saltem, in *Æneid*. Lib. IV. (Ver. 327.) GROTIUS.

2 Lex naturæ hæc est, ut qui nascitur, sine legitimo matrimonio, matrem sequatur, nisi lex specialis aliud inducit. Digest. Lib. I. Tit. V. De Statu hominum, Leg. XXIV. But there is just Reason to believe, that the Civilian understands here, by the Law of Nature, natural Right properly so called, and this is alluded to by a Passage of C I C E R O's, which Mr. SCHULTING cites in his Notes upon the Fragments of ULPIAN, Tit. V. § 8. Ut enim, Jure Civili, qui matre est libera, liber est: Item, Jure Naturæ, qui Dea matre est, Deus sit necesse est. "As according to Civil Right, an Infant born of a free Woman is also free. In like manner by the Law of Nature, he who has a Goddess for his Mother, must necessarily be a GOD." De Natur. Deor. Lib. III. Cap. XVIII. For the ancient Lawyers pretended, that according to the Law of Nature, founded upon Reason, Children, born out of Wedlock, follow the Condition of their Mother, on account of the Uncertainty in Relation to the Father. And this indeed takes Place, by the very Principles of that Law, in regard to Children born of a Mother, who abandons herself to all Comers: But as to those, whose Father is sufficiently known, as the Father of the Children of a Woman Slave may be, the Law of Nature of itself is far from allowing that their Condition shall always be the same with that of the Mother. See

above, B. II. Chap. V. § 29. Num. 1. There is in Reality no greater Certainty, in regard to the Birth of Children, whose Mother is lawfully married: It is only a Presumption, authorized by the Laws, which leave it without Force, the Moment it is destroyed by sufficient Reasons. So that, according to the Roman Law, an Husband is not bound to acknowledge a Child for his own, because born of his Wife and in his House, in the Sight and Knowledge of all his Neighbours, if it appears by good Proof, that he has not lain with his Wife for some Time, upon account of a Distemper, or some other Impediment, or if he was impotent: Sed mihi videtur, quod & SCÆVOLA probat, &c. Digest, Lib. I. Tit. VI. De his qui sui vel alieni juris sunt, Leg. VI.

3 P. 1073. Vol. I. Edit. Wech.

4 Obstructæ strage corporum viæ, &c. (Cap. XLIV. Num. 1.) The same Historian Remarks elsewhere in speaking of the People of *Cremona*, that it signified nothing to the Soldiers to make them Prisoners, for all *Italy* were agreed not to buy such Slaves: Inritamque prædam fecerat consensus Italiæ, emtionem talium mancipiorum aspernantis, Lib. III. (Cap. XXXIV. Num. 3.) GROTIUS.

5 Item quæ ex hostibus capiuntur, &c. Digest, Lib. XLI. Tit. I. De acquirendo rerum dominio, Leg. V. and VII. Princ.

VI. (1) See below, Chap. IX. § 5. *PLINY* says, that *Marcus Servius* was taken twice by *Hannibal*, and escaped as often out of Prison: Bis ab Annibale captus — bis vinculorum ejus profugus, &c. Hist. Natur. Lib. VII. Cap. XXVIII. GROTIUS.

Country

Country during War, they recover their Liberty by the Right of Postliminy: But if elsewhere, or to their own Country after the making of the Peace, they are to be delivered to their Masters upon demand. But it does not therefore follow, ² that the Prisoners are bound in Conscience not to run away, for there are many Rights that have only an external Effect, and impose no internal Obligation, such are those of War, of which we are now treating. Neither can one object, that from the very Nature of Property a real Obligation is laid upon the Conscience: Because there being many Kinds of Property it may be such an one as has only Power in ³ human Judgment and by Compulsion, which is often found in other Kinds of Right.

2. For such in some Sort is also that Right that makes void some Wills, or Testaments, for want of some particular Forms which the civil Law requires. For the more probable Opinion is, that what is bestowed by such a Will, may be retained with ⁴ a safe Conscience, at least, whilst there is no Opposition made to it. And the Right of Prescription, which a dishonest Possessor acquires by the civil Law, very much resembles that we now treat of. For the Courts of Justice maintain such a Possessor, ⁵ as if he were real Proprietor; just as the Law of Nations maintains the Possessors of Prisoners that are taken even in an unjust War. And by this Distinction is solved that difficult Point of *Aristotle's*, ⁶ ἅρα δίκαιον τὰ αὐτῶν εἶναι, &c. *Is it not just that every one should enjoy his own?* But whatsoever the Judge has decreed to the best of his Knowledge, (however unjust his Sentence be) stands good in Law, so that the same Thing may be both just and unjust.

3. But to return to our Question, there can be no Reason supposed, why Nations should have extended the Force of this Right so far as to oblige the Conscience. For the Power of claiming a Prisoner, of forcing him to return, nay, of binding him too, and of taking what he has, is a Motive strong enough to induce the Captor to save the Life of his Captive; or if he were so barbarous as not to be moved by this Consideration, then certainly he would not be prevailed upon by any Bond of Conscience, but if he think that absolutely necessary, ⁷ he may demand an express Promise, ⁷ or a formal Oath.

² See Bembo, *Hist.* l. 10.

4. Besides we must not rashly admit that Interpretation, which makes an Act criminal, which is otherwise allowable, in a Law not arising from natural Equity, but made purposely to avoid a greater Mischiefe. ⁸ *It signifies not much* (says *Florentinus* the Lawyer) *how a Prisoner escapes, whether freely dismissed, or by Force or*

² But there is an express or tacit Consent of the Prisoner in this Case, by Virtue of which, the Victor has acquired a Right over him, that lays the Slave under a real Obligation, and consequently will not permit him in Conscience to run away, or to withdraw himself in any other manner from the Subjection, into which he is entered. See above, § 1. of this Chapter, Note 2. § 3. Note 2. and PUFENDORF's *Law of Nature and Nations*, B. VI. Chap. III. § 6. as also Mr. NOODT's *Discourse Of the Power of Sovereigns*, p. 247. & seqq. the second of the *French Translation*. The Justice or Injustice of the War has nothing to do in this Case. How unjustly soever an Enemy has taken up Arms, the Conventions made with him whilst an Enemy are not the less valid, by the Confession of our Author who lays that down as a Principle below. Besides, both Parties generally believe their own Cause just: And if the Victors apprehended, that the Prisoners, under Pretext of the Injustice of the War, should believe they had a Right to throw off the Yoke, as soon as they had a favourable Occasion; they would give none of them their Lives. The Interest therefore of Mankind, and even the good of the Conquered, required, that the Engagement of Prisoners, whether express or tacit, should be valid, and that they should renounce the Right of using Reasons deduced from the Injustice of the War, or the Necessity to which they had

been reduced, in order to save their Lives. From whence appears the Difference between this Case, and that objected, of a Person who falling into the Hands of Robbers and Pirates should engage to become their Slave. See a Dissertation of the late Mr. HERTIUS, *De Lytro*, in Vol. I. of his *Comment. and Opuscul*, &c. Sect. II: § 24. p. 277, 278. The Reader may consult also the Commentary of Mr. VAN DER MEULEN, who also refutes our Author.

³ *Dominium, quod tantum in judicio humano, & quidem coactivo, valeat*, says our Author.

⁴ See PUFENDORF's *Law of Nature and Nations*, B. IV. Chap. X. § 7.

⁵ That is to say, in the Prescription of thirty or forty Years: For Faith and just Dealing was required in the *Usucapim*, or ordinary Prescription. See PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. XII. § 1.

⁶ *De Sophist. Elench.* Lib. II. Cap. V. (XXV.) p. 308. D. Vol. I. *Edit. Paris.*

⁷ Our Author then confesses, that an express Promise would be valid in this Case. Now such Promises were often made. And wherefore should not a tacit Engagement have as much Force?

⁸ *Nihil interest, quomodo captivus, &c.* Digest, Lib. XLIX. Tit. XV. De Captivis & Postlimin. &c. *Leg.* XXVI.

Cunning has got out of the Power of his Enemy ⁹. Because this Right of Captivity is so a Right, that in another Sense it is for the most part even an Injustice ; as ¹⁰ *Paulus* the Lawyer expressly calls it ; a Right as to some Effects, but an Injustice in respect to the Nature of the Thing itself. Whence it is also plain, if any Man taken in an unjust War fall into the Power of his Enemy, he cannot in his Conscience be thought guilty of Theft, if he carries off with him ¹¹ what was his own ; or tho' not his own, ¹² if it were due to him as a Reward for his Labour, over and above his Sustenance ; provided that he himself owes nothing to his Master, upon his own, or the publick Account, or to him from whom the Master derives his Right. Neither does it avail to say, that such a flight, and carrying off Goods, when caught, use to be severely punished : For there are many other Things that those who have the Power in their Hands do for their own Advantage, and not because they are just.

5. But whereas some Canons ¹³ prohibit the persuading a Slave to quit his Master's Service ; if that Prohibition relate to those Slaves who are justly punished with Bondage, or have by a voluntary Contract made themselves so, it is then just ; but if to them, who are taken in an unjust War, or born of such, it shews only that Chris-

⁹ This does not prove, that the Obligation of Prisoners of War was considered as of no Force : Otherwise they ought to have been received also, and to have had the Right of *Postliminy* granted them, after the making of Peace. But this was, because during the course of the War, the Prisoners were not deemed to be fully engaged as Slaves. It was not known to what Fate the Conqueror would doom them. There was always Hopes of recovering them, and it gave no great Trouble, if they had contracted in that respect any particular Engagement, which the State was not obliged to make good. In making Peace then, the State renounced the Right of receiving Prisoners, and of reinstating them in all the Rights of their former Liberty, if it was not stipulated by the Treaty.

¹⁰ *Idque naturali æquitate introductum est, ut qui PER INJURIAM ab extraneis detinebatur, is, ubi in fines suos rediisset, pristinum jus suum reciperet.* Digest, Lib. XLV. Tit. XV. De Captivis & Postlimin. &c. Leg. XIX. Princ. I do not know, whether this Lawyer intended to tax with Injustice, in the Sense and Meaning of our Author, the Detention of a Prisoner of War, much less his Subjection to Slavery. Upon that Foot all the Wars of the Romans were just on their Side, as the Right of *Postliminy*, of which we now speak, took Place in them all. It is likely, that *PAULUS* means only, that the Prisoner was in no Fault, and the Word *injuria*, signifies in this Place no more than an Act of Hostility ; just or not, on the Side of those, who exercise it. It is in this Sense, that another Civilian, speaking of violent Means, used by private Persons, says, that, if without having assembled People, or beaten any one, they have taken away *per injuriam*, that is to say, by main Force, any Thing belonging to another ; they render themselves thereby liable to the Penalty of the *Julian Law*. *De Vi privata : Sed si nulli convocati, nullique pulsati sint ; PER INJURIAM tamen ex bonis alienis quid ablatum sit : Hac lege teneri eum, qui id fecerit.* Digest, Lib. XLVIII. Tit. VII. Ad Leg. Jul. de Vi privat. Leg. III. § 2. *Per injuriam* signifies the same in this Passage, as *Vim facere* in the beginning of the Law.

¹¹ This being a Consequence of our Author's Principle, which we have refuted in *Note 2.* upon this Paragraph, it follows that we must decide in a manner directly contrary to it.

¹² To this may be referred the Passages of *St. IRENEUS* and *TERTULLIAN*, which we have quoted before, *B. II. Chap. VII. § 2. Note 3.* There is a Passage in *PHILO JUDÆUS*, where the same Subject is handled, that is, what the *Israelites*

did on their Departure out of *Egypt*. "As the *Egyptians*, (says he) subdued at Length by so many Plagues from Heaven, pressed the *Israelites* to depart, and expelled them in some Measure ; the latter calling to mind the Dignity of their Origin, undertook a Thing worthy of free Men, who had not forgot the unjust and cruel Treatment they had been made to suffer. For they carried off a great Booty, with one Part of which they loaded themselves, and with the other their Beasts of burden. Not that they were greedy of Riches, or coveted the Goods of others, as Slanderers might accuse them ; for from whence could they have such Sentiments ? But their Motive was, first to obtain by that Means the Reward due to them for their long Service, and next to avenge themselves, tho' not so much as the *Egyptians* deserved, for the Slavery they had imposed upon them. For there is no Comparison between Loss of Money and Loss of Liberty ; for the Preference of which, wise Men sacrifice both their Lives and Estates." So that whether the *Israelites* are considered in a State of Peace or War with the *Egyptians*, it is most easy to justify their Conduct. For, in the first Case, they did no more than seize the Wages, that had been so long kept from them, and in the other, they plundered their Enemies by the Right of Victors, as they had supplied them with a just Cause for taking up Arms, by treating them like Prisoners of War, when they were Strangers, and Suppliants. *De Vita Moysis*, (p. 624. Edit. Paris.) In *St. JEROME'S* Letters there is a like Account concerning an holy Person named *Malchus*. See also that of *Leupges* the Lombard as related by his great Grandson, *PAUL WARNAFREDE*, Lib. IV. and the Confession published under the Name of *Lanicius Patricius*. *GROTIUS*.

The Case of the *Israelites* is very different from that in Question ; and the Passage of *PHILO*, which I have cited more at large than our Author has done, relates as little to it ; as any one will easily conclude upon Reflection. The same must be said of the Story of *Malchus* : For he had been taken by Arabian Robbers, and escaped from their Slavery, carrying away with him two of his Master's Goats. See *St. JEROME*, *De vita Malchi*, Vol. I. p. 256. & seqq. Edit. Froben.

¹³ That of the Council of *Gangra* : *Si quis servum alienum, &c. Caus. XVII. Quæst. IV. Can. XXXVII.* See also the following Canon, and what has been said above, *B. II. Chap. V. § 29. in fin. GROTIUS*.

tians should advise Christians to Patience, rather than to those Acts, which tho' strictly lawful, may give Offence either to Infidels or weak Minds. In like manner we are to understand the Advice of the Apostle's given to Slaves, unless that Advice may seem rather to require of Slaves a faithful Obedience to their Masters, whilst they are with them, which is agreeable to natural Equity, for their Labour and their Maintenance mutually answer one another.

VII. But as the same Divines hold, that a ¹ Slave cannot resist his Lord in executing that external Right which he has over him without Injustice, I entirely agree with them; but there is this manifest Difference between that external Right, and those Things I said before. That external Right, which consists not in a bare Impunity, but is moreover supported by the Authority of Courts of Justice, would be wholly vain, if on the other Side it were lawful to resist. For if it be allowable for a Slave to resist his Lord, he may ² as well resist the Magistrate that defends his Lord: Since it is from the Law of Nations that that Magistrate ought to defend the Lord in that Right, and in the Exercise of it. This Right therefore is like that, which we have elsewhere ³ allowed to the Chief Magistrate in every State, whom the Subjects can never in Conscience resist. Therefore St. *Augustin* joins them both together, when he says, ⁴ *Subjects should so bear with their Sovereigns, and Slaves with their Lords, that by suffering these temporal Evils with Patience, they may hope for eternal good Things.*

VII. Whether they may resist their Lords.

VIII. But this also we must observe, that this Law of Nations concerning Prisoners, has not been at all Times, nor among ¹ all Nations received, tho' the *Roman* Lawyers call it General, thus giving the Name of Whole to the most known and most considerable Part. So among the *Hebrews*, who had peculiar Laws, whereby they were separated from the Commerce of other Nations, there was a Place of Refuge ² for Slaves, that is, for those (as the Interpreters well observe) who ³ became so by their Misfortune, not their Crime; on which that Privilege seems grounded among the *French*, given to Slaves to enter again on Possession of their Liberty, the Moment they come into the Dominions of that Kingdom, which is also now allowed, not only to those taken in War, but to all others whatever.

VIII. That this Right is not allowed in all Nations.

IX. 1. But among Christians ¹ it is generally agreed, that being engaged in War, they that are taken Prisoners, are not made Slaves, so as to sell them or force them to hard Labours, or to such Miseries as are common to Slaves, and that with Reason; for they are, or should be better instructed by the great Recommender of every Act of Charity, than not to be diverted from the killing of unhappy Persons, unless they may be allowed the Exercise of a somewhat less Cruelty. ² And *Gregoras* declares it

IX. Nor now among Christians, and what is introduced in its stead.

VII. (1) Our Author's Principles do not agree very well in this Place. For if the Slave, of whom he speaks, may run away, I do not see, why he may not resist his Master, and even kill him, when he has it in his Power, in order to deliver himself from Slavery; since if there be no Engagement on his Side, the State of War subsists always between him and his Master. See the following Note.

² No doubt he may, if he was not bound by any Engagement to his Master. But the Magistrate supposes, or ought to suppose, a real Agreement by which the Slave is bound; and that is the Reason, why he may be obliged to deliver him up to the Master, who reclaims him, without putting himself to the Trouble of examining, whether the War, in which the Slave was taken, was just or not.

³ B. I. Chap. IV. But there also we have shewn that our Author carries the Obligation of Non-resistance to Sovereigns too far.

⁴ The Passage has already been cited in the same Place, § 7. Num. 8. Note 31. I find since, that our Author in reciting it in his Treatise *De imperio Summarum Potestatum circa Sacra*, Cap. III. § 6. gives it as St. PROSPER's, Sentent. XXXIV. ex AUGUSTIN. in Psalmum CXXIV. but adds he, *non ad verbum*, that is to say the Sense is in that Father, tho' not the express Terms of the Passage.

VIII. (1) Amongst the *Indians* there were no Slaves. STRABO, *Geograph.* Lib. XV. p. 1036. Edit. *Amstel.* (710. Paris.) GRONOVIVS cites this Example.

² This is a meer Supposition. The Law is general, and relates to all Slaves, that is to say, the Slaves of other Nations. See Mr. LE CLERC's Commentary upon it. So that this Law may be considered as one of those, wherein GOD used his Right of Sovereignty over the Goods of Men; by which the *Israelites* were excused from restoring foreign Slaves to those to whom they belonged.

IX. (1) And before them the *Essenes*, from whom the first Christians derived their Original, according to JOSEPHUS. GROTIUS.

The Jewish Historian speaks of a Sort of *Essenes*, who believe, says he, that there was some Injustice in having Slaves: *Antiq. Jud.* Lib. XVIII. Cap. II. p. 618. B. What our Author lays down, as a Fact in regard to the Origin of the first Christians, is besides a mere Conjecture.

² B. IV. where are these Words, *It is a Custom delivered without Corruption from the Antients to Posterity, that it was lawful not only for the Græco-Romans and Thessalians, but for the Illyrians, Triballians and Bulgarians, because they were of the same Faith, to seize upon the Goods indeed as Spoils, but not to take the Men Prisoners of War, nor kill them,*

it is a continued Custom among those of the same Religion, nor was it peculiar to them who lived under the *Roman* Government, but was common to the *Thessalians*, *Illyrians*, *Triballians* and *Bulgarians*. And this at least (tho' but a small Matter) is an Effect of the regard Men have to the Christian Religion, which *Socrates* ³ in vain attempted to have introduced among the *Grecians*.

2. And what Christians in this Case observe among themselves, ⁴ the *Mahometans* likewise do among themselves. Yet even among Christians this Custom still continues, that those taken in War are kept till their Ransom ⁵ be paid, which is set at the Pleasure of the Conqueror, unless it be otherwise agreed upon; but this Right of keeping Prisoners is usually granted to the Captors, except they be Persons of considerable Rank, to whom the State only, or its chief Magistrate has a Right, according to the Custom of most Nations.

them, when the Battle was over. Adam Bremen of St. Angarius, returning from thence to Hamburg, rebuked the Nordalbians for selling the Christians. This Custom BOER. speaks of *Decis* 178. and adds, it is observed in *France*, *England* and *Spain*, that if a Duke, Count or Baron was taken, he does not belong to the Soldiers, but to the Prince who makes War. GROTIUS.

3 Our Author cites here in the Margin one of PLATO's Dialogues, wherein that Philosopher, whom he supposes in this to have followed his Master's Doctrine, establishes for one of the Laws

of his Republick, that no Greek should make Slaves of those of his own Nation, nor advise other Greeks to do so: *De Legib.* Lib. V. p. 469. C. Vol. II. Edit. H. Steph.

4 See CHALCOCONDYLAS, *Rerum Turcic.* Lib. III. LEUNCLAVIUS, *Lib.* III. and XVII. BUSBEQU. *Epist. exotic.* III. (p. 162. Edit. Elzevir 1662.) GROTIUS.

5 See upon this Subject a Dissertation of the late Mr. HERTIUS, *De Lytro*, on the first Volume of his *Comment. & Opuscul. &c.* p. 253. & seqq.

C H A P. VIII.

Of Empire over the Conquered.

I. That Sovereignty, whether in a King, or People, may be acquired by War; and the Effects of such an Acquisition.

I. I. **N**O wonder that he who can bring into Slavery every particular Person of the Enemies Party, that falls into his Hands, (as we have shewn in the preceding Chapter) may ¹ also impose a Subjection upon the whole Body, whether it be a State, or part of a State; whether that Subjection be merely Civil, merely despotical or mixt. *Seneca* makes Use of this Argument in the Controversy *De Olynthio*, ² *he* *bad*

I. (1) Provided there be on the Side of the Conquered either an express or tacit Consent. And in that Case the Acquisition is deemed lawful, whether the War was just or unjust; as I shall explain below, *Chap.* XIX. § 11. *Note* 1. Compare this Place with PUFENDORF, *B.* VII. *Chap.* VII. § 5. and what Mr. CARMICHAEL, Professor at *Glasgow*, says in his Notes upon the Abridgment *De Officio Hom. & Civ.* Lib. II. *Cap.* X. § 2. and *Cap.* XVI. § 14. The late Mr. COCCEIUS, has however maintained, that, in a just War, the Victor acquires an entire Right of Sovereignty over the Vanquished, by the sole Right of Conquest, independently of all Convention, and that, even tho' the Victor has otherwise obtained all the Satisfaction and Amends he could require. The principal Reason this Doctor makes Use of to prove his Opinion is, that otherwise the Conqueror could not be assured of the peaceable Possession of what he had taken, or forced the Conquered to give him, for his Pretensions; since they might retake it from him by the same Right of War. See the Dissertation, *De jure Victoris diverso a jure Belli*, § 23. But an Author of the same Nation, Mr. FREUER, Professor of Politicks and Ethicks at *Helmstadt*, has refuted this Opinion in his Notes upon PUFENDORF, *De Offic. Hom. & Civ.* Lib. II. *Cap.* XVI. § 13.

The Reason alledged proves only, that the Victor, who has possessed himself of an Enemy's Country, may command in it, whilst he holds it, and not resign it, till he has good Security, that he shall either obtain, or possess without Hazard, what is necessary for the Satisfaction and Amends he has a Right to exact by the Methods of Force. But the End of a just War does not always demand of itself, that the Conqueror should acquire an absolute and perpetual Right of Sovereignty over the Conquered. It is only a favourable Occasion of obtaining it, and for that Purpose there must always be either an express or tacit Consent of the Conquered; otherwise the State of War still subsisting, as is granted; the Sovereignty of the Victor has no other Title, but that of Force, and continues no longer than the conquered People are incapable of throwing off the Yoke. All that can be said is, that the neutral Powers, as being such, may and ought to look upon the Conqueror, as the lawful Possessor of the Sovereignty, even tho' they should believe the War unjust on his Side; and that without the Necessity of supposing here, with our Author, an arbitrary Law of Nations.

2 *Servus, inquit, est meus, quem ego emi belli jure; vobis Athenienses, expedit: Alioquin imperium vestrum in antiquos fines redigitur, quidquid est*

had been taken by Right of War; he is my Slave by Purchase. It is your Interest, O Athenians, to maintain me in my Rights: Otherwise your Dominion must be confined within its former Bounds, by restoring what you have gained by War. Wherefore Tertullian³ owns, that Empires are gained by Arms, and enlarged by Conquests: So Quintilian,⁴ Kingdoms, Nations, the Bounds of Cities and Countries are determined by the Right of War. Alexander in Curtius⁵ says, that Laws are imposed by the Conqueror, and received by the Conquered. A Favourite (of Antiochus) in his Oration to the Romans, ⁶ Why do you send every Year your Prætor with the Ensigns of Empire, the Rods and Axes, unto Syracuse, and other Greek Cities in Sicily? Truly you can say nothing else, but that having subdued them by Arms, you impose these Laws upon them. And Ariovistus⁷ in Cæsar's Commentaries says, that by the Law of Arms the Conqueror may govern the Conquered as he pleases. And again, The Romans govern those whom they have conquered, not after the Prescriptions of others, but according to their own Pleasure.

2. Justin tells us out of Trogus,⁸ that Princes that made War before Ninus, sought not Empire, but Glory, and being contented with the Victory, did not reduce their Enemies under their Dominion. That Ninus was the first who enlarged the Bounds of his Empire, and subdued other Countries by War, and from him it became a Custom. Bocchus argues in Salust,⁹ That he took up Arms to defend his Kingdom, for that Part of Numidia, from whence he had beaten Jugurtha, was become his own by the Right of War.

3. But Sovereignty may be acquired by Conquest, either so far as it was¹⁰ in the King, or another Governor, and then all the Power he had passes to the Conqueror, and no more. Or¹¹ as it is in the People, and then the Conqueror has the same Right to alienate it as the People had, and thus Kingdoms become patrimonial, as I have said elsewhere, B. I. Chap. III. § 11.

II. I. And

est bello partum, et est contra. At ille, &c. Controvers. Lib. V. Contr. XXXIV. p. 390. Edit. Gron. Major. Tho' the Sense of this Passage is sufficiently clear, the Words are however corrupted, as the learned Commentator JOHN SCHULTING remarks, who conjectures with Probability enough, that it ought to be read: *Servus, inquit, est meus, quem ego emi belli jure. Id tueri vobis, Athenienses, expedit: Alioquin — redigitur; quidquid est bello partum perdetis. Contra ait: Ille, &c.* It seems to me only that after *belli jure, captum* ought to be read, or some Term of the same Sense, as I have expressed it in my Translation; for it is not by the Right of War, that the Painter bought the Slave; but the Validity of the Purchase was founded upon the Seller's possessing the Slave by the Right of War. For the Rest, the reasoning contained in those Words amounts to that of our Author, by the Reason of Contraries. For the Painter means, if Prisoners of War are not lawfully acquired by those who take them, neither can a Conqueror lawfully become Master of a People by the Right of Conquest.

3 *Ni fallor enim, omne Regnum, vel Imperium, bellis quaritur, & victoriis propagatur.* Apologetic. Cap. XXV.

4 *Sed hinc aspera & vehemens quæstio exoritur de jure Belli, dicentibus Thessalis, hoc regna populos fines gentium atque urbium contineri.* Instit. Orat. Lib. V. Cap. X. p. 431. Edit. Burman.

5 *Leges autem a victoribus dici, accipi a victis,* Lib. IV. Cap. V. Num. 7.

6 *Cur Syracusas, &c.* Lib. XXXV. Cap. XVI. Num. 3.

7 *Ad hæc Ariovistus respondit, &c.* De Bell. Gall. Lib. I. Cap. XXXVI.

8 *Fines imperii tueri magis, &c.* Lib. I. Cap. I. Num. 3. & seqq.

9 *Se non hostili animo, &c.* De Bell. Jugurth. Cap. CX. p. 506. Edit. Waff.

10 Alexander the Great after the Battle of Gaugamela (otherwise called the Battle of Arbela) was

saluted King of Asia. PLUTARCH, in Vit. Alex. p. 685. B. Vol. II. Edit. Wech.

The Romans appropriated to themselves by the Right of War, (πολέμῳ νόμῳ) the Countries which had belonged to King Syphax. APPIAN ALEXAND. Excerpt. Legat. X. Num. 28. The Embassadors of the Goths, as AGATHIAS relates, told Theodorick, one of their Kings, that having overcome Odoacer, a Stranger, of Scyros, he was become Master of all his Dominions, by Right of War: ἅλλ' Ὀδοάκρον κατελὼν τὸν ἐπηλύτην τὸν Σκύρηνον (as it must be read instead of Τύρηνον) ταῖς αἰσὶν ἅπαντα κατέσχε τῷ τῷ πολέμῳ θεσμῷ. Hist. Lib. I. (Cap. IV. p. 11. Edit. Vulcan.) But MENANDER the ProteCTOR informs us, that when the Huns pretended to have conquered the Gepidæ, because they had taken their King, the Romans denied it, averring the Chief of the Gepidæ was a Prince rather than a real King, and that therefore the Gepidæ were not his, as a patrimonial Estate, GROTIUS.

In the Passage of AGATHIAS, the antient Version of CHRISTOPHER PERSONA a Roman, printed at Ausburgh in 1519. has, *Et peregrino strenue debellato Tyranno*: From whence it appears, that the Translator read τύραννον in his Original, instead of Τύρηνον. Our Author, citing this Passage above, probably by Memory, (Chap. VI. of this Book, § 2. Note 11.) says πολέμῳ νόμῳ, for θεσμῷ.

11 The Persians, as the same MENANDER, cited in the foregoing Note relates, maintained, that the Territory of the City of Daros belonged to them, because they had conquered that City: Belisarius, after having defeated the Vandals, insisted that the City of Lilybæum in Sicily should become dependent upon the Roman Empire, because the Goths had given it to the Vandals: But the Goths denied their having given it to them, as we find in PROCOPIUS, Vandalic. Lib. II. (Cap. V.) Henry the Son of the Emperor Frederick Barbarossa, after having taken Sicily, claimed also the Cities of Epi-

II. An Empire may be acquired over the People that is despotic, and then they cease to be a State.

II. 1. And yet a Sovereignty may be more absolutely acquired, as that which before was a State may cease to be a State; which may be done, either by adding it to another State, as the *Roman Provinces* were, or without any such Incorporation, when a King making War¹ at his own Charge conquers the People, so as to govern them not for their Profit, but chiefly his own Interest, which is the Character of despotic Power in Opposition to civil Government. *Aristotle*² says, *There is a Government for the Benefit of the Sovereign, and another for the Advantage of the Subject, the one takes Place among free Men, the other between Masters and Slaves.* The People then under this Government, for the future, are not a State, but a Multitude of Slaves; for it was well said of *Anaxandrides*³,

οὐκ ἔστι δέλων, ὃ γὰρ, ἐδαμῶ πόλεις.

My Friend, a State is not made up of Slaves.

2. And *Tacitus* thus opposes civil Government to arbitrary Power. And *Xenophon* of *Agefilas*, ἐπίσας ἢ πόλεις προσαγάγει, &c.⁴ *Whatsoever Cities be subdued, he excused them from all servile Offices, and required no more Obedience than what a free People pay their Prince.*

III. Sometimes a mixt Government is acquired.

III. And hence we may understand, what a mixt Sovereignty is between the despotick and the civil, namely, when Slavery is mixt with a kind of personal Liberty. Thus we read some People have their Arms taken away, and that they should use no other¹ Instruments of Iron, but what were necessary for Husbandry:² Others forced to change their Language and Method of living.

IV. That even the incorporeal Things may be acquired by War, where is handled a Question concerning the Theſſalian Bond.

IV. 1. But as the Goods of every particular Prisoner, by the Right of War, belong to the Captors, so the Goods of the People in general belong to the Conquerors, if they please. For what *Livy* said of those that surrendered themselves, *When all Things are given up to the Conqueror, it is wholly in his own Power and Will to take what he pleases to himself, and to leave them what he has a mind;* the same may be said of those conquered in a solemn War. For a Surrender doth but voluntarily yield up, what would otherwise be taken away by Force. So *Scaptius* in *Livy*² says, *That the*

damnum, Theſſalonica, and other Places possessed by the *Sicilians*: *NICEſAS*, *Lib. I. De Alexio Isaaci fratre*, (Cap. IX.) *Bajan*, Chagan (or Prince) of the *Avari*, told the Emperor, that the City of *Sirmium* was his, because it had belonged to the *Gepidæ*, whom the *Avari* had conquered. *MENANDER*, *Protector*, (Cap. III. *Legat. Justin. Justinian & Tiber.*) *Peter*, *Justinian's* Ambassador, told *Chosroez*, King of *Persia*, that he who is Master of the Principal, ought to be so of the Accessory; and that therefore *Suania* was conquered with the *Lazi*, as the *Suanians* and *Lazians* agree that the latter had formerly been in Subjection to the former. *Apud eundem*, (Chap. III.) See above, § 4. *GROTIUS*.

II. (1) See above, *B. I. Chap. III. § 12. Num. 2.*

2 *Politic. Lib. VII. Cap. XIV. p. 442. D.*

3 (In *Anchis.* Excerpt. Vett. Comic. & Frag. p. 639.) *TACITUS* says: *Addiditque præcepta* [*Claudius Cæsar*] — *ut non dominationem & servos, sed rectorem & cives cogitaret.* *Annal. Lib. XII. (Cap. XI. Num. 2.) GROTIUS.*

4 *De Agefil.* (Chap. I. § 22. Edit. Oxon.) *GROTIUS.*

III. (1) This in a Treaty of Peace granted by *Porſenna*, King of *Etruria*, to the *Romans*, after they had expelled their Kings, there was an express Clause, that the *Romans* should not have any Instruments of Iron, but for the Uses of Agriculture. *In fœdere, quod, expulsis regibus, &c.* *LINNY, Hist. Natur. Lib. XXXIV. Cap. XIV.* Our Author quotes this Example himself in a Note upon the first Book of *SAMUEL*, Chap. XIII. Ver. 19. where he thinks a like Method is spoke of, which the *Philistines* used for disarming the *Israelites*. But

it seems probable, that it was in a different Manner; the Reader may see *Mr. LE CLERC's* Commentary upon it. The *Roman* Historians have passed over in silence this Circumstance of the Treaty between *Porſenna* and the *Romans*, as shameful to a People, who were afterwards Masters of the World; as our Author observes in the same Place. To this may be added a Note of *FREINSHEMIUS* upon *FLORUS*, *Lib. I. Cap. X. Num. 2.*

2 The learned *GRONOVIVS* introduces here very properly the Example of the *Lydians*, from whom *Cyrus*, after having conquered them, took away their Arms and Horses, obliging them at the same Time to frequent Taverns, Places of Diversion, and bawdy Houses: *Quibus* [*Lydis*] *iterum victis, arma & equi ademti, jussique cauponias & ludicras artes, & lenocinia exercere.* *JUSTIN. Lib. I. Cap. VII. Num. 12.* See *Mr. BERNEGGER's* Note upon this Passage, who adds other Examples.

IV. (1) See above, *B. I. Cap. III. § 8.* and *B. II. Cap. V. § 31.* and in this *B. Cap. V. § 2.* and afterwards, *Cap. XX. § 49.* Add also the Extracts of *POLYBIUS*, *Legat. CXLII.* they that yield themselves to the *Romans*, do first give up their Country and the Cities therein, besides all the Men and Women that are in the Country or the Cities. Also all the Rivers and Ports, and in general all Things Sacred and Religious: So that the *Romans* become Lords of all, and those that surrender themselves have nothing that they can call their own. See what has been said above, *B. I. Cap. IV. § 7.* *JUSTIN, B. XXXV.* speaking of the *Jews*, says, afterwards with the *Persians* they fell into the Power of *Alexander the Great.* *GROTIUS.*

2 *Agrum, de quo ambigitur, &c. Lib. III. Cap. LXXI. Num. 6.*

Lands

Lands in dispute were Part of the Territory of Corioli, which being taken, by the Right of War, they became then the Romans. And Hannibal in the same Author thus encourages his Soldiers in his Oration before the Battle, ³ *Whatsoever the Romans have by so many Victories got, and heaped up, shall, together with themselves the Masters of it, be ours upon the Victory.* And thus ⁴ *Antiochus* pretended, that *Seleucus* having subdued all the Dominions of *Lyfimachus*, those Countries belonged to him (*Antiochus*) as Conqueror of *Seleucus*. So all that *Mithridates* had taken in War, and added to his own Dominion, ⁵ *Pompey* (by beating him) made the Romans.

2. Wherefore even those incorporeal Rights, which belonged to the State, shall become the Conqueror's, as far as he pleases. So upon the subduing *Alba*, all the Rights of the Citizens were ^a claimed by the Romans: Whence it follows, that the *Theffalians* were entirely discharged from the Obligation of an hundred Talents ⁶ which they owed to the *Thebans*, when *Alexander the Great* having conquered the *Thebans*, had as their Lord by the Right of Conquest forgiven the Debt. Neither is that perfectly true, which *Quintilian* ⁷ alledges in behalf of the *Thebans*, that what he takes only belongs to the Conqueror, that the Right which is incorporeal cannot be seized on; that the Condition of an Heir is one Thing, and that of a Conqueror another; because the Right passes to the one, and the Thing to the other: For he that is Master of the Persons, is also of the Things, and of the Rights belonging to them. He that is possessed by another, ⁸ can be in Possession of nothing in his own Name, and when one is under the Power of another, ⁹ he has nothing in his own Power.

3. Yea, tho' the Conqueror leave to the Conquered *Jus Civitatis*, the form of a State, yet may he take to himself some Rights that belonged to it. For it is in his Power to limit his own Bounty as he pleases. *Cæsar* imitated *Alexander*, in forgiving a Debt ^b to the *Dyrrachians*, which they owed to some of the contrary Party. But here it may be objected, that the War of *Cæsar* ¹⁰ was not of the same Kind, concerning which this Law of Nations was instituted.

^a *Dion. Hal.*
l. 3. c. 31.

^b *Cicer. Epist.*
ad Brut. VI.

³ *Quidquid Romani tot triumphis. &c.* Idem, Lib. XXI. Cap. XLIII. Num. 6.

⁴ *Quo [Lyfimacho] victo, quum omnia, &c.* Livy, Lib. XXXIII. Cap. XL.

⁵ See STRABO, *Geograph.* Lib. XII. (p. 815. Edit. Amstel. 541. Paris.)

⁶ See PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VI. § 20. and what our Author says in the following Chapter, § 9. Num. 2. Mr. CARMICHAEL, Professor at Glasgow, says in his Notes upon the Abridgment *De Officio Homin. & Civis*, Lib. II. Cap. XVI. § 14. that the Advantage of the Discharge, in the Case under Consideration, can hardly be extended to beneficent Contracts, or such as have been entered into solely for the Debtor's Benefit. So that it does not suffice, according to this Author, that the Conqueror discharges those of such a Debt owed to the Conquered. But if the Neutrality, which dispenses with the Debtor's examining into the Justice of the War and of the Conquest, lays him under the Obligation of paying the Conqueror, and thereby dis-

charges him with regard to the Creditor, to whose Rights the Conqueror is deemed to succeed: I do not see why the same Thing should not take Place in the Case of a Donation, or an Acceptilation. What Generosity or Humanity requires is foreign to the Question: But as to Right, properly so called, that is certainly the same in both Cases.

⁷ *Tum secundo gradu, &c.* Institit. Orat. Lib. V. Cap. X. p. 432. Edit. Burman.

⁸ *Qui in servitute est, usucapere non potest, nam, quum possideatur, possidere non videtur.* Digest, Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. CXVIII.

⁹ *In sua enim potestate non videtur habere, qui non est suæ potestatis,* Lib. XLVIII. Tit. V. *Ad Leg. Jul. de Adulteriis coercendis*, Leg. XXI.

¹⁰ *Antony* commanded the *Tyrians* to restore what they held belonging to the *Jews*, not granted by the Senate, and possessed before the War of *Cassius*, as JOSEPHUS relates. See also BIZAR. *Genuens. Histor.* Lib. X. GROTIUS.

CHAP. IX.

Of the Right of Postliminy.

I. 1. **A**S the Lawyers of latter Ages have writ almost nothing reasonably of Things taken from Enemies, so neither have they of the Right of Postliminy. This Subject has been treated of by the old *Roman* Lawyers somewhat more accurately,

I. The Original of the Word Postliminium.

rately, but oftentimes too confusedly; so that the Reader could not well distinguish, what they attributed to the civil Law, and what to the Law of Nations.

2. The Opinion of *Servius Sulpicius* of the Word *Postliminium*, is to be rejected, who takes the latter Part of it to be only an Extension of no Signification; but that of *Scævola* to be approved, who compounds ¹ it of *Post*, ² that may signify a Return, and *Limen*, which signifies Frontiers; for *Limen*, and *Limes*, differ only in Termination and manner of declining, for they are both derived from the old Word *Limus*, that signifies oblique, or across, and in the primitive Notion are the same; as *Materia* and *Materies*, *Pavus* and *Pavo*, ³ *Contagio* and *Contages*, *Cucumis*, and *Cucumer*; tho' afterwards, *Limen* was particularly applied to the Entrance of private Dwellings, and *Limes* to that of the Lands of the State. So the Antients called banishing of a Person *Eliminare*, and Banishment they termed ⁴ *Eliminium*, thrusting out of their Bounds, or Limits.

II. Where
this Right
takes Place.

II. 1. Therefore the Right of *Postliminy* is that which ariseth from a ¹ return to ² the Frontiers, that is, the Territories of the State. *Pomponius* ³ says, that a Man has this Right of Return, the Moment he enters into any Place, that the State is Master of. *Paulus*, ⁴ when he is entered our Bounds, or Territories. But from a Parity of Reason, the general Consent of Nations has extended the Thing further, so that this *Postliminium* (or Right of Return) should take Place, even as soon as a Person (or any Thing capable of this Right) should come safe to our Friends, as *Pomponius* ⁵ has it in the aforesaid Place; or as *Paulus* ⁶ explains it by way of Ex-

I. (1) As *CICERO* informs us, who recites both Etymologies: *Sed quum ipsius Postliminii vis quæritur, & verbum ipsum notatur: In quo Servius noster, ut opinor, nihil putat esse notandum, nisi post, & liminium illud, productionem esse verbi vult, ut in finitimo, legitimo, æditimo, non plus inesse timum, quam in Meditullio, tullium. SCÆVOLA autem P. F. junctum putat esse verbum, ut sit in eo & post, & limen: Ut quæ a nobis alienata sunt, quum ad hostem pervenerint, & ex suo tamquam limine exierint, dein quum redierint post ad idem limen, postliminio videantur rediisse. Topic. (Cap. VIII.)* For this Reason *TERTULLIAN* used the Word *Postliminium* in a metaphorical Sense, to express the return or Re-establishment, by which a Sinner is received into the Peace of the Church: *Incesto fornicatori postliminium largitus pacis Ecclesiasticæ, &c. De Pudicitia, Cap. XV.* *FESTUS* says in regard to *Limen*: *LIMUS, obliquus id est, transversus: Unde & LIMINA.* See also *SERVIVS*, upon the twelfth Book of the *Æneid*, (Ver. 120.) and *DONATUS* upon the Eunuch of *TERENCE*, (*Act. III. Scen. V.* (Ver. 53.) *ISIDORUS* says with respect to *Limes* & *Limen*: *LIMITES* adpellati, antiquo verbo transversi. Nam transversa omnia antiqui Lima dicebant: A quo & limina ostiorum, per quæ foris & intus itur; & limites quod per eos foras in agros eatur. Orig. Ling. Lat. Lib. XV. Cap. XIV. And in the old Glossary, (published by *HENRY STEPHENS*.) *Limes* is explained by *πλάγια ὁδοί*. *GROTIUS*.

The Passage of *SERVIVS* referred to by our Author in this Note, but without marking the Verse where it is found, tends to prove that *Limus* signifies oblique, what goes across. And the Grammarian speaks of it upon Occasion of a Word of the Poet, which some Antients believed corrupted *Lino*, instead of which they were for reading *Limo*, the Ablative of *Limus* taken as a Substantive. And by *Limus* they understood a Kind of Vestment bordered with watered Purple, which reached from the Navel down to the Feet. This, by the way, is a Word omitted in the Dictionaries, tho' found in the Grammarian, who has commented upon *VIRGIL*, and in *ISIDORUS*, who informs us further that this Vestment was peculiar to the Slaves of the Publick. See also *HYGINUS*, *De limitib. constitutendis*, p. 151. and the Notes of the late Mr. *GOES* upon him, p. 162, 163. as also *LAURENT. PIGNORIUS*, *De Servis*, p. 29, 30. Edit. Patav.

1656. As to the Word *Limen*, which our Author believes to have signified of old the same as the Word *Limes*, following a Remark contained in a Passage of the *Institutes*, which will be cited upon the next Paragraph, Note 2. The learned *SALMASTIUS* has taken upon him to refute this Opinion in his *Observationes ad jus Atticum & Romanum*: And *MENAGE* agrees with the latter in his *Amœnitates Juris Civilis*, Cap. XXXIX. p. 331. Edit. Lips. But as Mr. *SCHULTING* observes, upon the *Institutions* of *CAJUS*, Lib. I. Tit. VI. § 2. p. 49. the very Passages, alledged by *MENAGE*, prove, that the Word *Limen* was used to express the Frontiers or Bounds of a State, by other antient Authors, than those followed by *TRIBONIANUS*.

2 From whence came the Name of a Goddesses, called *Postvorta*. *GROTIUS*.

She was one of the Goddesses who presided at the Birth of Children. See *AULUS GELLIUS*, Noct. Attic. Lib. XVI. Cap. XVII.

3 *Compago* and *Compages*, a Joint, which was formerly *Compagen*, as the Genitive Case shews, and the Verb derived from it, (*Compagino*, to join) as also *sanguis*, was formerly *sanguen* Blood. *GROTIUS*.

4 And *Colliminium*, a Word which may be found in *SOLINUS*, (Cap. XV. or XXV. according to some Editions) instead of *Collimitium*, which is commonly used. *GROTIUS*.

II. (1) That is to say a Right, in Virtue whereof, the Things, and Persons, taken by the Enemy, return to their first State: The Person recovering their Rights, and the Things returning to their former Masters.

2 *Dicitur est autem Postliminium, &c. Institut. Lib. I. Tit. XII.* Quibus modis jus patriæ potestatis solvitur, § 5.

3 *Tunc autem reversus intelligitur, si aut ad amicos nostros perveniat, aut intra præsidia nostra esse cepit. Digest, Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. V. § 1.*

4 *Postliminio rediisse videtur, quum in fines nostros intraverit: Sicuti amittitur, ubi fines nostros excessit. Digest, Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. XIX. § 3.*

5 See Note 3. upon this Section.

6 *Sed & si in civitatem sociam amicumve, aut ad regem socium vel amicum, venerit, statim postliminio rediisse videtur: Quia ibi primum nomine publico tutus esse incipiat. Ibid. Leg. XIX. § 3.*

ample, to a King in Alliance or Friendship with us; (where Friends, ⁷ or Allies, are not to be taken simply for those with whom we are at Peace, but those who join with us in the same War) unto whom they who shall arrive, are to be safe, as *Paulus* speaks, upon the publick Account; for it is all one, whether Person, or Thing, escape to these, or to his own Countrymen.

2. But among those who are Friends, but not engaged in the same Party, Persons taken in War, change not their Condition (of Captivity) unless by a special Article and Agreement, as it was stipulated ⁸ between the *Romans* and *Carthaginians*, in their second Treaty, that if any of the Friends of the *Romans*, being taken by the *Carthaginians*, should escape into any Ports subject to the *Romans*, they should obtain their Liberty, the like Provision being made for the Friends of the *Carthaginians*. ⁹ Therefore the *Romans*, who being taken in the second Punick War, and sold as Slaves, were come from Master to Master into *Greece*, could not be admitted to this Right of *Postliminy*, because the *Greeks* were Neuters in that War; there was therefore a Necessity of their being ransomed, before they could be set at Liberty. We also read in *Homer* of several Persons taken in War, sold into such Countries as were at Peace, as *Lycaon*, *Iliad*, (*Lib. XXI.*) and *Eurymedusa*, *Odyss. Lib. VII.*

III. According to the antient Language of the *Romans*, even free Men were said to be recovered by Right of *Postliminy*. *Gallus Aelius*, in his first Book of the Significations of Law Terms, saith, *That a free Man who went from one City to another, and afterwards returned to that City, was first said to be recovered by the Right of Postliminy. Also a Slave taken Prisoner, by the Enemy, if he afterwards returns to us, returns to the Obedience of his old Master by Right of Postliminy. A Horse, a Mule, and a Ship, have the like privilege of Postliminy*, in *postliminii receptu*, (thus I judge those three Words with little Alteration may be retained, which *Jacobus Cujacius*, a Man incomparable for his Study of the *Roman Law*, would have left out) *as a Slave: What kinds of Things do return to us by this Right of Postliminy, the same may return from us to our Enemies.* But the modern *Roman Lawyers* have with more Exactness distinguished two Kinds of *Postliminy*, ¹ *viz.* when we either return, or recover something.

IV. 1. The Opinion also of *Tryphoninus* ¹ is allowable, who says this Right of *Postliminy* takes place in War, or Peace; in a Sense somewhat different than *Pomponius* ² expressed it. This Right of *Postliminy* in Peace (unless it be otherwise stipulated) belongs ³ to those who were not overcome in War by force of Arms, but were by their own Misfortune surprized, as found in the Enemies Country, when the War suddenly broke out. But there is no Benefit of *Postliminy* to the other Prisoners in Time of Peace, ³ unless it were comprised in the Treaty of Peace: As the most learned ⁴ *Peter Faber* judicially corrects that Place of *Tryphoninus*, not disapproved

III. *That some Things return, and some are recovered by this Right of Postliminy.*

IV. *This Right of Postliminy is of Force in Peace and War, and what if nothing be said in Peace.*
² See Paruta, *De Bell. Cypr.* l. 1.

⁷ The King of *Morocco* and *Fez* understood so, according to *THUANUS, Hist. Lib. CXXX.* upon the Year 1603. *GROTIUS.*

⁸ *POLYBIUS, Lib. III. Cap. XXIV. p. 248.* Edit. Amstel.

⁹ *VAL. MAX. B. V. Cap. II. 6. DIOD. SIC. Excerpt. Legat. Note 3.* So the *Rhodians* freely restored to the *Athenians*, what *Athenian* Citizens they had bought in *Philip's* War. *POLYBIUS, Excerpt. Legat. III. GROTIUS.*

III. (1) *Quum duæ species postliminii sint, ut aut nos revertamur, aut aliquid recipiamus, &c. Digest, Lib. XLIX. Tit. XV. De Capt. & Postlimin. &c. Leg. XIV. Princ.*

IV. (1) *In bello Postliminium est, &c. Ibid. Leg. XII. Princ.*

² See below, § 18. of this Chapter, *Note 4.* where the Law is cited.

³ See *JOSEPHUS, Antiq. Hist. XIII. 2. POLYBIUS* tells us, that in the Treaty of Peace which the *Romans* made with *Philip* King of *Macedon*, in that with the *Ætolians*, in which however there was some Exception, and in that with *Antiochus*, it was agreed that all Prisoners on either Side should be restored, *Excerpt. Legat. IX. 28, 35. LIVY* has the same Examples, and adds that of the Peace

with *Nabis*. There are some also in *ZOSIMUS*. The Peace of *Probus* with the *Vandals* and *Burgundians* runs thus, *That all the Prey which they had taken, and all the Prisoners, should be restored*, B. I. He also relates a like Peace made by *Julian* with the *Germans* in general, also with the *Quadi*, that were in *Germany*, B. III. (Cap. VII. where there is no such Thing.) *AMMIANUS MARCELLINUS*, of *Swomarius*, King of the *Almains*, or *Germans*; he begged Peace on his Knees, and he obtained it with the Forgiveness of what was passed, upon this Condition, that he should restore our Prisoners. Again of the *Sarmatians*, being ordered to get dwelling Places, they without Fear delivered up our Prisoners. He again says the same of another Part of the *Sarmatians*. And many such in *ZONARAS*, among the Rest, in the Affairs of *Michael* Son of *Theophilus*, speaking of the *Bulgarian* Prince, he says, *He set the Prisoners at Liberty.* *NICETAS, B. II.* says, that Liberty was given to all the Prisoners, except to the *Corinthian* and *Theban* Men and Women. Sometimes it is agreed, that the Prisoners should be restored that properly belonged to the State, as it is in *THUCYDIDES V. GROTIUS.*

⁴ It is not necessary to recur to the Correction of *PETER FABER*, which our Author adopts.

proved by *Cujacius*; the Solidity of which Correction appears, as well by the Reason that follows immediately after, as by the Opposition to what goes before. *The Peace was made, and the Prisoners released* (saith ⁵ *Zonaras*) *for so it had been agreed upon.* So *Pomponius*, ⁶ *If the Prisoner, concerning whom, it was comprehended in the Articles of Peace, that he might return, should chuse of himself to remain with the Enemy, he shall not afterwards challenge this Right of Postliminy.* And *Paulus*, ⁷ *If a Prisoner taken in War, after the making of Peace shall fly Home, and upon the War's breaking out again be retaken, he by this Postliminy returns to him, who in the former War had taken him, unless it be expressed in the Articles of Peace, that the Prisoner should be released.*

2. *Tryphoninus* ⁸ alledges this Reason out of *Servius*, that the Romans thus behaved themselves to their Prisoners, *because they would have them place all their Hopes of returning in their own Valour, rather than in Peace.* For as *Livy* saith, ⁹ *Rome in the most antient Times had no Compassion on those that fell into the Enemies Hands.* But this Reason being peculiar to the Romans, could not constitute a Rule of the Law of Nations; it might yet be one Motive why they themselves did admit that Custom introduced by other Nations. But this seems to be a better founded Reason, because Kings, and States, who enter into War, desire to have it believed, that their Cause was just in doing it, and theirs unjust who engaged against them: Which whilst both Parties desire to have equally believed, it would not be safe, for others not interested that would live in Peace, ¹⁰ to engage in the Controversy. Therefore the Nations that are at Peace can do nothing better, than quietly ¹¹ to take that to be just, that was done in that War, and so the Prisoners mutually taken in Arms, should be esteemed lawful Captives.

3. But the same cannot be alledged against those who have been unhappily surprized by the sudden breaking out of a War, for no Design of injuring can be laid to their Charge: Yet it has not been thought unjust to detain them during the War, in order to weaken the Enemies Power; but upon the End of the War, nothing can be offered why they should not be discharged. Therefore it was established by a tacit Consent of Nations, ¹² that such Prisoners, upon the Conclusion of a Peace,

The illustrious Mr. BYNKERSHOEK has shewn in a very clear manner, that when the Civilian says (in the Passage referred to in Note 1.) *In pace postliminium est his, qui bello capti erant, de quibus nihil in pactis erat comprehensum*; he means those, he speaks of afterwards, who were made Prisoners, only from being unfortunately upon the Lands of the Enemy in the beginning of an unforeseen War. See that great Lawyer's *Observations*, Lib. I. Cap. XX. and the Law cited above in this Book, Chap. VI. § 12. Num. 1.

⁵ As in Note 3. The Passage is in Vol. III. of ZONARAS.

⁶ *Si captivus, &c.* Digest, Lib. XLIX. Tit. XV. De Capt. & Postl. &c. Leg. XX. Princ.

⁷ PAULUS: *Immo si in bello captus, &c.* Ibid. Leg. XXVIII. See the Observations of Mr. BYNKERSHOEK upon this Law, Lib. III. Cap. VI. and the *Jurisprudencia Papiniana* of ANTHONY FAURE, Tit. XI. Princip. VIII. Illat. XXV. p. 635.

⁸ See the Law quoted in Note 1. upon this Paragraph.

⁹ The Passage will be cited below, Chap. XXI. § 24.

¹⁰ Not only that: They have renounced the Right of examining the Justice of the Cause, and have tacitly engaged, by only remaining Neuter, to suppose the Acts of Hostility, and the Acquisitions thereby made to be just on both Sides. See what I have said upon Chap. IV. of this Book, § 4. Note 1. There is no Occasion for supposing any Thing else.

¹¹ See PRISCUS, *Excerpt. de Legat.* XXVIII. And BEZAR, of the War of the *Genese* against the *Venetians*, B. II. GROTIUS.

¹² But our Author has said above, Chap. VII.

§ 1. that even those, who have fallen in this manner into the Enemy's Hand by pure Misfortune, are however Slaves by Right of War: Because they, who have taken them, are not obliged to enquire whether they are culpable, and it suffices that they are of the Enemy's Party. Besides, young Children cannot be supposed guilty of any Fault, who however, according to our Author, may be made Prisoners and Slaves in the same manner, as if they were at Years of Discretion. So that the Reason alledged, of a pretended Consent of Nations, is far from being solid: And the more, as it does not appear, that after the Conclusion of a Peace, the Parties believed they had less Right, either over the young Children they had taken, or the unfortunate Prisoners in question, and who were not included in the Treaty, than over those who had been taken in Arms. This then is no more than a civil Law of the Roman People; by which, in Consideration of the unhappy Fate of such, as were become Slaves to the Enemy, without having exercised, or having it in their Power to exercise, any Act of Hostility, they were granted the Right of *Postliminy*, even after the Peace; whereas it was refused to the others. And if the Masters of these Slaves, after the making of Peace, could not reclaim this kind of Prisoners from the antient Enemy of the State, (for it does not appear, that the Case was the same with neutral States) it was because as the State knew, or might now, the Custom of the Romans, it was supposed, for itself and People, to renounce its Right, from the Time it had not stipulated by the Treaty, that such Slaves for the future, as well as others that belonged to it, should be restored. In regard to the latter see what I have said before, Chap. VII. of this Book, § 6. Note 9.

should

should be released, ¹³ as being accounted innocent by both Parties. But that as to other Captives, every one might use the Right which he would be thought to have over them, unless the Articles of Agreement have otherwise provided. Therefore for the same Reason, ¹⁴ neither Slaves, nor Things taken in War, are restored in Peace, unless expressed in the Articles. Because the Conqueror pretends to have a just Title to them, which to contradict, were to lay a Foundation for a new War; whence it is plain, that that alledged in *Quintilian* for the *Thebans*, is rather ingenious than true; that Prisoners, if they can escape into their own Country, are to be esteemed free, because what is gotten ¹⁵ by Force, is not to be kept but by the same Force; we have hitherto treated of the Acquisition of the Right of Postliminy in Time of Peace.

4. In Time of War they return by the Right of Postliminy, who ¹⁶ were free before they were taken Prisoners, but Slaves and other Things are said to be recovered.

V. He that was free, returns so by this Right (of Postliminy,) if he returns with this Design, to follow the Fortunes of his own People to whom he returns, as *Tryphoninus* ¹ has it. For a Slave, in order to become free, ought (if I may so speak) to acquire himself, which he cannot do without willing it. But whether he be retaken from the Enemy by force of Arms, or by Craft made his Escape, it is all the same Thing, as *Florentinus* ² observes. And so it is likewise, if he be freely ³ delivered up by the Enemy. But what ⁴ shall we say of a Prisoner, who having been sold by the Enemy, is arrived amongst his own People, by passing, as it often happens, from Master to Master? This Controversy is discussed by ⁵ *Seneca* in the *Olynthian*, whom *Parrhasius* bought. For when a Decree was passed by the *Athenians*, whereby the *Olynthians* were ordered to be free; he makes this Query, whether by it was meant, that they should become free, or adjudged to be free; ⁶ of which the last is the best founded.

V. When a free Man, during the War, may return by this Right of Postliminy.

VI. 1. But one that is free, after he is returned to his own Country, does not only become Master of himself, but also of all Things, that he had in any Nation at Peace, whether corporeal, or incorporeal; because as neutral States had reputed the Fact for a real Right, in regard to the taking of the Prisoner, they ought to do

VI. What Right he may recover, and what not.

¹³ That is to say if they happened to escape, and return into their own Country.

¹⁴ *Totilas* declared to *Pelagius* the Deacon who was sent to him from the *Romans*, that he should not mention the restoring the *Sicilian* Slaves, alledging that it was unjust that the *Goths* should deliver their Fellow Soldiers to their old Masters. The Passage is in *Goth. Lib. III. Chap. XVI.* GROTIVS.

Our Author in the last Words had put the *Romans* for the *Goths*. And the Passage relates to fugitive Slaves to whom the *Goths* had engaged by Oath not to deliver them up to their antient Masters.

¹⁵ *Dicamus imprimis in eo quod, &c.* Institut. Orat. Lib. V. Cap. X. p. 432. Edit. Burman.

¹⁶ The Emperor *JULIAN*, in his Oration against the Followers of the Cynick Philosophy misunderstood, maintains, that to speak philosophically, a Man cannot really be said to be another Man's Slave, from that other's having only given Money to the Seller for his renouncing his Right to him. For adds he, at that Rate Prisoners of War, when redeemed, should also be stiled the Slaves of those who redeem them; whereas the Laws give them their Liberty, the Moment they return into their Country, and they are ransomed, not in order to their being Slaves, but that they may enjoy their Liberty. Orat. VI. p. 195, 196. Edit. Spanheim. GROTIVS.

See below, § 10. Num. 3. where the Laws to which the Emperor alludes is spoken of.

V. (1) *Non enim postliminio revertebatur, &c.* Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XII. § 9. See also Leg. V. § 3.

2 See the Law cited above, Chap. VII. of this Book, § 6. Num. 7. Note 8. Our Author alledges

here in a little Note the Example of the *Huns*, who took away, and set at Liberty, some Prisoners, whom the *Slavonians* had taken, as *PROCOPIUS* relates, *Gothic. Lib. III. Cap. XIII.* The *Huns* are put for the *Herulians*; for that Historian says this of the latter, who having taken up Arms for the *Romans* met a Troop of *Slavonians* upon their March, who had taken some Prisoners from the *Romans* along the *Danube*.

3 *Quum non redemptum ab hostibus filium, &c.* Cod. Lib. VIII. Tit. LI. De Postliminio revertis, &c. Leg. V.

4 As the Youth *Childubius* in the same Book of *PROCOPIUS*, He alledged that from the Time he returned into his own Country, he should by Law be free for the future; and *LEUNCLAVIUS* observes, that formerly there was no Postliminy among the *Turks* for Prisoners. GROTIVS.

5 *Ut scias, inquit, servos fuisse, &c.* Lib. V. Controv. XXXIV. p. 390.

6 Because the *Olynthians* were Allies of the *Athenians*, as is said a little before: *Quid enim si Atheniensem a Philippo emissus? Atqui sciebas Olynthios nobis conjunctos esse fœdere.* Our Author insinuates therefore, that it was the worse for the People either of the same Country; or of the States in Alliance with them, if they bought any Slave who was free by Right of Postliminy; because in buying him, they ought to have supposed, it might possibly happen that the Slave might have that Right, and therefore that they could only acquire him under that tacit Condition, as is said in the following Paragraph, in regard to the Goods of a Prisoner returned, which had been alienated.

the same in regard to his release; otherwise they would not act in an equal manner towards both Parties; wherefore he that by Right of Arms is possessed of the Body of a Prisoner, has not an absolute but conditional Right to all Things that belong to him, for it may cease against his Will, *viz.* if the Captive should return into his own Country; for so he loses his Right to those Goods of his, as he does to his Person, of which they were an Accessory.

2. What if he had alienated those Goods, shall he who derives his Title from him that was Owner of the Prisoner by Right of War, be secured by the Right of Nations, or else shall those Things (alienated) be recovered? I mean those that are in a neutral Country. And here, in my Opinion, we ought to distinguish between those Things that may be recovered by Postliminy, and those not capable of that Right; which Distinction we shall explain below, so that the former seem to be alienated only so far as they could be alienated, that is, conditionally, but the other, ¹ simply and absolutely. By Alienation here, I mean such as includes Donation and ² Accaptulation.

VII. *All Rights in Regard to him are restored.*

VII. But as he that returns by Postliminy, recovers the Rights he was possessed of before, so those Rights which one had in Regard to him, are re-established, and deemed to have always subsisted, as if he had never been in the Enemy's Power, as Tryphoninus ¹ says.

VIII. *Why they that yield themselves are not capable of the Right of Postliminy.*

VIII. Paulus ¹ justly makes this Exception to this Rule, as it relates to Freemen, *They have no Benefit of Postliminy, that being conquered by Arms, yield themselves up to their Enemies.* Because all Agreements made with Enemies, by the Law of Nations, are to be punctually observed, as we shall shew hereafter; neither is Postliminy allowed against them. Therefore those Romans, in Gellius, ² taken by the Carthaginians, did own, that *The Right of Postliminy did not belong to them, because they had engaged themselves by Oath.* Whence it is well observed by Paulus, ³ that during the Time of Truce there is no Postliminy allowed. But Modestinus ⁴

VI. (1) The Distinction between Things recoverable and not recoverable, by the Right of Postliminy, relates merely to Civil Right, and takes Place only in Regard to the Subjects of the State itself, who would reclaim what has been retaken from the Enemy. See below, § 13. Note 3, 4. So that the Difference here put by our Author, in Regard to Things alienated in a neutral State, has no Foundation. The Prisoner of War returned home has an equal Right to recover them all.

2 That is, when a Person discharges another of a Debt, by declaring he has received what was not actually paid. See the *Institutes*, Lib. III. Tit. XXX. § 1.

VII. (1) *Cætera, quæ in jure sunt, &c.* Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* Leg. XII. § 6. See also § 15. and *Leg. V.* So when a Son returned from Captivity, the Rights of paternal Power, suspended in Regard to him, resumed all their Force. *Ipse quoque filius, Neposve si ab hostibus captus fuerit, similiter dicimus, propter jus postliminii, jus quoque potestatis Parentis in suspenso esse.* Institut. Lib. I. Tit. XII. *Quibus modis jus Potestatis Patriæ solvitur*, § 5.

VIII. (1) *Postliminio carent, qui armis victi hostibus se dederunt.* Digest. Lib. XLIX. Tit. XV. *De Captiv. & Postlim.* &c. Leg. XVII. This can be looked on only as a particular Law of the Roman People, instituted solely to animate the Citizens to fight to the last Extremity. For as the State had no Part in their Engagement, so was it not held to make it good, and might, if it thought fit, grant them, during the War, the Right of Postliminy, in the same Manner as to those, who, having been made Prisoners by superior Force, and without surrendering, were, however, become the Enemy's Slaves, by either an express or tacit Convention. See what I have said above, Chap. VII.

of this Book, § 6. Note 9.

2 *Tum octo ex iis, &c.* Noct. Attic. Lib. VII. Cap. XVIII.

3 *Induciæ sunt, quum in breve & in præsens tempus convenit, ne invicem se laceessant: Quo tempore non est postliminium.* Digest. ubi supra, Leg. XIX. § 1. See below, Chap. XXI. § 6. It is plain, that this Decision is a Consequence of the Nature itself of a Truce, which will be treated of below in its Place.

4 *Eos qui ab hostibus capiuntur, vel hostibus deduntur, jure postliminii reverti, antiquitus placuit.* Digest. *ibid.* Leg. IV. Our Author, in his *Forum sparsio ad jus Justinianum*, p. 221. Edit. Amstel. says that we must read here, *Ab hostibus deduntur*, and he explains the Words before, *ab hostibus capiuntur*, as *de hostibus*, &c. On that Foot the Sense of the Law would be, that the Prisoners retaken from the Enemy, and those which we recover, by their being restored voluntarily, enjoy the Right of Postliminy. So that then there would be nothing in it relating to the Subject. Our Author, without Doubt, supplies the Particle *ab*, according to the Reading in the vulgar Editions, *Ab hostibus deduntur*. But the Authority of the Florence Edition, with the Example that immediately follows, gives Room to believe that our Author's first Thought was the best. See above, B. II. Chap. XXI. § 4. Num. 8. where he explains the Case of this Law himself. However, we must then confess, that in the Beginning of the Law, it treats of Persons restored in a certain Manner: Otherwise there would have been no Difficulty in the Case proposed, if it had been the general and received Maxim of ancient Times, (*antiquitus placuit*) that every Person delivered up to the Enemy, returned by Right of Postliminy. See the following Note.

says, that if they that are delivered up to the Enemy, are engaged by no Covenant, ⁵ or Promise, they may return by the Right of Postliminy.

IX. 1. What

⁵ That is to say, if they have not engaged to put themselves into the Power of the Enemy, and if the State which delivers them up, has not deprived itself, by a real Agreement, of the Right it had to recover or receive them; in a Word, when it has delivered them simply and purely of its own Accord, or has been reduced to do so by the Superiority of the Enemy's Forces. This is probably what our Author means. For if, according to him, the Engagement of a Prisoner of War, contracted without the Participation of the State, is of sufficient Force to oblige the State to refuse him the Right of Postliminy, the Prisoner much more ought to be excluded from it, when the State itself is bound by its Promise. And if there be no such Engagement, the Action of delivering up does not, of itself, imply any Obligation towards the Enemy, or Intention to deprive the Person delivered up, of the Right of Postliminy. It is the Enemy's Bussiness to keep him, who has been given up into their Hands, or to lay him under the Restriction of some Promise. See what our Author says above, *B. II. Chap. XXI. § 4. Num. 6.* The Civilian *MODESTINUS*, whose Words I have recited in the preceding Note, speaks there, in my Opinion, of those whom the State has delivered up purely and simply, being compelled to it by the Misfortune of War; and this may be inferred from his joining them with the Prisoners of War, taken in some Battle, or military Expedition. For it is without Necessity, that *FRANCIS BAUDOUIN*, (*Jurisprud. Mucian. p. 48.*) and *MR. THOMASIVS*, (*Diff. de sponsione Roman. Numantina, § 75.*) after him conjecture, that instead of *Vel hostibus deduntur*, it should be read in a quite contrary Sense, *NEC hostibus deduntur*. The Difficulty arose from another Manner of delivering up, treated of in the End of this Law, which, according to the particular Custom of the *Romans*, excluded those from the Right of Postliminy, who had been delivered up, so that a Rehabilitation was necessary, in Order to their becoming Citizens again, tho' the Enemy had not been willing to receive them. I have spoke of this above, *B. II. Chap. XXI. § 4. Note 13, 14, 16.* and the Thing is fully confirmed by what follows. I say then, that in this Part of the Law we are now considering, as well as in the last Law of the Title *De Legationib.* the Question solely relates to Persons delivered up, in Order to discharge the State of some Crime, or shameful Engagement, which, tho' committed or contracted without its Order or Participation, seemed to fly back upon it, principally because the Authors were Persons otherwise invested with its Authority. The *Romans*, either out of Horror for the Crime, or a great Sensibility for the Dishonour, with which they were, at least, as much touched to the Quick; judged proper, at the same Time they delivered up such People, not to consider them any longer as Citizens, whether those to whom they delivered them up, received them or not. And this was executed with great Ceremony, by the Chief of the Heralds at Arms, (*Fetiales*) who caused the Person delivered up to be stript naked, and bound; as appears by the History itself of *Hostilius Mancinus*, who is there spoken of. See *VELLEIVS PATERCULUS*, *Lib. II. Cap. I.* *DIONYSIVS HALICARNASSENSIS*, *Antiq. Rom. Lib. II.* The Form used by the Herald, shews the Aversion the *Romans* professed, both for the Persons delivered up in this Manner,

and the Occasion which obliged them to do so. *Quandoquidem hinc homines, injussu populi Romani Quiritium, sædus iustum iri sponderunt, atque ob eam rem noxam nocuerunt; ob eam rem quo Populus Romanus scelere impio sit solutus hosce homines vobis dedo.* *LIVY, Lib. IX. Cap. X. Num. 9.* They apprehended, that without this, the most just Wars might become unjust; as the same Roman Historian makes another General of the Army, *Spurius Postumius*, say, on an Occasion of the same Nature with this of *Mancinus*. *Dedamur per Fetiales, nudi vinctique. Exsolvamur religione populum, si qua obligavimus; ne quid divini humanive obstet, quominus justum piumque de integro incatur bellum.* *Cap. VIII. Num. 6.* *Mancinus*, in Order to be received in the Camp of the *Romans*, after the Refusal of the *Numantines*, to whom he had been delivered up, had Occasion to call in the Aid of Religion; the Augurs being consulted, declared in his Favour, without which he would not have been admitted. *Deditus nec receptus, augurio in castra deductus.* *AURELIUS VICTOR. De Viris Illustr. Cap. LIX.* It is not then to be wondered at, that when the Enemy, or allied State, refused to take those delivered up to them, that Refusal did not hinder their being considered as deprived of all the Rights of a Citizen, from the Moment the Herald at Arms had pronounced the Sentence for abandoning them. *HENNIGES*, who has espoused this Opinion, in his Notes upon our Author, (*Lib. II. Cap. XV. § 16. p. 751.*) with Reason alledges in this Place, what *Postumius* says, the Moment the Ceremony was over, that he was become a Citizen of the *Samnites*, who, however, had not then accepted him, nor would receive him afterwards. *Hæc dicenti Fetiali, Postumius genu femur, quanta maxima vi, perculit, & clara voce ait, se Samnitum civem esse, &c.* *LIVY, ubi supra, Cap. X. Num. 10.* So that *Mucius* had Reason to compare those unfortunate Persons, to such as were banished the State by a Decree, prohibiting all Persons to give them Fire and Water; and in Consequence, excluding them from the Right of Postliminy, as did the Tribune of the People, who, as *CICERO* relates, hindered *Mancinus* from entering the Senate. *Quia memoria sic esset proditum, quem ——— Pater patratus dedisset, ei nullum esse postliminium.* *De Orat. Lib. I. Cap. XL.* If that Orator seems elsewhere to decide in Favour of *Brutus*, (*Topic. Cap. VIII. and Orat. pro Cæcin. Cap. XXXIV.*) that only proves, either that he has changed his Mind, as he does sometimes, or that he believed, notwithstanding the Decision of *Mucius*, followed by the Senate, the Case ought to have been adjudged in a different Manner. He says, in one of these Passages, that the Opinion in favour of *Mancinus* might be defended, and not that it may be well demonstrated. The Passage has been cited above, *B. II. Chap. XXI. § 4. Note 13.* So that it is not necessary to have Recourse to the Reconciliations laid down by *FRANCIS BAUDOUIN*, *Jurisprud. Muc. p. 46.* *M. THOMASIVS*, *Diff. de Spons. Numant. § 67.* and *MR. JENS*, *de Fetialib. Pop. Rom. Cap. VI. p. 71, 72.* In a Word, *Mancinus*, and every other Person, who being delivered up, had been refused, was not indeed the Slave of those to whom he was designed to be delivered up, but he did not therefore continue a *Roman* Citizen; he was free, but a Stranger, as *ANTHONY FAURE* very well observes, *Jurispru. Pa-*
pin.

IX. How a People may obtain this Right of Postliminy.

IX. 1. What we have said of particular Persons, the same may be likewise of Nations, that those that were free, may recover their Freedom, if the ¹ Assistance of their Allies happen to rescue them from the Power of the Enemy. But if the Body of the People that constitute the State, be dissolved, it is more reasonable to say, ² that they are not to be esteemed the ³ same People; nor the Things formerly belonging to that State to be restored to them by the Law of Nations; because a People, like a Ship, by a Dissolution of the Parts, is entirely destroyed, because its whole Nature consists in that perpetual Conjunction. Therefore the City of *Saguntum* was not the same, when it was restored to the antient Inhabitants, eight Years after they had been driven out of it. Nor *Thebes* the same, after the *Thebans* had been sold by *Alexander* for Bondslaves. Hence it is plain, that what the *Thebessians* were indebted in to the *Thebans* before, was not restored to the *Thebans* by the Right of Postliminy, and that for these two Reasons. First, Because they were a new People that demanded this Debt; then, because *Alexander*, whilst he had the Lordship over them, had a Power to alienate that Right, and did really alienate it; besides that a Debt ⁴ is not to be reckoned among Things capable of the Right of Postliminy.

2. What we have said of a State, is not very different from that of the old *Roman* Law, by which Marriages were dissoluble: Marriage was not reputed to be restored by Postliminy, but to be renewed ⁵ by joint Consent of both Parties.

X. What Rights have they of the Civil Law, who return by Postliminy.

X. 1. By what we have said, one may easily judge what Manner of Right, by the Law of Nations, Postliminy gives to Freemen. But by the Civil Law this very Right, as to what respects those Things that are done within the State, may be restrained by adding some Exceptions, or Conditions, and may be extended to other Profits and Advantages. Thus by the *Roman* Civil Law, ¹ Fugitives are excepted out of the Number of those intitled to this Right of Return, even the Sons of Families, over whom the Father, (one would think) should have retained his paternal Power, as a Privilege peculiar to the *Romans*. But it was thought proper to make this Regulation, because, as *Paulus* ² says, the *Romans* sacrificed their paternal Tendernefs to the Observation of military Discipline. Agreeable to which,

pin. Tit. XI. Princ. VIII. Illat. I. All that I have now advanced is founded upon the Genius and Sentiments of the *Roman* People. So that it is of no Use to prove, as Mr. THOMASius doth, (*ubi supra*, § 14. & *seq.*) that the Treaty concluded with the *Numantines*, without the Participation of the *Roman* People, was not really shameful, and that the Fault itself was not to be ascribed to *Mancinus*, but to *Tiberius Gracchus*. It suffices that the *Roman* People believed the contrary, and that they followed the Principles of their Ambition, rather than those of natural Equity, according to which, I confess, they ought to have laid down other Maxims. It is as easy to destroy, by the Reasons here alledged, the Endeavours of the late Mr. COCCEIUS, (*Dissert. De Postlimin. in Pace*) to reconcile here, as well as every where else, the Rules of the *Roman* Law with those of the Law of Nature and Nations, both of which he misunderstands.

IX. (1) See PUFENDORF, B. VIII. Chap. VI. § 23. Of the Law of Nature and Nations.

2 See above, B. II. Chap. IX. § 6.

3 They may always be considered of the same Nation, but they have no longer that Tie which formed a Body of People, or a State. So that the Objections here raised against our Author, fall to the Ground of themselves.

4 That is to say, the Debts paid to him whom the Person was Prisoner to, or those of which he had discharged the Creditor; for the Case is not the same, with Regard to other Debts.

5 *Non ut pater filium, ita uxorem maritus, jure postliminii, recipit, sed consensu redintegratur matrimonium.* Digest, Lib. XLIX. Tit. XV. De Cap-

tiv. & Postlim. Leg. XIV. § 1. See also Leg. VIII. But it is not the same amongst Christians. POPE LEO says, that if the married Person, who remained in the Country, has married again, during the Captivity of the other, and the other returns, let the Marriage, contracted in the latter's Absence, be annulled. *Ut sicut in mancipiis, vel agris, aut etiam in domibus, ac possessionibus, in captivitatem ductis, postliminium reversis de captivitate servatur; ita etiam & conjugia, si aliis juncti fuerint, reformentur.* Epistol. ad Nicet. Aquileiens. Episc. See HINC MAR, *Opusc. de divortio Lotharii & Tethbergæ*, ad Interrog. XIII. and the Answer of POPE STEPHEN, Cap. XIX. in the second Tome of the *Gallican Councils*. GROTIUS.

See CUJAS upon the *Novel*. XXII. and in *JULIANI Digest*. Lib. LXII. p. 445. Vol. III.

X. (1) *Transfugæ nullum postliminium est: Nam qui malo consilio & proditoris animo, patriam relinquit, hostium numero habendus est.* Digest, Lib. XLIX. Tit. XV. De Captiv. & Postlim. &c. Leg. XIX. § 4. Some say here, that our Author has improperly stated this Exception, as peculiar to the *Roman* Laws, and add, that the same Thing took Place amongst all other Nations. That may be: But they alledge neither Example nor Proof. For the Passage of LIVY, Lib. XXVII. Cap. XVII. Num. 10. which GRONOVIVS cites, is not very conclusive, it only proves the Diffidence and Horror they had for Deserters.

2 *Filius quoque familias transfuga non potest postliminio reverti, neque vivo patre: Quia pater sic illum amisit, quemadmodum patria, & quia disciplina castrorum antiquior fuit parentibus Romanis, quam caritas liberorum.* Digest. Ibid. § 7.

says

says Cicero of *Manlius*,³ that he strictly maintained the *Roman* Discipline, to his own personal Sorrow, that he might effectually consult the Safety of the State, in which he esteemed his own included; and that he preferred the Preservation of the General's Authority to the Motions of Nature, and the Affections of a Father.

2. This also somewhat lessens the Right of Postliminy, which was first enacted by the *Athenian*⁴ Laws, and after by the⁵ *Roman*, viz. *That he that was redeemed from the Enemy, should be Slave to him who had paid the Ransom, till he had reimbursed it.* But this seems to have been made in favour of Freedom, lest all Hopes of recovering the Money being lost, many (of the Captives) should be left in the Power of the Enemy. And this very Slavery was much softened by the *Roman* Laws, and by the last Law of *Justinian*⁶ it was limited to five Years Service. Also, upon the Death of the Ransomed, the Right of recovering the Money entirely ceased. Likewise, by any Contract of Marriage between the Redeemer and the Redeemed,⁸ it was adjudged to be remitted; it was also⁹ lost by the Prostitution of a Woman ransomed. There were also many other Things enacted by the *Roman* Law, in favour of those that would redeem Captives, and for the Punishment of their Kinsmen that would not redeem them.

3. This Right of Postliminy was on the other Hand extended by the Civil Law; in that, not only those Things which are capable of being recovered by the Law of Nations, but also all Goods,¹⁰ and all Rights in general were preserved to a Prisoner that returned, as if he had never been in the Power of the Enemy; this was also the *Athenian* Law: For as we read in *Dion Pruseensis*, fifteenth Oration, A certain Man pretending to be the Son of *Callias*, and that he had been taken Prisoner, in the Defeat at *Acanthus*, and had been a Slave in *Thrace*; when by the Right of Postliminy he returned to *Athens*, demanded the Inheritance of *Callias* from the present Possessors of it; and the only Thing he was obliged to do, was to prove that he was really the Son of *Callias*. The same Author also relates, that the *Messenians*,¹¹ after a long Time of Slavery, recovered both their Liberty and Country. Nay further, when a Prisoner of War was returned,¹² what had been taken from his Goods, either by Prescription, or a¹³ Disengagement of any Obligation of another, by Vertue of which he might have before demanded any Thing, was re-

3 That Consul, as is known, caused his own Son to be put to Death, for having given Battle contrary to his Orders, tho' he gained the Victory: And the Orator says, that he confirmed the Law of military Discipline by a Sentence, which he could not pass without plunging himself into the greatest Affliction. *Quod vero securi filium percusserit, privavisse se etiam videtur multis voluptatibus, quum ipsi naturæ patrioque amoris prætulit jus Majestatis atque imperii — Sin ut dolore suo sanciret militaris imperii disciplinam, exercitumque in gravissimo bello animadversionis metu contineret; saluti prospexit civium, quâ intelligebat contineri suam.* De Finib. Bon. & Mal. Lib. I. Cap. VII. & X.

4 DEMOSTHENES, *Orat.* in Nicoftrat. (p. 724. B. Edit. Basil. 1572.) The same Thing is decreed in the Edict of *Charles the Bald*, passed at *Pistes*, Cap. XXXIV. GROTIUS.

5 This Sort of Prisoners, ransomed by a Citizen of the State, continued, as a Kind of Pledge, in his Service who had paid their Ransom, till they had reimbursed him, or he had forgiven them the Debt. *Ab hostibus redempti, &c.* Code, Lib. VIII. Tit. LI. De Postliminio reversis, &c. Leg. II. See the Title of the *Digest*. Leg. XV. Leg. XX. § 2. and *CUJAS*, *Recit. in Cod.* Vol. IX. Opp. p. 1372, 1373. ANTHONY FAURE, *Jurispr. Papin.* Tit. III. Princ. IV. Illat. III. p. 118. JAMES GODEFROY, in *Cod.* THEODOS. Lib. V. Tit. V.

6 It is in an Ordinance of *HONORIUS* and *THEODOSIUS*, adopted by him. *Ne quando enim damni consideratio, &c.* Cod. Lib. VIII. Tit. LI. De Postliminio reversis & redemptis ab hostibus, Leg. XX. seu ult.

7 *Si patre redempto & ante luitionem defuncto, &c.* Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XV. We see in this Passage of *ULPIAN*, that he does not absolutely decide, but with a *perhaps*; and that after having said, that the Son may, by paying the Ransom owed by his Father, be considered as his proper Heir. The Civilian even finds a Subtlety in the last Thought, undoubtedly with Regard to the Principles of the *Roman* Law, upon various Matters which relate to the present Case. This the subtil *ANTHONY FAURE* treats at large in the Place of his *Jurispr. Papin.* p. 119. & seq. cited above, Note 5.

8 *Si is, qui te ab hostibus, &c.* Cod. Lib. VIII. Tit. LI. De Postliminio reversis, &c. Leg. XIII. See the *Jurisprudentia Papiniana* of *ANTHONY FAURE*, Tit. XI. Princ. VIII. Illat. XXII. p. m. 634.

9 *Fœdissimæ mulieris nequitia permovemur. Quum igitur Filiam tuam, ab hostibus captam, ac prostitutam ab ea, quæ eam redemerat, &c.* Ibid. Leg. VII.

10 See the Law cited above, § 7. Note 1.

11 This Example is not applicable in this Place, but to the Case treated by our Author, in *Paragraph* 9.

12 *Quæ vero per usucapionem vel liberationem, &c.* Cod. ubi supra, Leg. XVIII.

13 This is called in the *Roman* Law by one Word *Liberatio*. The Reader may see the Interpreters upon the *Digest*. Lib. XLVI. Tit. II. & seqq. but especially the Treatise of the President *BARNABY BRISSON*, De Solutionibus & Liberationibus.

stored to him by a rescissory Action: As well as the Rights that were otherwise deemed extinct by ¹⁴ Non-Usage: For in the Edict of entirely restoring Ancestors, he is likewise included, who ¹⁵ is in the Power of the Enemy; and this was established by the antient Roman Law.

4. The *Cornelian* Law afterwards made Provision for the Heirs of those that died in Captivity with the Enemy, and ¹⁶ preserved all their Goods, just as if the Person taken Prisoner died at that very Time. If it were not then for these Civil Laws, the Captive's ¹⁷ Goods would immediately be theirs that seized on them, because he that is taken by the Enemy, ¹⁸ is reputed as not to be at all. But if a Captive did return, he should receive ¹⁹ only those Things which, by the Law of Nations, challenge the Right of Postliminy. But that the Goods of a Prisoner, if he have no Heir, should come to the Publick, ²⁰ was a Law peculiar to the Romans. We have hitherto treated of Persons who return from Captivity. I will now speak of such Things as are recovered.

^a See Lex Wisigoth. l. 5. tit. 4. c. 15.

XI. How Slaves are recovered by Postliminy, how Fugitives, and those that are redeemed.

XI. 1. Among these are chiefly Slaves of both Sexes, yea ¹ even those that have been often alienated, ² or have been discharged by the Enemy. Because (as *Tryphonius* ³ well observes) a Release from the Right of an Enemy ought not to prejudice a Citizen of ours, his former Master. But that the former Master may recover his Slave, it is necessary that he either actually possess him, or that he may easily possess him. Wherefore, tho' in other Things it is sufficient, that they be brought just within our Territories, that will not be enough, in Regard to a Slave, unless also the antient Master know his being there. For he that is in the City of Rome (as it were) incognito, in *Paulus's* Opinion, is not ⁴ allowed to be yet recovered.

¹⁴ As an usufructuary Right, which is lost by Non-Usage for a certain Time.

¹⁵ *Si cujus quid de bonis, &c.* Digest. Lib. IV. Tit. VI. *Ex quibus causis majores viginti quinque annis in integrum restituantur*, Leg. I. § 1. After bonis should be added *diminutum erit*. See Mr. NOODT, upon this Title, p. 189, 191, 192.

¹⁶ *In omnibus partibus juris, is qui reversus non est ab hostibus, &c.* Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. XVII. *Bona eorum, qui in hostium, &c.* Ibid. Leg. XXII. Princ. See the *Jurisprudencia Papiniana* of ANTONY FAURE, Tit. XI. Princip. IX.

¹⁷ See above, B. II. Chap. IX. § 1. Num. 3.

¹⁸ According to the Rule of the Civil Law. *Quod attinet ad jus civile servi pro nullis habentur*. Digest. Lib. L. Tit. XVII. *De diversis Reg. Juris*, Leg. XXXII. And this was conformable to the received Custom; according to which, every Prisoner of War was deemed to be the Enemy's Slave who had taken him. From whence it arose also, that those, of whom no Mention was made in the Treaty of Peace, and who remained Slaves without Ressource, were considered as having no longer any Right, and as incapable of transferring any, with Regard to the Things which had belonged to them in the Country. It was to elude this Principle, that the Fiction of the Right of Postliminy and the *Cornelian* Law was invented, in Regard to Prisoners who returned, or died, during the Course of the War. In which, if there was any Thing contrary to the Right, established by Custom, in Relation to Prisoners of War, the Enemy however had no Cause to complain, because it was sufficiently declared, that this Custom would not be observed, and that the Enemy, without being opposed, might dispense with following it, by making, on his Side, the same Supposition. Hence the Prisoners were not deemed to be actually engaged to be Slaves, during the Course of the War, in Regard to the Right, which the State had to receive and consider them as free Persons.

¹⁹ Our Author in this Place confounds the Ef-

fects of the Right of Postliminy in Relation to Strangers, with those it might have in Regard to Citizens of the same State. For it belongs to the Sovereign to dispose of the latter, as he thinks proper, and he has no Occasion to have Recourse for that End to any Fiction. He may therefore extend them further than the Law of Nations, or the Custom of States does, which are not concerned in this Point.

²⁰ *Quod si nemo ex lege Cornelia hæres extiterit, bona publica fient*. Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. XXII. § 1. See also Tit. XIV. *De jure Fisci*, Leg. XXXI.

XI. (1) But by an Edict of *Theoderick* it was thus ordained, *That Slaves, or Tenants taken by the Enemy, and returning home, be restored to their own Lords, if they were not bought before by some other*. See also *CASSIODORE*, Lib. III. Cap. XLIII. But by the Law of the *Wisigoths*, a Slave recovered by War is restored to his Lord, and the Captor receives the third Part of the just Value. But if he were sold by the Enemy, his Lord was to pay the full Price for which he was sold, together with what had been laid out to render him more capable of Service. B. V. Tit. IV. XXI. GROTIUS.

See what I say below, upon § 14. Note 2.

2 So the Slaves to whom *Mithridates* had given their Liberty, were restored by *Sylla* to their antient Masters. *APPIANUS ALEXANDRINUS*, *Bell. Mithrid.* (p. 355. Edit. Amstel. 211. H. Steph.) GROTIUS.

3 *Quia hostium jure manumisso obesse civi nostro servi domino, non potuit*. Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. XII. This was because, during the Course of the War, the Acquisition of Things, taken from the Enemy, was not full and entire. no more than the Slavery of Prisoners; on Account of the Hopes People had, and the Right they retained, of recovering what they had lost. See what is said above, Chap. VII. of this Book, § 6. Note 9.

4 Unless he serves some other Citizen. *PAULUS: Immo quum servus civis nostri, ab hostibus captus,*

vered. And as a Slave, in this Case, differs from Things inanimate, so does he likewise from a Freeman in this, that in Order to recover him by Right of Postliminy, it is not required that he should return, with an Intent to follow the Fortunes of the State. For that is only required of him, that is to recover his own Freedom, not of him that is to be recovered by another. And as *Sabinus* has it, *Every Man has a free Power to chuse what State he pleases to make himself a Member of, but not to dispose of the Right of Property which we have over him.*

2. The Roman Law did not except fugitive Slaves from this Law of Nations; for even in these the Master may recover his old Right, as *Paulus* ⁶ observes; lest, allowing the contrary, it may be prejudicial, not to him who is still to continue a Slave, but to the Master himself. The Emperors ⁷ (*Dioclesian* and *Maximinian*) say in general, and without Restriction, of Slaves retaken in any military Expedition, that *They ought to be deemed recovered, and not taken, and that the Soldier should be their Deliverer, and not their Master.*

3. Those Slaves who are ransomed from the Enemy, by the Roman Law ⁸ become his that redeemed them, but upon laying down their Ransom, they are deemed recovered by the Right of Postliminy. But it belongs to the Civilians to give a more exact Explication of all this. But some Things have been altered by the modern Laws: And, to invite captive Slaves to return, they propose present Liberty to the disabled, and to the Rest, after five Years; as you may see in the military Laws collected by ⁹ *Rufus*.

XII. That Question more nearly relates to us, whether a People subjected to a foreign Prince return to their antient State, which may be handled, by supposing that it is not their antient Sovereign, but some Ally, who has rescued them from the Enemy; the same, I think, may be answered, ¹ as before, of Slaves, unless it be otherwise agreed by the Treaty of Alliance.

XII. Whether Subjects may be recovered by Postliminy.

XIII. 1. Among

captus inde aufugit, & vel in urbe Roma ita est, ut neque in domini sui potestate sit, neque ulli serviat: nondum postliminio rediisse, existimandum est. Digest. *ibid.* Leg. XXX. *five ult.* To consider the Thing in itself, I do not see upon what this Difference is founded; and the rather, because, according to the following Law, the Will of the Slave is not necessary in the Case. ANTHONY FAURE, in his *Jurispr. Papin.* Tit. XI. Princ. VIII. Illat. XXVII. finds an Instance in it of the Spirit of Contradiction, with which the Civilian PAULUS wrote his Notes upon LABEO's *Probable Rules*. He explains the Thought of the former in this Manner. The Slave, says he, in the present Case, tho' returned into the Dominions of the State, can neither of himself enjoy the Right of Postliminy, because he never was a Citizen; nor have that Right in favour of the Person of his former Master, so long as he keeps away from him, and does not put himself again into his Power. If there be not an Exception in this to the general Rule, as Mr. BYNCKERSHOEK (*Observ.* III. 6, and 12.) is for having all these Notes of PAULUS to be considered, which others call Criticisms, and even treat sometimes as Cavils; it is at least a meer Subtlety of the Roman Law. The Person of the Slave is not here in Question, but only that of the Master: It is to the Master the Right of Postliminy belongs, the Slave is only the Matter, or passive Subject of it. It is not the Slave that recovers himself, as Persons do who were before free; it is the Master who recovers the Slave. In a Word, the Slave here is to be considered only as Goods recovered by the Right of Postliminy; and, if so, wherefore does it not suffice, that the Slave is in the Country, tho' the Master know nothing of it; as it is allowed, that Things inanimate are deemed to be recovered by their antient Proprietors, the Instant they are within the Country again; whether the

Owner of those Things be informed of it or no? Besides, according to the Principles of the Roman Law, a Master retains the Possession of his fugitive Slave, as long as he is not in the Service of some other, who possesses him as his own. (*Digest.* Lib. XLI. Tit. II. *De adquir. vel amitt. Poss.* Leg. XIII. Princ. Leg. XV. Leg. I. § 14.) wherefore then could he not recover this Possession by Right of Postliminy, even tho' the returned Slave conceals himself from him? And the rather, because during the War, the Captivity of the Slave only suspends, in some Measure, the Rights of the Master.

⁵ *Certe apud hostes manumissus liberatur, &c.* Digest. *ibid.* Leg. XII. § 9. See the *Jurisprudentia Papiniana* of ANTHONY FAURE, Tit. XI. Princ. VIII. Illat. XIX. p. 631. & seq.

⁶ *Si vero servus transfugerit, &c.* Digest. *ibid.* Leg. XIX. § 5. See the same ANTHONY FAURE, cited in the preceding Note. *Ibid.* Illat. III. p. 613.

⁷ *Ab hostibus capti & non commercio redempti, &c.* Cod. Lib. VIII. Tit. LI. *De Postliminio reversis, &c.* Leg. XII.

⁸ Even tho' he who ransoms them knows to whom they belong. *Si quis servum captum, &c.* Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. XII. § 7. Consult ANTHONY FAURE here again, *Jurispr. Papin.* Tit. XI. Princ. VIII. Illat. II. p. 622. & seq.

⁹ It is in Num. 64. of those Laws, the Latin Version of which, by JOHN LEUNCLAVIUS, is annexed to VEGETIUS, of *Plantin's* Edition, with the Notes of STEWECHIUS, printed in 1607. The learned GRONOVIVS refers us in this Place to the Edition of *Simon Schardius*, published at *Basil.* in 1561, which is probably the first.

XII. (1) That is to say, that the People, delivered from the Dominion of the Enemy, should return

XIII. That
Lands are re-
covered by
Postliminy.

XIII. 1. Among Things recoverable by Postliminy, the first to be considered are Lands; *It is true* (saith ¹ *Pomponius*) *the Enemy being beaten out of the Lands which they had seized on, the Right of them returns to their former Owners.* But the Enemy must be understood to be driven out, when they cannot come thither any more openly as we have explained elsewhere, (*Ch. iv. of this Book, § 4.*) Thus the *Lacedemonians* restored the Island *Ægina*, recovered from the *Athenians* ² to the antient Lords. So ³ *Justinian*, and other Emperors, restored the Lands recovered from the *Goths* and *Vandals*, to the Heirs of the antient Possessors, ⁴ not admitting those Prescriptions against them, which the *Roman Laws* had introduced.

2. What I have said of Lands takes Place also, in my Opinion, in Regard to all Rights annexed to those Lands. For even Places taken by the Enemy, which had been sacred or religious, when freed from that Misfortune, return as it were by a Kind of Postliminy to their former State, as ⁵ *Pomponius* decides. Whereto agrees that of *Cicero*, in his Oration against *Verres*, concerning *Diana* ⁶ of *Segesta*, *She recovered her Worship and Habitation by the Valour of Publius Africanus.* And *Marcianus* ⁷ compares that Right to the Right of Postliminy, by which, a Place of the Shore being built upon, when the Building is fallen, makes again Part of the Shore. Upon this Principle it must be ⁸ said, that the Profits of the Land recovered are to be restored; like to what *Pomponius* delivers of Lands that had been ⁹ drowned. So it is provided by the Laws of ^a *Spain*, that Counties, and other hereditary Jurisdictions, shall return by Postliminy; the greater absolutely, the less if within the Space of four Years they be claimed after their Recovery, unless it be a Castle, or Fort, lost by War, and recovered again in what Manner soever, the King then hath Right to keep the Possession of it.

^a Reg. Constit.
l. 10. tit. 29.
part. 2.

XIV. What
Difference was
formerly ob-
served in Re-
lation to Move-
ables.

XIV. 1. Concerning Moveables, the general Rule is directly contrary, that they do not return by Postliminy, but make Part of the Spoil; for *Labeo* ¹ opposes those two Ideas. Therefore, when such Things pass from the Enemy to others by Commerce, wheresoever they are found, they are allowed to be his who bought them; neither has the first Owner ² any Power to claim them, either amongst ³ a neutral

return to their lawful Sovereign; upon Condition, that the latter reimburse the Deliverer the Expences he has been at in his Expedition.

XIII. (1) *Verum est, expulsis hostibus, &c. Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XX. § 1.*

2 *STRABO, Geogr. Lib. VIII. (p. 577. Edit. Amstel. 376. Paris.)* This was, because they had been of the *Lacedemonian* Party. For the Rest, see what we have said above, *Chap. VI. of this Book, § 7. GROTIUS.*

3 See *Novel. XXXVI. of JUSTINIAN.*

4 And that by a Law of *Honorius*, who, tho' *Spain* were left to the *Vandals*, yet, whilst the *Vandals* possessed it, he would not allow that a Prescription of thirty Years should prejudice the antient Lords, as in *PROCOPIUS, Vandal. I.* The same Exception is found in a *Novel of VALENTINIAN's*, with Respect to some Lands in *Africa*, possessed by the *Vandals. Tricennali temporum, &c. Nov. De episcopali judicio.* The second Council of *Seville* decides, that a Church ought to recover the Parishes it had before the War: And that it cannot be deprived of them by Right of Prescription: Just as by the *Roman Laws*, a Prisoner of War recovers his Possessions, when he returns from Captivity. *GRATIAN, in Caus. XVI. Quæst. III. Can. XIII.* See also the *Decretals, Lib. II. Cap. XXVI.* and *CUJACIUS*, on the Title, *C. de Præscript 30 Annor. GROTIUS.*

5 *Quod si ab hac calamitate, &c. Digest. Lib. XI. Tit. VII. De Religiosis, &c. Leg. XXXVI.*

6 *Quæ [Diana Segestana] Carthagenensium victoriâ, &c. Lib. IV. Cap. XXXV.*

7 *In tantum ut & soli domini, &c. Digest. Lib. I. Tit. VIII. De divisione rerum, & qualitate, Leg. VI. princ.*

8 This is formally decided by the Civilian *PAULUS*, in the Law which our Author cited in the Margin, where he says the same Thing of a Slave, of whom a Person has the Use without the Property. *Si ager ab hostibus, &c. Digest. Lib. VII. Tit. IV. Quibus modis ususfructus, vel usus, amittitur. Leg. XXVI.*

9 *Sed quemadmodum si eodem impetu, &c. Ibid. Leg. XXIII.* See Mr. *NOODT's* fine Treatise, *De Usufructu, Lib. II. Cap. XI.*

XIV. (1) He says, that whatever is Part of the Booty is not recoverable by the Right of Postliminy. *Si, quod bello captum est, in præda est, non postliminio redit. Digest, Lib. XLIX. Tit. XV. De Captivis & Postlim. &c. Leg. XXVIII.* I have followed Mr. *BYNKERSHOEK's* Correction of this Law, with a very small Alteration, which seemed necessary: *Si, quod, &c. for Si quid, &c.* *Observat. Jur. Civ. Lib. III. Cap. VI.* For the Rest, this general Rule concerning moveable Things, relates only to civil Right. The same Reasons which authorize the Right of Postliminy, in Regard to Immoveables, take Place in this Case, and with equal Force. Mr. *COCCEIUS* confesses it, in his Dissertation *De Postliminio in Pace, Sect. II. § 5.* and he says, that if the *Roman Laws* determined otherwise upon it, it was in order to animate the Soldiers to plunder. Another Reason might have been added, of which I shall speak in the following Note.

2 Slaves being of the Number of Effects, and
of

³ a neutral People, or in his own Country. But from this Rule we find of old excepted, Things that were useful in War; which seems to have been generally allowed by all Nations, for this Reason, that the Hope of recovering them might render Men more willing to provide them: For the Laws and Views of most States at that Time, had Respect to warlike Affairs, and therefore they easily agreed in this. We have already mentioned, out of *Gallus Ælius*,⁴ what Things were esteemed useful in War; but they are more exactly set down, both by *Cicero*⁵ in his Topicks, and in *Modestinus*,⁶ viz. Men of War and Merchant Ships, but not Gallies and Pleasure-Boats; Mules, but only those used to the Pack-Saddle; Horses and Mares, but only those that will endure the Bit. And these are Things⁷ which by the *Roman Law* may be validly bequeathed, and may come into the Division⁸ of an Inheritance.

2. Arms⁹ also, and Cloaths, are useful in War, but these returned not by Postliminy, because it was an odious Thing, and was even accounted criminal, for a Man to suffer his Arms or Cloaths to be taken from him, as may be every where found in Historians. And in this, Arms are observed to differ from¹⁰ Horses, because the Horse may possibly break loose without the Fault of the Rider. And this Difference of Moveables seems to have been used in the West, even under the *Goths*, to the Time of *Boetius*. For he expounding the Topicks of *Cicero*, seems to speak of this Right, as if it were in full Force to that Day.

of moveable Effects, it does not appear at first, why they were excepted out of this general Rule, as our Author has shewn above, § II. ZIEGLER says, it was because Slaves might run away from their Masters, and afterwards pretend to have been taken. It is more likely, that it was, because it was easy to know to whom a Slave belonged; whereas, had it been necessary to restore inanimate moveable Things to their first Owners, that would have given Room for much Contest and Difficulty. Besides, those Things not being capable to return of themselves, from the Moment they were taken by the Enemy, the Owner ought to consider them as lost; and the more because it was scarce known into whose Hands they were fallen; whereas a Slave might have the Will, and find the Means to return.

3 The Reason why the first Owner could not claim moveable Things, in a neutral Country, is founded on the Nature itself of that Sort of Things. It would be the same with Regard to Immoveables, if it were possible that they could be found on the Lands of a neutral People, taken by Right of War, and afterwards alienated in Favour of some Person of such neutral State. This is a Consequence of the State of Neutrality, which obliging the neutral People to consider, as lawfully acquired, what one of the Enemies has taken from the other, engages also to maintain the Title of those who hold of them any Thing of this Nature, unless it belonged before to a Prisoner of War, who by returning home, and thereby in a Manner recovering himself, has recovered all his Rights, even with Regard to neutral States. See above, § 6.

4 See § 3. Note 1.

5 *Postliminio redeunt hæc: Homo, navis, mulus, clitellarius, equus, equa, quæ fræna recipere solet.* Topic. Cap. VIII. This Distinction is only in Favour of the Subjects of the State, who had lost Things of this Nature that were retaken by People of the same Party. But they can no more be claimed in a neutral Country, than others not excepted.

6 It is MARCELLUS, and not MODESTINUS: *Navibus longis, atque onerariis, &c.* Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg.

II. Our Author, in giving us the Abstract of this Law, joins with *Naves Actuariae*, those called *Lusoriae*. And as there were some of the latter, which served to guard the Frontiers of the Empire upon the *Danube*, the *Rhine*, and other Rivers; a German, named JOHN JAMES WISSENBACH, Professor at *Franker*, in his Life-Time, criticises our Author in this Place, as denying the Right of Postliminy to all those small Vessels comprized under the general Name of *Lusoriae Naves*. But the Critick was not aware, that GROTIUS has distinguished the two Sorts with sufficient Clearness, in describing that of which he intends to speak in this Manner: *Voluptatis causâ paratæ*; which extends also to the *Naves Actuariae*, some of which were also of Use in War. See the Note of the learned GRONOVIVS upon this Place, and JAMES GODEFROY, upon the *Theodosian Code*, Lib. VII. Tit. XVII. De *Lusoriis Danubii*, Vol. II. p. 401. & seq. The same WISSENBACH, in the same Place (that is to say, *Exercit. in Pandectas*, Disp. XXXIX. Num. 23.) suspects also, that our Author has omitted Fishing-Boats or Vessels, in Favour of the *Hollanders*, who have great Numbers of them. But this Suspicion is ridiculous, since the Question does not relate to modern Usages. I should rather believe that the Omission proceeded from the Copists or Printers.

7 *Id quod apud hostes est, legari posse*, OCTAVENUS scripsit: & *postliminii jure consistere*. Digest. Lib. XXX. De *Legatis & Fideicommissis* I. Leg. IX. See CUVAS upon it, *Recit. in Dig.* 103. T. VII.

8 It is plain that this is upon the Supposition of their being recovered. PAPINIANUS, *De re, quæ apud hostes est*, MARCELLUM reprehendit, &c. Digest. Lib. X. Tit. II. *Familia eriscundæ*, Leg. XXII. § 5. and Leg. XXIII. See the great CUVAS here again, *Recit. in Paul.* p. 363. Vol. V. Opp.

9 *Non idem in armis juris est: Quippe nec sine flagitio amittuntur: Arma enim postliminio reverti negatur quod turpiter amittuntur. Item vestis.* Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. II. § 2. and Leg. III.

10 In the Law cited above, Note 5.

XV. *What the Law now says of Moveables.*
 * Decif. Genu-
 enf. 101.

XV. But in these later Times, if not before, this Difference seems to have been taken away. ¹ For those skilled in the Customs of Nations do commonly declare, that Moveables are not recovered by Postliminy, ² and we see the same in many Places determined in Relation to Ships.

XVI. *What Things are recovered that want not this Right of Postliminy.*

XVI. But those Things (tho' taken by the Enemy) which were not yet brought into Places whereof he is Master, have no Occasion for Postliminy, because they have not yet changed their Owner by the Right of Nations. Also what Pirates and Robbers have taken from us, has no Need of Postliminy, (as ² *Ulpianus* and *Javolenus* ³ relate) because the Law of Nations has not authorised them to appropriate it to themselves, in Prejudice of the antient Owner; on which Account the *Athenians* pretended to receive the Island ⁴ *Halonesus*, which Pirates had taken from them, and *Philip* from the Pirates, as restored, not given, by *Philip*. Therefore, Things taken by them, wheresoever they are found, may be claimed; but, as we have concluded ² in another Place, so much must be restored to the Person who got Possession upon his own Charge, as the right Owner would willingly have expended for the Recovery of them.

* B. ii. ch. 10.
 § 9.

XVII. *That the Civil Law changes some Things, as to their own Subjects.*

XVII. But it may be otherwise determined by the Civil Law. As ¹ by the Laws of *Spain*, Ships taken from Pirates, become theirs who take them from the Pirates. For it is not unjust that a private Thing should yield ² to a publick Advantage, especially when the Recovery may prove so difficult. But this Law cannot hinder Foreigners from challenging their own.

XVIII. *How Postliminy was observed among those that were not Enemies.*

* See B. ii. ch.
 § 5. § 5.

XVIII. 1. That is more admirable, which the *Roman* Laws do testify, viz. That this Right of Postliminy took Place, not only between Enemies, but even between *Romans* and all foreign Nations. But this (as I said ² before) was the Reliques of that barbarous Age of the *Nomades*, wherein the Sentiments of that natural Society that is between all Men were stifled by wicked Customs. Therefore, among Nations which were not actually engaged in a publick War with one another, there was a Kind of War between private Men, authorised and, as it were, declared by Custom; and that such a Licence might not produce many Murders, they agreed to settle Laws of Captivity, which, consequently, introduced that of Postliminy, yet otherwise than with Robbers and Pirates, because those private Hostilities terminated in Conventions, accompanied with a Sort of Equity, which Robbers and Pirates usually despise.

XV. (1) The late Mr. COCCÆIUS, in the Dissertation cited before, *De Postlim. in Pace, & Amnestia*, Sect. II. § 6. & seq. pretends the modern Usage is, on the contrary, that all moveable Things, of whatsoever Nature they be, are recovered by Right of Postliminy. But he alledges only some Examples from the Custom in *Germany*. And therefore the Argument which he sounds upon what our Author says concerning Ships, as if it were an Exception to the general Rule, is of no Force, as the Universality of the Custom is not proved. See the different Regulations made in these Provinces, relating to the Recovery of Vessels, in the Commentary of the late Mr. VÖET, upon the *Digest*, Tit. *De Captivis & Postliminio*, &c. § 4.

XVI. (1) See what I have said above, Chap. VI. of this Book, § 3. Note 1. From whence it appears, that this Rule relates to the Civil Law, and not in the least to the Law of Nations, as our Author would have it, which the late Mr. TITIVS, (*Observ. in Lauterbach. 1446. Num. 3.*) endeavours in vain to justify, as if he spoke only of what takes Place in Regard to Subjects of the same State, between whom there can scarce happen any Dispute about it, so long as the Things retaken from the Enemy are not in a Place of Safety. Consult again here the Commentary of Mr. VÖET upon the *Digest*. Tit. *De Captivis & Postliminio*. &c. § 3.

² See the Law cited above, Chap. III. of this Book, § 1. Note 3. *A Piratis, aut Latronibus,*

capti, liberi permanent, says PAULUS, another Civilian, in the same Title, *Leg. XIX. § 2.*

³ He speaks of a Slave, who having been carried off by Robbers, had passed by Traffick from Hand to Hand to the *Germans*, that is to say, to the Enemies of the *Roman* People, and afterwards had been taken from them, in a Defeat, and then sold. Notwithstanding all this, the Prescription would not run in Favour of the Buyer, according to this Lawyer, who follows the Opinion of three others upon this Point. *Latrones tibi servum eripuerant, &c. Digest. Lib. XLIX. Tit. XV. De Captiv. & Postlim. &c. Leg. XXVII.* DENNIS GODEFROY opposes this with the sixth Law of the same Title, wherein, however, there is nothing contrary to it. See the *Jurisprud. Papinian.* of ANTHONY FAURE, Tit. XI. *Princ. VIII. Illat. VI. p. m. 615, 616.*

⁴ DEMOSTHENES, (*aut alius sub ejus nomine*) *Orat. De Haloneso*, p. 30. See the Letter of *Philip* himself, p. 63. A. B.

XVII. (1) The same is among the *Venetians*, as appears from the Letters of FRAXINIUS CANÆUS, *Tom. I.*

² The End of such a Law is to animate Soldiers and Privateers to pursue Robbers and Pirates, from the Hopes of possessing Things taken even from the Subjects of the State. GROENEWEGEN, in his Treatise *De legibus abrogatis & inusitatis*, &c. (in L. 24. and 27. D. *De Captiv. & Postlim.*) says, this is practised in *Holland* and the neighbouring Countries.

2. It seems of old to have been very much disputed, whether any of a confederate Nation, being our Slaves, if they should escape home, might be esteemed to return by Postliminy. For so ¹ *Cicero* propounds this Question, in his first Book *De Oratore*. And *Gallus Ælius* ² thus gives us his Opinion, *We observe the same Right of Postliminy, with a free People, with Allies, and with Kings, as with Enemies.* On the contrary *Proculus*, ³ *I doubt not, but that Allies, and a free People are as Strangers to us, there is no Postliminy between us and them.*

3. In my Opinion we ought to distinguish between Treaties, that if any were made merely with design to put an End to, or to prevent open War, they could not for the Time to come prevent the taking of Prisoners, or the Right of Postliminy. But if any expressed, that they might on both Sides travel in Safety, from one State to another, upon the publick Faith, then the taking of Prisoners ceasing between these two Nations, the Right of Postliminy ceased also. And *Pomponius* ⁴ seems to hint as much, when he says, *If there be a Nation, with whom we have neither Friendship nor Hospitality, nor Alliance on account of Friendship, they indeed are not Enemies. But whatever of ours happens to come to them, is theirs. And a free Man of ours taken by them, becomes their Slave; and so from them to us; therefore in this Case also Postliminy is allowed.* When he said an Alliance on the account of Friendship, he plainly shews that other Alliances may be made, in which may be neither Tie of Friendship nor Right of Hospitality. And *Proculus* fully declares, that he takes those to be People confederated, who have reciprocally promised Friendship, and safe Hospitality, ⁵ when he adds, *For what need is there of any Postliminy between us? When they also may retain even their own Liberty, and Property of their own Things with us, as freely as among themselves, and so we among them.* Therefore that which follows in *Gallus Ælius*, *There is no Postliminy with those Nations, that are under our Government, as Cujacius* ⁶ rightly reads it, must be supplied with this Addition, *nor with those, with whom we have made an Alliance on account of Friendship.*

XIX. 1. But in our Days, not only among Christians, but even most of the *Mahometans*, as this Right of Captivity out of Time of War, so also that of Post-

XIX. *When this Right may now be in force.*

XVIII. (1) *Similique in genere, &c. De Orator. Lib. I. Cap. XI.*

2 *Cum populis liberis, &c. Apud FESTUM, voce Postliminium.*

3 *Non dubito, quin fœderati & liberi nobis externi sint: Non inter nos atque eos postliminium esse. Digest, Lib. XLIX. De Capt. & Postlim. &c. Leg. VII. Princ.* So the *Florence Manuscript* has it. The vulgar Editions add a Negative here: *Nobis externi non sint.* And *ANTHONY FAURE* defends this reading in his *Jurisprud. Papinian.* (Tit. XI. Princ. VIII. Illat. VII. p. 616, 617.) but by giving the Word Strangers (*Externi*) an improper Signification, which he does not justify by any Example. The learned *SALMASIUS* on the contrary, whose Opinion *GRONOVIVS* approves was willing to reconcile the Readings, by striking out both the Negatives, and saying: *Quum fœderati & liberi nobis externi sint, inter nos atque eos, &c.* But this is not to be defended, and directly contradicts the Words that follow, where the Civilian shews, that there is no Occasion for the Right of *Postliminy* between the *Romans* and those Allies or free People, because by Virtue of such Relation between them, the Citizens on both Sides retained their Liberty, and the Property of their Effects out of their own Country: *Etenim quod inter nos atque eos postliminii opus est, quum & illi apud nos & libertatem suam, & dominium rerum suarum, æque atque apud se, retineant, & eadem nobis apud eos contingant?* Tho' the Lawyer might have expressed himself more clearly, his Meaning is evident enough. The Right of *Postliminy* had Place originally, and generally between Stranger and Stranger. The allied and free People did not therefore cease to be Strangers; which is the Exception *POMPONIVS* observes; as *C U J A S*

very well explains him, *Observat. Lib. XI. Cap. XXIII.* This will appear still more, if we call to mind what we have said, *B. I. Chap. III. § 21: Note 25.* upon the Condition of the People in question with regard to the *Romans*.

4 *In pace quoque Postliminium datum est: Nam si cum gente aliqua, &c. Digest, Ibid. Leg. V. § 2.* The illustrious Mr. *BYNKERSHOEK*, in his Dissertation, *De dominio Maris*, (Cap. I. p. 5) asserts, that what is said in this Place of a free Person, who becomes a Slave, by having been taken by the Subjects of any of the foreign Nations in question; ought to be understood only of those, who have been made Prisoners for some lawful Cause. But the Words of the antient Lawyer are too clear to admit that Restriction. The late Mr. *COCCEIUS*, (*Diff. de Postlim. in Pace*, Sect. II. § 29.) gives another the most forced Construction, to the whole Law: He is for having it relate only to People with whom War was made, and when a Clause of general Amnesty has not been inserted in the Treaty of Peace. But this was necessary to reconcile the *Roman Law* with the imaginary System of that Author, of a Right of War subsisting after a Peace between antient Enemies; of which we may speak elsewhere, upon *Chap. XX. § 15.* of this last Book.

5 See Note 3.

6 *Quæ Nationes in ditione nostra sunt, eum his Postliminium non est: Instead of: Quæ Nationes in opinione nostra sunt eum his, &c.* as it is in *FESTUS's* Edition. See the Chapter of that great Lawyer's *Observations*, cited in Note 3. *FULVIUS URSINUS* had before corrected the Word *opinio* in the same manner.

liminy is abolished, the Necessity of both ceasing because the Rights of that natural Relation, which is between all Mankind, have been re-established.

2. Yet that antient Right of Nations may still be in Force, if we should have to do with a State so barbarous, as to think it lawful without any manner of Reason, or Denunciation of War, to treat in a hostile Manner the Persons and Goods of all Strangers. And even while I am writing this, it is adjudged in the great Chamber of the Parliament of *Paris* (*Nicolaus Verdunius* being first President) ¹ that the Goods of the Subjects of *France*, taken by the *Algerines*, a Nest of Pyrates that live upon the Spoil of all Sea-faring People, by the Right of War had changed their Owner, and therefore when retaken by others than the antient Proprietors, became theirs that retook them. In the same Cause was this likewise adjudged, (which I said but now) that Ships are not in these Days reckoned among Things recoverable by Postliminy.

XIX. (1) The late Mr. COCCÆIUS in the Dissertation I have just cited, (*Sett.* II. § 8.) finds this Decision impertinent and unjust: Because there is no Right of War in Relation to Pirates. But our

Author supposes them not to be considered as Pirates. And if the Custom be such, it may be justified by the Reason alledged above, § 17. *Note* 1.

C H A P. X.

Advice concerning Things done in an unjust War.

I. In what Sense Honour and Conscience may be said to forbid what Law permits.

I. I. **I** Must now reflect, and take away from those that make War almost all the Rights, which I may seem to have granted them; which yet in Reality I have not. For when I first undertook to explain this Part of the Law of Nations, I then declared, that many Things are said to be of Right and lawful, because they escape Punishment, and partly because Courts of Justice have given them their Authority, tho' they are contrary to the Rules, either of Justice properly so called, or of other Vertues, or at least those, who abstain from such Things, act in a manner more honest and more commendable in the Opinion of good Men.

2. *Seneca* in his *Troas* ¹ makes *Pyrrhus* speak thus,

Lex nulla capto parcit, aut pœnam impedit.

*No Law commands to spare the Captive Slave,
Or does forbid to punish him.*

Agamemnon replies,

Quod non vetat Lex, hoc vetat fieri Pudor.

What Law forbids not, Honour doth restrain.

By *Honour* we are here to understand, not so much the Consideration of other Men, and the Care of our own Reputation; as a respect for Equity and Justice, at least a constant Adherence to that which is most just and most honest; so we read in *Justinian's* ² *Institutions*. *Feoffments of Trust* so called, because they are secured by no Bond of Law, but only the Honour of the Person entrusted. So in *Quintilian* ³ the Father, the Creditor cannot (*Salvo pudore*) with Honour demand his Debt of the Security, but when he cannot get it from the prime Debtor. And in this Sense we often see, *Justitia* and *Pudor*, Justice and Honour, joined together.

⁴ *Nondum Justitiam facinus Mortale fugârat,
Ultima de superis illa reliquit humum.
Proque metu populum sine vi pudor ipse regebat.*

X. (1) *Ver.* 333, 334:

² *Sciendum itaque est, &c.* *Instit. Lib. II. Tit. XXIII. De Fideicommissariis hereditat. § 1.*

³ *Non enim aliter, &c.* *Declamat. CCLXXXIII.*

⁴ Speaking of the Reign of *Saturn*. *OVID. Fast. Lib. I. Ver. 249. & seqq.*

*The Crimes of Men were not so mighty grown,
As Justice to expell from mortal View ;
She, last of all the Goddesses, retir'd ;
And Honour, without Force, then rul'd the World.*

Hesiod. Oper. & Dior. Ver. 192, 193.

—Δίκη δ' ἐν χερσὶ, καὶ Αἰδῶς
οὐκ ἔσται· βλάβη δ' ὁ κακὸς τὸν ἀρεῖονα φῶτα.

*Honour and Justice both have left the Stage,
All fall a Sacrifice to Vice and Rage.*

Plato in his 12th Book of Laws, ⁵ παρθένης γὰρ αἰδῶς δίκη λέγεσθαι τε καὶ ἐνῶς εἶρηται, or rather πάρεδρος. That the Sense may be, *Justice is called the Companion of Honour, and that with Reason.* And in another Place the same Plato tells us, ⁶ θεὸς, &c. God being solicitous for Mankind, lest they should be entirely destroyed, bestowed upon Men Honour and Justice, the Ornaments of States, and the Bonds of Friendship. ⁷ Plutarch in like manner calls δίκην Justice, ἔνοικον αἰδῶς, the Cohabitant of Honour ; and in another Place he joins αἰδῶ καὶ δικαιοσύνην, Honour and Justice, together. In DIONYSIUS HALICARNASSENSIS ⁸ are named together, αἰδῶς, κόσμος, καὶ δίκη, Honour, Modesty and Justice. So JOSEPHUS ⁹ couples together, αἰδῶ and ἐπιείκειαν, Honour and Equity. Paulus ¹⁰ the Lawyer unites natural Right and Honour. But CICERO ¹¹ thus distinguishes between Justice and Honour. Justice (says he) teaches not to hurt our Neighbour, Honour not to offend him.

3. With the Verse before quoted of Seneca, agrees that Expression of the same Author in his philosophical Writings. ¹² *How small a Matter is it, to be a good Man, only so far as the Laws require ? How much larger is the Rule of Duty than of Right ? How many Things does natural Affection, Humanity, Liberality, Justice and Faith demand ? Which are all beyond the reach of the civil Laws.* Where one may see he puts a Difference between Jus, and Justitia, Right and Justice. He means by Right, that which is actionable in Courts of Judicature. The same Seneca excellently explains this in another Place, by the Example of a Master's Right over his Slaves. ¹³ *As to our bond Servants we must consider, not what we may without Danger of the Law put upon them, but what the Nature of Equity and Honesty would allow, which obliges us to be merciful to our Prisoners, and those purchased with our own Money.* Further, *Indeed every Thing is lawful with regard to a Slave,*

⁵ De Legib. p. 943. E. Vol. II.

⁶ In Protogor. (p. 322. C. Vol. I. Edit. H. Steph.)

⁷ Ad princip. in erudit. (p. 781. Vol. II. Edit. Wech.)

⁸ Antiq. Roman. Lib. VI. (Cap. XXXVI. p. 354. Edit. Oxon. 369. Sylb.)

⁹ Antiq. Jud. Lib. XIII. Cap. XIX. (p. 456. A.)

¹⁰ In speaking of Marriages, wherein Modesty, properly so called is intended : The Lawyer says, that it is contrary to the Rules of this natural Modesty, and in Consequence to the Law of Nature, to marry one's own Daughter : *In contrahendis matrimoniis, Naturale jus & Pudor inspiciendus est. Contra pudorem est autem, filiam uxorem ducere.* Digest, Lib. XXIII. Tit. II. De ritu Nuptiarum, Leg. XIV. § 2.

¹¹ Honour, in general, is not meant here, according to the Idea, which our Author, after the Antients, affixes to the Word Pudor, I mean, a constant Adherence to the Rules of Honesty and Virtue. CICERO speaks of that Virtue, which consists in the Observation of the Rules of Decorum : *JUSTITIÆ partes non violare homines, VERECUNDIÆ, non offendere.* De Offic. Lib. I. Cap. XXVIII.

¹² *Ut hoc ita sit, quam angusta innocentia, &c.* De Ira, Lib. II. Cap. XXVII. That Philosopher observes elsewhere, that there are many Things, for

which there is no Law nor any Action to be brought, that however the Rules of Commerce in human Society require, which are superior to all written Laws : *Multa legem non habent, nec actionem, ad quæ consuetudo vitæ humanæ, lege omni valentior dat aditum.* De Benefic. Lib. V. Cap. XXI. CICERO maintains, that the Laws redress Wrongs, in a different manner from that in which the Philosophers correct them. The Laws confine themselves to what is more gross and palpable ; the Philosophers cut off every Thing, as far as the Light of an attentive and penetrating Reason extends : *Sed aliter Leges aliter philosophi tollunt astutias : Leges quatenus manu tenere possunt : Philosophi, quatenus ratione & intelligentia.* De Offic. Lib. III. Cap. XVII. See a Passage in QUINTILIAN, Instit. Orat. Lib. III. Cap. VI. which has been cited above in the fourth Chapter of this Book, § 2. Num. 2. GROTIUS.

The Reader may see my two Discourses, *De Permissione & Beneficio Legum*, upon this Subject.

¹³ *Et in mancipio cogitandum, &c.* Lib. I. De Clementia, Cap. XVIII. We might believe from what the Philosopher calls in the End of this Passage, *commune jus animantium*, that according to the Stoicks, there was a Right really and properly common to Men and Beasts. But see what I have said upon PUFENDORF, *Law of Nature and Nations*, B. II. Chap. III. § 2. Note 2. and § 3. Note 10. of the second Edition.

considered as such: But there are some Things which are not lawful with regard to a Slave, considered as a Man, according to the common Right of Animals. In which Place we may observe the double Meaning of the Word *lawful*, the one being taken for that which is really lawful in itself, the other for that which is only lawful externally.

II. This applied to what is allowed by the Law of Nations.

II. 1. To the same Intent is the Distinction of *Marcellus* in the Roman Senate, ¹ Not what I have done is here to be debated, since the Right of War justifies whatsoever I have done against the Enemies, but what they ought to have suffered, viz. in Reason and Equity. *Aristotle* disputing the Point, whether Slavery arising from War may be esteemed just, hints at this Distinction ². Some having in View a Sort of Right, that is, the Law which is certainly ³ something just, maintain that Captivity in War is just, but they do not say it is absolutely just, because it may so happen that the War may proceed from an unjust Cause. Agreeable to this is that of *Thucydides* ⁴ in the Oration of the Thebans, For those ye killed in Fight, it is not so much a Grievance to us, what they suffered was by a Kind of Right.

2. So also the Roman Lawyers themselves, what they often call the ⁵ Right of Captivity, in another Place call an Injury, and oppose it to natural Equity; and *Seneca* ⁶ says the Name of a Slave arose from Injustice, having a respect to what often happens. The *Italians* also in *Livy*, ⁷ retaining what they had taken from the *Syracusians* in War, are called obstinate in keeping what they had unjustly gotten. *Dion Prusæensis* having declared, that when Prisoners return Home, they recover their Liberty, adds this, ⁸ *ὡς ἀδίκως δεσφύοντες*, As being unjustly enslaved.

3. ⁹ *Lactantius* speaking of the Philosophers says, When they dispute of Duties relating to military Affairs, they reason not according to the Principles of Justice and true Vertue, but adapt their Precepts to the common Practice and Customs of civil Life. He says afterwards, that the Romans ¹⁰ acted unjustly by Law.

III. What is done in an unjust War is unjust in itself.

III. We then first declare, if the Cause of the War be unjust, tho' it be undertaken in a solemn Manner, yet all the Acts of Hostility done in it are unjust in themselves. So that they who knowingly do these Acts, or join in the acting of them, Are to be accounted in the Number of those, who without Repentance cannot enter into the Kingdom of Heaven, 1 Cor. vi. 10. But true Repentance, if Opportunity and Ability will allow, absolutely requires ¹ that he who has done any Damage,

II. (1) *Sed non, quid ego fecerim in disquisitionem venit, quem, quidquid in hostibus feci, jus belli defendit, sed quid isti pati debuerint.* *LIVY*, Lib. XXVI. Cap. XXXI. Num. 2. So our Author cites this Passage. But the Words *quem, quidquid in hostibus feci, jus belli defendit*, which he cites also above, Chap. IV. of this Book, § 5. Note 3. are not in the Manuscript, and *GRONOVIVS* had Reason for omitting them in his Edition, which has only, *in disquisitionem venit, quam quid isti.* See that learned Critick's Note. He might have observed, that this Gloss crept in probably from the following Words, which are a little lower in the Text, and which I have substituted in the Note referred to: *Quæ autem singulis victor aut ademi, aut dedi, quum belli jure, tum ex cujusque merito, scio me fecisse.*

2 *Polit. Lib. I. Cap. VI. p. 302. A. Vol. II. Edit. Paris.* See *GIPHANIUS*'s Commentary upon it.

3 *SENECA* says, that some acquire a Right to Lands belonging to other People by Arms: *Alii armis sibi jus in aliena terra fecerunt.* *Consolat. ad Helviam. Cap. VI.* Right, and the Acquisition of another's Effects, continuing such, seem incompatible. But they are reconcilable by the Principles we have here laid down in the Text. Add what we have said in Chap. IV. of this Book, § 2. *GROTIUS*.

4 *Lib. III. Cap. LXVI. Edit. Oxon.*

5 See the Law cited above, Chap. VII. of this Book, § 6. Note 10. with the Reflection which I have made there.

6 He says, that as the Title of *Knight* arose from Ambition, the Names of *freed Man* and *Slave* derived their Origin from *Injury* and *Injustice*: *Quid est Eques Romanus, aut Libertinus, aut Servus? Nomina ex ambitione, aut ex injuria nata.* *Epist. XXXI.*

7 On the contrary it was the *Greeks*, who were for keeping what they had taken, during the War, from the antient Inhabitants of *Italy*: *Græci res a quibusdam Italici generis, &c. Lib. XXIX. Cap. I. Num. 16, 17.*

8 *Orat. XV.*

9 *Itaque quum de Officiis, &c. Instit. Divin. Lib. VI. Cap. VI. Num. 24.* *St. AUSTIN* says, that if Men duly observed the Precepts of the Gospel, War itself would not be made without Charity and Benevolence: *Ac per hoc si terrena, &c. Epist. IV. Ad Marcellin.* He observes elsewhere, that Wars themselves are peaceable among the sincere Adorers of the true GOD: *apud veros DEI cultores, etiam ipsa bella pacata sunt.* *De diversis Ecclesiæ Observationibus. GROTIUS.*

The last Passage is cited in the Canon Law, *Caus. XXIII. Qu. I. C. I.*

10 These Words have been cited above, Chap. IV. of this Book, § 5. in fin.

III. (1) See *NUMBERS* v. 6, 7. *St. JEROME* says, that if all we have unjustly taken be not restored, we cannot avoid the Sentence of Condemnation: *Nec differtur ultionis sententia, si non redantur universa.* *Ad Rusticum.* *St. AUSTIN* maintains, that if another's Goods are not restored, for which we have sinned, when it is in our Power to

mage, either by killing, ravaging or plundering, should make full Restitution. Therefore GOD himself declares their ² Faits to be unacceptable to him, who detained their Captives unjustly taken. And the King of Nineve, (*Jonab* iii. 8.) proclaiming a Fast to his Subjects, commands them all to restore what they had taken by Rapine; acknowledging, by the Guide of natural Reason, that all Repentance without such a Restitution would be but pretended, and to no Purpose. And not only the ³ Jews and Christians are of this Opinion, but even the ^a *Mahometans* themselves.

IV. But the Authors of War, whether by their Authority; or Counsel, are obliged to make this Restitution, according to what we have declared in general ^a elsewhere, for all those Damages which are the usual Consequences of War; and for what are unusual, if they either contributed to them by Command or Advice, or not prevented them, if it was in their Power to have done it. Thus are Generals and Officers also obliged to do, in Relation to those Things which have been committed by those under their Command. The Soldiers, who have concurred in an Act of Hostility committed in common, as the burning of a Town, are each responsible for ¹ the whole Damage. But if the Damage has been caused by the distinct Acts of several, each shall be answerable for the Mischief, of which he has been the sole or partial Cause.

V. 1. Neither can I allow the Exception, which some make of those that serve under others, that they are only responsible for the Damage, when there is on their Part ¹ some Fault accompanied with Fraud. For the bare Fault, without bad Intention, is sufficient to engage to a Restitution. There are some who seem to think, that Things taken in a War, tho' its Cause were really unjust, are not to be returned; because both Sides, when they engaged in the War, were supposed to have granted them to the Captors. But it cannot be easily presumed, that any Man will rashly part with his Right, and War in itself is far different from the Nature of Contracts. But that neutral Nations might know what to do, and might not be forced into a War against their Wills, it was judged sufficient to introduce this external Right of Property, (which we have mentioned before) which may be agreeable with the internal Obligation to Restitution. And indeed those very Authors seem to allow as much concerning the Right over Prisoners of War. Wherefore the *Samnites* in *Livy* ² say, *We have restored the plundered Goods of our Enemies, which by the Law of Arms seemed to be ours; seemed only, he saith, because that War was unjust, as the Samnites had before acknowledged.*

^a See Leunclavius, *Turc.* v. and 17.

IV. *Who are hereby obliged to make Restitution, and how far.*

^a B. 2. c. 17.

V. *Whether Things taken in an unjust War, are to be restored by the Captor.*

restore them our Repentance is not real, but feigned. *Ad Macedon.* Epist. LIV. The latter Passage is cited in the CANON LAW, *Caus.* XIV. *Quæst.* VI. *Can.* I. GROTIUS.

I do not find the Words of St. JEROME in the Place referred to.

² It is in the fine Passage of ISAIAH, *Chap.* LVIII *Ver.* 5, 6, 7. that JUSTIN Martyr, repeats in Greek in his Dialogue with Tryphon. (p. 47. Edit. Oxon.) GROTIUS.

³ MICOTZI, *Lib. Præceptorum Legis*, Præcept. jub. XVI. See also the *Penitential Canons* of MAIMONIDES, *Cap.* II. § 2. GROTIUS.

IV. (1) It is decided in a Law, which our Author cites in the Margin, that if two or more Men have stolen a Beam, which one of them alone could not carry off, each of them is entirely responsible for the Theft: *Si duo pluresve unum, &c.* Digest, *Lib.* XLVII. *Tit.* II. *De Furtis, Leg.* XXI. § 9. We must further observe here, that it is generally impossible for a Soldier to make amends for the Damage, to which he has concurred in common, and for which he is thus wholly responsible. The Instance of burning a City suffices to explain this. And as to what a Soldier has done, where the Proportion of the Damage he has caused, may be distinguished, as when he has been concerned with others in plundering a City; he cannot commonly know to whom what he has taken belonged, nor in Consequence to whom he ought to restore it. In the first Case, the absolute Impossibility of Amends must acquit him, with regard to those who have suffered

the Damage. In the latter, the Obligation of making Restitution is suspended, till the Soldier has discovered the right Owner of the Booty he has taken. But in either Case, a Person that has the least Tenderness of Conscience, will be extremely mortified for the Impossibility either absolute or present under which he finds himself; since when People have the Means in their own Hands of making Amends for a Wrong done, it is a great Consolation, and a Discharge, which obliterates in some Sort the Crime. After all, as the Powers, who undertake an unjust War, are always more culpable than those who serve under them in such Wars, they can also generally make Amends, either wholly or in Part, for the Evils of which they have been the first Cause; and by discharging their Duty in that manner, exempt the Soldiers from the Obligation they are under of making Restitution, which they very seldom believe they are bound to do.

V. (1) In all the Editions it is in this Place: *Si modo in ipsis aliquid hæreat culpæ.* But our Author's Answer to this Proposition shews, that there must be some Fault in it. I therefore translate it, as if it had been writ: *Aliquid hæreat DOLORIS culpæ.* The Sense necessarily requires something of this Kind, and I might perhaps assure myself, that I have guessed the Word, if I had SYLVESTER, to whom our Author refers in the Margin, (*Part I. Num.* 10.) and whom he refutes.

² *Res hostium in præda captas, quæ belli jure nostræ videbantur, remisimus.* *Lib.* IX. *Cap.* I. *Num.* V.

2. Not much unlike this, a certain Power arises from the Law³ of Nations in a Contract made without Fraud, wherein there is an Inequality, to force the Contractor to perform his Contract; Nevertheless he that stipulates more than his Due, is obliged in Honesty and Conscience to reduce it to a fair and just Equality.

VI. Whether
by him also
that detains.
^a See B. 2. ch.
10.

VI. 1. But further, tho' a Man has not done the Damage himself, or if he did it without any Fault of his, ^a but yet keeps in his Possession ¹ a Thing taken away by another in an unjust War, he is obliged to restore it; because there can be no Reason produced naturally just, why the other should be deprived of it. There is neither a Consent on his Part, nor an Occasion of Punishment, nor a Compensation to make. Not unlike to this is that of *Valerius Maximus*. ² *The People of Rome*, faith he, when P. Claudius publicly sold some Camerine Prisoners taken in the War, when he was General, tho' they found their Treasury filled with the Money, and the Borders of the Empire enlarged, yet because they were not fully convinced of the Justice of that Expedition, they with utmost Diligence having sought out the Prisoners, redeemed them, and restored them their Lands. Thus by the Decree of the Romans, even their publick Liberty was restored to the ³ Phocians, and also their Lands, which had been taken from them: And afterwards the ⁴ Ligurians, who had been sold by M. Pompilius, (their Ransom being paid to the Purchasers) were restored to their Liberty, and their Goods carefully returned. The Senate ⁵ decreed the same in favour of the *Abderites*, adding this Reason for it, because the War made upon them was unjust.

2. Yet may the present Possessor, whatsoever Charge or Pains he has been at, lawfully deduct as much, as the Proprietor would willingly have expended to have recovered his endangered Possession, according to the Principles we have before laid down. But if the Possessor of it, without any Fault of his, has either wasted or alienated it, he shall not be obliged to refund, further than he shall be thought to have been made richer by it.

³ See above, B. II. Chap. XII. § 26. or last.

VI. (1) This must be explained according to the Principles referred to in my Notes upon the Chapter cited in the Margin.

² *Idem* [Populus Romanus] *quum*, &c. Lib. VI. Cap. V. Num. 1. Mark Anthony caused the Tyrians to return what belonged to the Jews. He ordered, that the Prisoners, who had been sold, should be set at Liberty, and the Effects taken from the Jews restored to their Right Owners. JOSEPH. *Antiq. Jud.* Lib. XIV. (Cap. XXII. p. 492. G.) Macrinus restored the Prisoners and

Booty to the Parthians, because the Romans had broken the Treaty without Cause. HERODIAN. Lib. IV. in fin. Sultan Mahomet set the Prisoners at Liberty that had been taken at Santa Maria in Achaia, CHALCOCONDYLAS, Lib. IX. GROTIUS.

³ *Phocænsibus* & *ager*, &c. LIVY, Lib. XXXVIII. Cap. XXXIX. Num. 12.

⁴ *Quas ob res, placere Senatui*, &c. *Idem*. Lib. XLII. Cap. VIII. Num. 7. See also DIOD. SICUL. *Excerpt. Peiresc.* (p. 298.) GROTIUS.

⁵ *Iisdem mandatum, ut* & Hostilio, &c. LIVY, Lib. XLIII. Cap. VI. Num. 21.

CH A P. XI.

Moderation concerning the Right of killing Men in a just War.

I. That some
Acts in a just
War, are un-
just in them-
selves.

I. 1. **B**UT that is not to be allowed in a just War, as is commonly said,

— ¹ *Arma tenenti*
Omnia dat, qui justa negat.—

He gives up all, who what is just denies.

But Cicero has it better, *There are certain Duties to be observed even towards those that have wronged us*, ² *for there is a Moderation required in Revenge and Punishment.*

XI. (1) LUCAN: *Pharsal.* Lib. I. Ver. 349, 350.

² *Sunt autem quædam officia*, &c. *De Offic.*

Lib. I. Cap. XI. See what we have said above, B. II. Chap. XX. § 2. and 22. and the Passages of St. AUSTIN, cited in the preceding Chapter, (§ 2. Num.

ment. The same Author commends the antient Times of the ³ Romans, when the Ends of their Wars were either mild, or rigorous, merely through Necessity: *Seneca* ⁴ calls those cruel, who having a just Cause to punish, have no Moderation in it. *Aristides* saith, ⁵ *It is possible that they may be unjust, who only revenge a Wrong done to themselves, if they go beyond Moderation; for he that in this Act shall exceed just Bounds, renders himself culpable in his Turn.* Thus in *Ovid's* ⁶ Opinion, a certain King,

—*Cæde nocentum*

Se nimis ulciscens extitit ipse nocens.

*Following the Guilty with too quick Revenge,
Deriv'd a Guilt upon himself.—*

The *Plateans* in an Oration of *Isocrates* demand, ⁷ *If it be just, thus for such slight Trespasses to exact rigorous Punishments.* And the same *Aristides* in his second Oration for Peace, saith, *Consider not only the Reasons for punishing, but also the Persons to be punished, who we ourselves are, and what is the just Measure of Punishment.* *Minos* is commended in *Propertius*:

Victor erat quamvis, æquus in hoste fuit.

Tho' Conqueror, ⁸ to Foes was always just.

And in *Ovid* ⁹,

—*leges captis justissimus auctor*
Hostibus imposuit—

Most just to Captives he dispenses Laws.

II. 1. But when it is just to kill (for there we must begin) in a just War according to internal Justice, and when not, may be plainly understood from what I have said in the first Chapter of this Book. For a Man may be killed either designedly, or

II. *Who may be killed with a safe Conscience.*

Num. 3. Note 9.) in regard to the Benevolence *Christians* ought to retain for each other, even in War. *ARISTOTLE* speaking of a too rigorous Punishment exercised of old at *Thebes* and *Heraclea*, ascribes it to a Spirit of Sedition. *Polit. Lib. V. Chap. VI.* *THUCYDIDES* ranks amongst the Disorders of *Greece*, of which he gives a lively Description, the revenging of Injuries, beyond the Bounds of Justice and the publick Good, *Lib. I. (Cap. LXXXII.)* *TACITUS* says of *Pompey*, that in making too rigorous Laws for the Correction of Vice, the Remedies were worse than the Diseases: *Tum Cn. Pompeius, tertium Consul, corrigendis moribus delectus & gravior remediis, quam delicta erant, &c. Annal. Lib. III. (Cap. XXVIII. Num. 1.)* The same Historian blames *Augustus* a little above, for having forgot, in the Punishment of Adultery, the Clemency of the antient Romans, and his own Laws: *Nam culpam inter viros ac feminas, &c. (Ibid. Cap. XXIV. Num. 3.)* *JUVENAL* observes that an Husband's Repentment for his Wife's Infidelity hurries him sometimes into more terrible Extremities, than all the Laws have ever admitted in favour of Revenge:

—*Exigit autem*

*Interdum ille dolor plus, quam Lex ulla dolori
Concessit—*

Sat. X. Ver. 314, 315. *QUINTILIAN* takes it for granted, that only the most atrocious Parricides are punished, when no longer in Being, that is to say, by depriving their Bodies of Sepulture: *Ideoque non nisi ab ultimo parricidio exigitur poena trans hominem. Declam. VI. Cap. X. p. 137. Edit.*

Burm.) The Emperor *Marcus Antoninus* wrote to the Senate so to moderate the Proscription and Punishment of the Accomplices in the Revolt of *Avidius Cassius*, that nothing might be too rigorous nor cruel in them: *Et ad Senatum scribam, ne aut proscriptio gravior sit, aut poena crudelior. VULCAT. GALLICAN. Vit. Avid. Cass. (Cap. XI.)* *AUSONIUS* intimates, that Punishment and Vengeance may exceed the Crime:

—*Vindictaque major*

Crimine visa suo—

[*Cupid. Crucifix. Ver. 93, 94.*] *AMMIANUS* condemns such Conduct in regard to a conquered Enemy: *Sævitum est in multos acrius, quam errata flagitaverant, vel delicta, Lib. XXVI. (Cap. X. p. 514. Edit. Vales. Gron.)* There is a like Reflection in *AGATHIAS, Lib. III. [or rather Lib. IV. Cap. VI.]* *GROTIUS.*

³ *Verumtamen quamdiu imperium, &c. De Offic. Lib. II. Cap. VIII.*

⁴ *Illos ergo Crudeles vocabo, &c. De Clement. Lib. II. Cap. IV.*

⁵ *Orat. Leuætric. I. (p. 94. A. Vol. II. Edit. Paul. Steph.)*

⁶ *De Ponto, Lib. I. Epist. VIII. Ver. 19, 20.*

⁷ *Orat. Plataic. p. 298. B. Edit. H. Steph.*

⁸ *Lib. III. Eleg. XVII. Ver. 28.*

⁹ (*Metam. Lib. VIII. Ver. 101, 102.*) The same Poet says elsewhere, that Compassion is laudable even towards an Enemy:

Est etiam miseris pietas, & in hoste probatur.

Trist. Lib. I. Eleg. VIII. (Ver. 35.) GROTIUS
without

without a direct Design. No Man can be justly killed with Design, unless for a capital Crime, or because we cannot really secure our Lives and Estates without doing it. Tho' that very Thing, to kill a Man on account of our Estates, which are frail and perishable Goods, is not repugnant to Justice strictly taken, yet is it far wide from the Law of Charity. But that the Punishment may be just, it is absolutely required, that he who is killed should have rendered himself culpable, and that in so heinous a Manner, that before an upright Judge he should be condemned to die. Of which we shall here say the less, because we have fully explained already, in the Chapter concerning Punishments, whatever is necessary to be known on this Head.

III. No Man can be justly killed for his Misfortunes, as they that are forced to follow a Party.
^a B. 2. ch.
 21. § 5.

III. 1. Above, ^a when we treated of Suppliants, (for there are such both in Peace and War) we distinguished between the unfortunate and culpable. *Gylippus* in that Place of *Diodorus Siculus*, which I there quoted, asks this Question, ¹ in what Class the *Athenians* ought to be reckoned, either of the unfortunate or the unjust. And he declares, they cannot be ranked among the unfortunate, because voluntarily without any manner of Provocation, they had made War on the *Syracusans*: Whence he infers, since they had freely begun a War, they must expect to undergo the Miseries of that War. They are to be esteemed unfortunate who happen to be in the Party of one of the Enemies, without any hostile Disposition towards the other Party, as the *Athenians* in the Time of *Mithridates*, of whom thus speaks *Velleius Paterculus*, ² *If any one should charge the Athenians with Rebellion, at the Time (when Athens was besieged by Sylla) he is very ignorant both of Truth and antient History. For the Fidelity of the Athenians was so firm to the Romans, that always, and upon all Occasions, whatsoever was done with a singular Honesty, the Romans used proverbially to say, it was done Athenian like. But then being oppressed by the Forces of Mithridates, they were reduced to a most miserable State, whilst they were within enslaved by their Enemies, and besieged by their Friends, whilst their Hearts were without the Walls, but their Bodies in compliance with Necessity, were within.* Which last Part seems to be taken out of *Livy*, ³ in whom *Indibilis* the *Spaniard* declares, that his Body only served the *Carthaginians*, but his Mind the *Romans*.

2. For, saith *Cicero*, ⁴ *all those whose Lives are in the Power of others, often consider what they can or may do, at whose Mercy they lie, rather than what they ought to do.* So says the same *Cicero* ⁵ for *Ligarius*, *It is the third Time that he continued in Africk after the coming of Varus, which if it be a Crime, it is of Necessity not of Will.* And *Julian* took this course in the Case of the *Aquileians*, as *Ammianus* ⁶ testifies, who when he had ordered the Punishment of a few, adds, he let the others Escape, *as whom Necessity, not Choice, had forced into Arms.* Thus says an antient Commentator on that Place of *Thucydides*, of the *Corcyrean* Captives that were sold. *It was an Act of Clemency, worthy of the Greeks, for it is inhuman to kill Prisoners*

II. (1) But see what I have observed above, B. II. Chap. I. § 13. Note 1.

III. (1) *Lib. XIII. Cap. XXIX. p. 345. Edit. H. Steph.*

2 *Si quis hoc rebellandi, &c. Lib. II. Cap. XXIII.*

3 *Itaque corpus dumtaxat suum, &c. Lib. XXVII. (Cap. XVII. Num. 13.)*

4 *Propterea quod omnes, &c. Orat. pro P. Quint. [Cap. II.]*

5 *Tertium est tempus, &c. Orat. pro Qu. Ligario, Cap. II.*

6 *Residui omnes abierunt innoxii, &c. Lib. XXI. Cap. XII. p. 307.* The Historian adds immediately after, that this Emperor who was of a mild and merciful Disposition acted in this manner from the Motive of Equity: *Id enim æquitate pensatâ statuerat placabilis Imperator & Clemens.* *THUCYDIDES* makes *Cleon* the *Athenian* say that he pardoned those, whom the victorious Arms of the Enemy had compelled to revolt, *Lib. III. (Cap. XXXIX.)* This is what *PAULUS* the Lawyer [in treating another Subject] calls: *Contemplatio extremæ necessitatis.* Recept. Sentent. *Lib. V. Tit. I. § 1.* And certainly nothing is stronger than Necessity, as *SYNESIUS* said: *ἰσχυρὸν ἀνάγκη πρᾶγμα,*

καὶ βίαιον. *JUVENAL*, speaking of the *Calaguritani* a People of Spain, who were reduced in a Siege to eat human Flesh, maintains, that Men and Gods ought to pardon them upon account of the Extremity to which their City was reduced:

— *Quis nam hominum veniam dare, quisve Deorum, Viribus abnueret dira atque immania passis.*

Sat. XV. 102, 103. See *CASSIODORUS* upon what Famine is capable of reducing Men to do, *Var. Lib. IX. Cap. XIII.* The Emperor *Pertinax*, to excuse *Lætus* the *Præfetus Prætorio*, and some others, who had been the Instruments in *Commodus*, his Predecessor's Crimes; said, that they had been compelled to obey him; but that since they were at Liberty to speak and act, they had shewn of what Sentiments they had always been: *Nec parendi scis necessitatem, &c. (CAPITOLIN. in Pertin. Cap. V.)* *Cassius Clemens* justifies himself to *Severus* thus: "I knew, says he, neither you nor *Pescennius Niger*: But finding myself in the midst of his Party, I did what Necessity obliged me to do: I obeyed him, who was in the actual Possession of the Empire, not with design to make War against you, but to expel *Julian.*" *XI-*

PHILIN.

Prisoners after the Battle is over, especially Slaves, who do not fight of their own Choice. The Plataeans thus argue in the aforesaid Oration of Isocrates, ' We did not serve them willingly (the Lacedemonians) but were forced to it. And so for the other Grecians, They were forced with their Bodies to join with them, but their Hearts were with you. Herodotus ' also says of the Phocians, They followed the Medes not voluntarily, but forced by Necessity. Alexander spared the Zeldi, as Amianus relates, ' Because they were forced into the Service of the Barbarians. Diodorus ' makes Nicolaus the Syracusan thus plead for the Captives, The Allies were forced to make War ; wherefore as it is but just that they should be punished, who designedly offer the Wrong ; so it is equally just to pardon them, who offend against their Will. So in Livy, ' the Syracusans to excuse themselves to the Romans, said, they broke the Peace being oppressed by Fear and Fraud. Thus for a like Reason Antigonus declared, ' That he made War with Cleomenes, and not with the Spartans.

IV. 1. But it is to be observed, that between an absolute Injury, and a mere Misfortune, there often intervenes something of a middle Nature, as it were composed of both, so that the Action cannot be said to be either entirely of Knowledge and voluntarily, nor purely of Ignorance and against the Will.

IV. Nor for a middle Fault between Misfortune and Fraud, whose Nature is explained.

2. Aristotle calls this Act ἀμαρτυρία, in Latin rendered culpa, a Fault. For thus he says in the 5th Book of his Morals, and the 10th Chapter. Of voluntary Actions, some we do deliberately, others not. They are said to be done deliberately, which are acted by a certain previous Consultation of the Mind ; what are otherwise, we say are done unadvisedly. Since then in human Society an Injury may be done three Ways, that which proceeds from Ignorance is termed a simple Fault. As, if a Man should do a Mischief to one whom he did not design to hurt, or what he did not really intend, or not in the manner he intended it, or not with such a View ; as if any one did not think to strike with this Instrument, not this Man, or not upon this account ; but it happened otherwise than he proposed to himself : He designed to pinch, not to wound, either not this Person, or not in this manner. Therefore if a Damage happen thus against all Expectation, it is a Mischance ; but if it might in some manner have been expected or foreseen, tho' not with an evil intent, it is a simple Fault : For there is some Fault on the Part of the Agent, when the Principle of Action is within him : But when the Principle of Action is without him, he is only unfortunate ; but when a Man does knowingly what he does, though not deliberately, it must be acknowledged that an Injury is done : As whatsoever Men may do through Anger, or other like Disturbances of the Mind, either natural, or inevitable ; for they who in Passion do Mischief, and yet through their Fault, do certainly commit an Injury, neither yet are they reckoned unjust or malicious. But if a Man should do it deliberately, he is rightly accounted wicked and unjust.

3. Therefore whatsoever is done through Anger, is judged with Reason not to be done premeditatedly ; for he does not begin, who in a Passion does an Injury, but he that provoked that Passion. Hence it is, that when such Cases are tried at Law, the Question frequently turns, not upon the Fact, but upon the Right ; for Anger arises from hence, that a Man thinks himself wronged. Therefore the Query is not here, as in Contracts, whether what is complained of be done, or not ; for there, unless there be Forgetfulness, one of the Parties must of Necessity be wicked in not performing the Contract, but in this they demand, whether what was done were justly done. Now he that first laid an Ambush, did it not through Ignorance, wherefore no wonder if the one Person

PHILIN. in Sever. The Emperor Aurelian having entered Antioch, where many People had joined Zenobia against him, published an Edict, by which he granted a general Amnesty to all those who had escaped, regarding all that was past as the Effect of Necessity, rather than a Disposition to revolt. (ZOSIM. Lib. I. Cap. LI.) The General Belisarius forgave the Africans, because they had submitted to the Vandals only through Force. PROCOPIUS. Vandal. Lib. I. (Cap. XX.) TOTILAS, as the same Historian relates, tells the Neapolitans that he knew they were under the Romans only out of Necessity. GOTTHIC. Lib. III. (Cap. VII.) NICETAS, or the Person who continues his Work, informs us, that the Emperor Henry, the Brother of Baldwin,

caused the Inhabitants of a certain City to be put to the Sword, like an Herd of Beasts, and not a Multitude of Christians ; and with so much the greater Cruelty, adds he, because they had submitted to the Blachi thro' Force, and not Persuasion. GROTIUS.

7 P. 299. A. Edit. H. Steph.

8 Lib. IX. Cap. XVII.

9 ARRIAN. De Exp. Alexandr. Lib. I. Cap. XVIII. Edit. Gronov.

10 Lib. XIII. Cap. XXVII. p. 344. Edit. H. Steph.

11 Nec postea pacem Tyranni, &c. Lib. XXV. Cap. XXIX. Num. 3.

12 Veniamque his, qui superfuerunt, &c. Lib. XXVIII. Cap. IV. Num. 13.

thinks himself wronged, and the other not. But even those who commit Injuries without Deliberation, and in Passion, ought to be accounted unjust, when in rendering Evil for Evil, they pass the Bounds of Proportion or Equality; so he is truly just who acts justly with Deliberation, for sometimes a Man may do a just Thing willingly, but not deliberately.

4. But of those Wrongs that are not done voluntarily, some may be pardonable, others not; ¹ those are pardonable that are done not only by Men ignorant, but through pure Ignorance also. But if any be done by ignorant Persons, but not through pure Ignorance, yet through some Passion that exceeds the common Bounds of human Nature, they are no wise pardonable.

5. Michael Ephesius interpreting this Passage, as an Instance of what happens contrary to all Expectation, gives us the Case of a Son, who by the opening of a Door, has hurt his own Father: Or of a Man who in a solitary Place trying to shoot, has accidentally wounded a Person; and of that which might have been foreseen, but without any evil Intent, he alledges the Case of a Man shooting at random in a Highway. The same Commentator gives us an Example of Necessity in him, who is obliged by Hunger, or Thirst, to do any Thing. Of natural Passions, in Love, Grief, Fear: He says that one acts through Ignorance, when the Fact is unknown; as if a Man did not know a Woman was married; a Crime is done by a Person ignorant, not through pure Ignorance, when the Right is not known. But this Ignorance of Right may sometimes be excused, and sometimes not; all which well agree with the Opinion of the antient Civilians. There is a Place in Aristotle not unlike this, in his Book of the Art of Oratory: Equity distinguishes between simple Faults and Injuries, and between simple Faults and Miscchances; Miscchances are those which could neither be foreseen, nor done with an ill Design. Simple Faults, those that might have been foreseen, but not done with an evil Intent; but Injuries, which have been done both designedly; and with a malicious Intent. The Antients have remarked that Homer had a Notion of those different Sorts of Action: And on that Head alledge what the Poet ² relates in the last of his Iliad concerning Achilles.

οὐτε γὰρ ἐς ἄφρων, ἔτ' ἀσχοπος, ἔτ' ἀλήμων.

Not ignorant, nor rash, nor ill disposed.

6. The like Distinction is also in Marcian, ³ We offend either purposely, through Passion, or accidentally. Purposely, as a Gang of Thieves do. Through Passion, as when a Man in Drink falls to fighting with Fists or Sword. Accidentally, as when in Hunting an Arrow levelled at a Deer, kills a Man. Those two which are done purposely and through Passion, Cicero thus distinguisheth, In all Acts of Injustice it is highly to be considered, ⁴ whether they be done by any Perturbation of Mind, which is generally short, and quickly over; or with premeditated Design. For those are much slihter, which are done by some sudden gust of Passion, than they done deliberately and designedly. ⁵ Philo in his Explanation of some particular Laws, says, It is but half a Crime, which is not done deliberately.

7. Of which Kind are those chiefly, which Necessity, ⁶ if it does not justify, yet excuses;

IV. (1) DIONYSIUS HALICARNASSENSIS lays down as a Maxim, that whatever is involuntary deserves Pardon. *Antiq. Rom.* Lib. I. (Cap. LVIII.) PROCOPIUS says, that when any Man is injured, either thro' Ignorance or Forgetfulness, the Sufferer ought to forgive the Offence. *Gothic.* Lib. III. (Cap. IX.) GROTIUS.

² Ver. 157, 186.

³ *Delinquitur autem aut proposito, &c.* Digest, Lib. XLVIII. Tit. XIX. De Poenis, Leg. XI. § 2.

⁴ *Sed in omni injustitia, &c.* De Offic. Lib. I. (Cap. VIII.) SENECA says, that an upright Judge often chooses to acquit a Person, tho' accused and convicted of having done ill; if his Repentance gives Reason to conceive good Hopes of him; and he finds his Fault did not arise from a confirmed habit

of Wickedness. He will even punish (adds he) sometimes great Crimes with less Rigour than small ones, if the former have been committed, not out of Cruelty but Weakness, and the latter are the Effect of concealed and inveterate Malice. He will not punish the same Fault alike, if of two Criminals the one has been guilty through Negligence, and the other by premeditated Design. *Dimittit sæpe eum, &c.* De Ira, Lib. I. Cap. XVI. GROTIUS.

⁵ *De Legib. Special.* Lib. II. p. 791. B. Edit. Paris.

⁶ See what we have said above, B. II. Chap. XX. § 29. and in this Chapter, § 29. Alcidas, the Lacedæmonian General, having caused many Prisoners to be put to Death, the Embassadors of Samos represented to him, that he called himself the Deliverer

excuses; for as *Demosthenes* ⁷ argues against *Aristocrates*, *Necessity takes from us the Liberty of examining what we ought to do, or not to do; wherefore such Cases are not to be too strictly searched into by equitable Judges.* Which Point the same Author (*Demosthenes*) handles ⁸ more largely, in his Oration of false Witness against *Stephanus*. As also *Thucydides*, in his fourth Book, ⁹ *It is highly probable, that GOD himself is willing to forgive those, who are compelled by War, or otherwise necessitated to do any Thing; for the sacred Altars have been ever allowed sure Places of Refuge for them to fly unto, as have unwillingly offended; and the Name of Crime is given to unlawful Actions, which are committed on purpose, and not to those which extreme Necessity gives Courage to commit.* The *Cerites* in *Livy*, ¹⁰ thus address the Romans, *That they would construe that a deliberate Act, which was more justly to be called Force or Necessity.* And *Justin* ¹¹ says thus, *The Act of the Phocians, tho' all condemned it for its heinous Sacrilege, yet it brought a greater Odium upon the Thebans, who perfectly forced them to it, than upon themselves.* And this is the Opinion of *Isocrates*, ¹² *Of him who steals purely to keep himself from starving, he hath Necessity, a good Plea for Pardon.* Also *Aristides* ¹³ says, *The Hardness of the Times is some Excuse for those that abandon their Allies.* Thus says ¹⁴ *Philostratus* of the *Messenians*, that they did not receive those that were banished from *Athens*, *They could not safely do it, for Fear of Alexander, whom all Greece severely dreaded.* And thus we find in *Aristotle*, ¹⁵ *Half wicked, but not unjust, nor a Lie-in-wait.* *Themistius*, in his Praises of the Emperor *Valens*, thus applies these Distinctions to our Purpose, ¹⁶ *You have well distinguished between a real Injury, a Fault, and a Misfortune; 17 tho' you are not acquainted either with Plato, or Aristotle, yet you put in practice their Precepts; for you have not judged them worthy of the same Punishment, who were the Authors of the War, and those who afterwards were forcibly*

verer of Greece with a very ill Grace, whilst he put Persons to Death, who had not taken Arms against him, nor were his Enemies; because if they had joined the *Athenians*, they had been reduced to do so by Necessity. *THUCYDID.* Lib. III. (Cap. XXXII.) *St. CHRYSOSTOM* says that Enemies themselves know how to pardon Enemies, tho' they have suffered ever so great Injuries by them, when the latter have acted involuntarily. *De Provident.* V. The *Misimians*, as *AGATHIAS* relates, believed themselves not entirely unworthy of Pardon, and the Clemency of the *Romans*, because they had only committed the Offences, that had induced the latter to turn their Arms against them, out of brutal Rage occasioned by having been unjustly treated in several Respects. Lib. IV. Cap. VI.

⁷ P. 449. B.

⁸ P. 524. The Passage is quoted above, B. II. Chap. XX. § 29. Num. 2.

⁹ Lib. IV. Cap. XCVIII. See what is said in *DEUTERONOMY*, Chap. XXII. Ver. 26. in regard to a Maid ravished in the Country and the Rabbi *MAIMONIDES*, *Duct. Dubitant.* III. 41. *GROTIUS*.

¹⁰ *Ne adpellarent consilium, quæ vis ac necessitas adpellenda esset.* Lib. VII. Cap. XX. Num. 5.

¹¹ *Factum Phocensium, &c.* Lib. VIII. Cap. I. Num. 10.

¹² Our Author repeats these Words without saying from which Work of the Greek Orators he takes them. I am almost certain that there is no such Sentence in *ISOCRATES*; and I believe one Name is put here for another. Since I wrote this I am convinced of the Truth of my Conjecture, and have found the Thought, and even the Words in a Passage of *PORPHYRY*, to which our Author refers in B. II. Chap. XX. § 29. Note 4.

¹³ *Orat. Leuætic.* II. p. 145. C. Vol. II.

¹⁴ *De Vit. Sophist.* Lib. II. Cap. XV. § 2. p. 596. Edit. Olcar.

¹⁵ *Ethic. Nicomach.* Lib. V. Cap. XI. On the contrary *Cleon*, to render the Cause of the *Mitylenians* odious, said, that they had with premeditated Design, laid Ambuscades for the *Athenians*, and in consequence deserved no Pardon, which is due only in Cases, where People act involuntarily, Lib. IV. Cap. XL. *PHILO* the Jew praises his Nation, for their making a Difference, when they punished Injuries done them, between such as are used to commit Insults upon others, and those who observe a quite different Conduct. For, adds he, it is brutal and barbarous to kill without Mercy all who come in the Way, without distinguishing those who have had little or no Share in the Offence. *De constit. Princip.* (p. 734. B.) *GROTIUS*.

¹⁶ *Orat. de laud. Valent. Imp.* *SENECA* observes, in speaking of *Jupiter's* Thunderbolts, that if the Antients believed that God sometimes threw small ones, it was to instruct those who are charged with the Care of Punishing, and fulminating, to use that Expression, against the Crimes of Men, that they are not always to strike in the same Manner: That there are Cases wherein the Whole is to be broken, others in which slightly hurting is sufficient, and some where only shewing the Bolt is enough. *Illos vero altissimos viros, &c.* *Natur. Quæst.* Lib. II. Cap. XLIV.

¹⁷ Such was *Trajan*, one of the best of the Roman Emperors. *XIPHILINUS* gives him this Praise, in his Life, (p. 230. Edit. Rob. Steph.) *HERODIAN* also says in praise of *Marcus Antoninus*, that he was the only Emperor who applied himself to Philosophy, in which he shewed the Progress he had made; not by his Discourse, or the vain Ostentation of Science, but by the Gravity of his Manners, and the Regularity of his Life. (Lib. I. Cap. II. Num. 6. Edit. Boecler.) *Macrinus*, another Roman Emperor, observed the Laws more exactly than he was acquainted with them. *XIPHILINUS*, in *ejus vit.* (p. 342.) GOD grant us such good Princes in these Days! *GROTIUS*.

engaged in it, and those who submitted to him who seemed Master of the Empire. But those you have condemned, these you have corrected, and the last received unto Mercy.

8. The same Author, in another Place, advises a young Emperor. Consider what Difference there is between a Misfortune, a Fault, and a direct Injury; and how it becomes a Prince to forgive the first, chastise the second, and severely punish the third. Thus, according to *Josephus*,¹⁸ did *Titus* the Emperor punish only the principal in a Crime, μέγας ἐπὶ, really; but the Multitude μέγα λόγῳ, only by Reprimands. Bare Misfortunes neither deserve Punishment, nor engage us to make any Restitution; but unjust Actions are obnoxious to both. But the Fault of a middle Nature, as it is liable to Restitution, so often it does not merit Punishment, especially capital. To this we may refer that of *Valerius Flaccus*.

*At quibus invito maduerunt sanguine dextræ,
Si fors scæva premat miseros, sed proxima culpæ
Hos variis mens ipsa modis agit, & sua carpunt
Facta viros refides —*

*But those who by Chance imbrue their Hands in Blood,
Press'd by Misfortune, tho' not the greatest Crime,
Yet conscious of a Guilt, feel Loads of Anguish,
Remorse distracts 'em, and the hideous Image
Still stares them in the Face.*

V. The principal Authors of a War to be distinguished from those drawn into it.

^a See Gailius, De pace publ. l. 2. c. 9. n. 18.
^b Lib. 9. c. 85.

V. We meet with frequent Examples in History, of different ^a Punishments inflicted on the principal Authors of a War, and those who have been drawn into it; (as *Themistius* observes) *Herodotus*^b relates, that the Grecians took an exemplary Punishment on those who had been the chief Authors of the *Thebans* Revolt to the *Medes*. Thus (as *Livy* tells us)¹ the principal Men of *Ardea* were beheaded. In the same Author,² *Valerius Levinus*, having taken *Agrigentum*, he whipt their chief Leaders with Rods, and then beheaded them, the Rest, and the Prey, he sold. Also, in another Place of the same *Livy*,³ When *Atella* and *Calusia* were surrendered, their Leaders were put to Death. Again, in another Place,⁴ (he addresses the Roman Senate) Since the chief Authors of this Rebellion are deservedly punished by the immortal Gods, and by you, illustrious Fathers, what do you intend to do with the innocent People? At last they were pardoned, and their Freedom restored; ⁵ to the End (as he says) where the Fault begun there the Punishment should stop. *Eteocles* the *Argive* is highly commended in *Euripides*,⁶ because

*When he was Judge, the Guilty always bore
The Weight of their own Faults; the People never
Groan'd with the Burden of their Rulers Crimes.*

And the *Athenians* (as *Thucydides* relates) repented of their Decree against the *Mitylenians*,⁷ That they should destroy the whole City, rather than the principal Authors

¹⁸ *De Bell. Jud.* Lib. V. Cap. XIII. (VI. 5. Latin.) p. 912. B. The Emperor gives this as a general Maxim, that when a single Person has committed the Offence, it is necessary to punish him really; but when a Multitude are criminal, it suffices to menace them. So that we see our Author does not exactly give the Sense of the Jewish Historian.

V. (1) In all the Editions before mine they are called *Principes Ardeæ*; that is to say, the principal Persons in the City, instead of the Ringleaders of the Insurrection. But I believed, that the Copyists or Printers had left out the Word *seditionis*, from its Likeness to *securi*, which follows; tho' our Author never perceived it, as has happened to him in other Instances. However it was, the Original

is, *Romanus Consul [M. Geganius] Ardeæ turbatas seditione res, principibus ejus motus securi percussis, bonisque eorum in publicum Ardeatium redactis, composuit.* Lib. IV. Cap. X. Num. 6.

² *Oppido recepto Levinus, &c.* Idem. Lib. XXVI. Cap. XL. Num. 13.

³ *Atellaque & Calatia, &c.* Ibid. Cap. XVI. Num. 5.

⁴ *Quoniam auctores defectionis, &c.* Ibid. Lib. VIII. Cap. XX. Num. 11. and Cap. XXI. Num. 10.

⁵ *Vicit sententia lenior, &c.* Idem. Lib. XXVIII. Cap. XXVI. Num. 3.

⁶ *Supplic.* ver. 878, 879.

⁷ Lib. III. Cap. XXXVI. The Sense of the last Words is clear; but there is some Difficulty in the

thors of the Revolt. Demetrius is also reported by Diodorus, when he took Thebes, to have put only ten of the chief Leaders to the Sword.

VI. 1. But also in the very Authors of the War, we must distinguish the Causes; for there are some, not indeed just, but yet such as may impose upon Men not really wicked. The Writer to Herennius lays down this as a most just Plea for Pardon, ¹ *If any one who hath offended, did it not out of Hatred or Cruelty, but out of Duty and good Design.* Seneca's Wiseman, ² *Will let his Enemies go off safe, even sometimes commended, if they were engaged in the War upon honest Grounds; out of Loyalty, according to the Obligations of an Alliance, for their Liberty.* The Cærites, in Livy, ³ beg Pardon for their Fault ⁴ in assisting their Kinsmen. The Phocians, ⁵ the Chalcidians, and others, who had aided Antiochus, according to their Treaty, were pardoned by the Romans. Aristides, in his second *Leuctrica*, speaks of the Thebans, who under the Conduct of the Lacedemonians marched against the Athenians, ⁶ *They were indeed engaged in an unjust Action, but with a fair Plea, they did it out of Fidelity to the Lacedemonians.*

VI. In the very Authors we must distinguish the Causes, whether probable, or improbable.

2. Cicero, ⁷ in his first Book of Offices, says, they are to be pardoned who have not been cruel nor inhuman in the War. Also, that Wars undertaken for the Glory of Empire, are to be managed with less Severity. Thus King Ptolemy signifies to ⁸ Demetrius, that *They ought not to make War for every Kind of Reason, but only for Glory and Empire.* And so Severus, ⁹ in Herodian, *When we first took Arms against Niger, we had not any specious Pretences of Quarrel against him; but the Empire being the Prize disputed for, both of us with equal Ambition contended for it.*

3. That often happens, which Cicero ¹⁰ observed in the War between Cæsar and Pompey. *There was a great Uncertainty, the most famous Commanders were not agreed, many could not tell whose Cause was best.* And what he also says in another Place, ¹¹ *Tho' we be guilty of a Failing, through human Frailty, yet we are certainly free from a Crime.* As in Thucydides, those Acts are positively declared par-

the Expression: Upon which the Reader may, if he pleases, consult a Note of the late Mr. PERIZONIUS, in *ÆLIAN, Var. Hist. III. 43. Note 4. p. 288.*

VI. (1) *Heic ignoscendi ratio queritur, &c. Lib. II. Cap. XVII.*

² *Hofes dimittet salvos, &c. De Clement. Lib. II. Cap. VII.*

³ *Pænitebatque [Cerites] populationis, &c. Lib. VII. Cap. XX. Num. 2.* This is what the Historian says, and it appears by the Sequel, the Cerites excused themselves by saying, that having only given Passage to the Tarquinians, some Peasants purely by their own Authority, had joined them, in order to go and plunder the Lands of the Romans. Those Kinsmen, of whom our Author speaks, were therefore the Tarquinians. But a faulty Punctuation in all the Editions, not excepting the first, had so much disfigured the Passage, that it made the Phocians, a People of Greece, the Relations of the Cerites, a People of Etruria. In this Supposition, the learned GRONOVIVS criticises our Author in this Place, and he takes great Pains to discover the Origin of a Fault which he finds in the following Period. This is one of the Places wherein the first Edition has been of most Use to me, and might alone shew how necessary it was to compare the Text with that Edition, and the others of ancient Date. In the Margin there was *Appian. Syr.* That Citation being omitted, I know not how, in all the Editions I have seen, after the first, prevented GRONOVIVS from consulting the Historian from whom our Author had extracted the Fact, and whose Passage being found, immediately shews the faulty Punctuation, which ought to be placed to the Account of the Printers or Copists. See Note 6. of this Paragraph. So that the Fault of our Author consists in his not having perceived, that,

contrary to his Intent, they had put *quod fuerint auxilio consanguineis* Phocenibus Chalcidenibus, & aliis, qui, &c. instead of *quod fuerint auxilio consanguineis.* Phocenibus, Chalcidenibus & aliis, &c. as I have printed it in my Latin Edition.

⁴ ISOCRATES says, that a conquered Prince ought sometimes to be pardoned, who did not know the Justice of the Conqueror's Cause. The Passage has been translated by AMMIANUS MARCELLINUS. *Ut ISOCRATIS memorat pulchritudo; cujus vox est perpetua docentis, Ignosci debere interdum armis superato Reſtori, quam justum quid sit ignoranti.* Lib. XXX. (Cap. VIII.) GROTIUS.

I do not know whether the Passage of the Greek Orator is to be found amongst the Remains of his Works. At least the Words which the learned VALOIS cites from the *Oratio Panathenaica*, are entirely foreign to the Subject.

⁵ APPIANUS ALEXANDRINUS says this of the General Manius Acilius Glabrio. *De Bell. Syr. p. 160. (98. Edit. H. Steph.)* See Note 4. above.

⁶ *Orat. Leuctr. II. p. 135. B. C. Vol. II. Edit. Paul. Steph.*

⁷ *Partâ autem victoriâ, &c. De Offic. Lib. I. Cap. XI.*

⁸ PLUTARCH gives us this Saying of Ptolemy's, when he sent back the Baggage and Prisoners to Demetrius, after having defeated the latter in a Battle near Gaza. In Vit. Demetr. p. 891. A. Vol. I. Edit. Wech.

⁹ *Lib. III. Cap. VI. Num. 9. Edit. Boecler.*

¹⁰ *Erat obscuritas quædam, &c. Orat. pro Marcello. Cap. X.*

¹¹ *Et si aliquâ culpâ tenemur erroris humani a scelere certè liberati sumus. (Ibid. Cap. V.)* So THUCYDIDES lays down as a Maxim, *καὶ ἐν ὅλῳ, &c. Lib. I. Cap. XXXII. GROTIUS.*

donable which are done, *Not out of Malice, but through Error.* The same Cicero¹² says of *Dejotarus*, *He did not engage out of any Hatred to you, but slipt through common Frailty.* And *Salust*,¹³ in his History, *And the common People, more from Example than any Understanding of the Cause, flocked in one after another, and followed the foregoing Leader as the wiser.* What *Brutus* writ of Civil Wars, may not improperly be applied to all Wars, ¹⁴ *We ought to be more severe in preventing them, than ready to discharge our Wrath upon the conquered.*

VII. Even to Enemies who have deserved Death, oftentimes the Punishment may rightly be remitted.

VII. 1. Even where Justice does not demand it, yet it is often agreeable to Goodness¹ to Moderation, and a great Soul to forgive. *Salust*² says, that *The Romans advanced their Greatness by forgiving.* And *Tacitus*,³ *We ought to be as merciful to Suppliants, as implacable against Enemies.* But *Seneca*,⁴ that *It belongs only to wild Beasts, and even such as have no Spark of Generosity, to bite and tear those they have thrown down.* *Elephants and Lions, after they have flung on the Ground, what resisted them, leave it there, and go away.* The Situation of Things is often such that one may say, as it is in *Virgil*,

⁵ — *Non hic victoria Teucrum
Vertitur, aut anima una dabit, discrimina tanta.*

*If I survive, shall Troy the less prevail?
A single Soul's too light to turn the Scale.*

Dryden.

2. There is a remarkable Place to the same Purpose, in the fourth Book to *Herennius*.⁶ “ Our Ancestors well observed, to put no captive King to Death. “ And why? It would be unjust to abuse that Power which Fortune hath bestowed on us to the Destruction of them, whom the same Fortune, a little before, had placed in the most eminent Station. But, you will say, he brought an Army against us! I now absolutely forget it. Why so? Because it is the Part of a brave Man to hold those his Enemies who dispute with him the Victory, and to consider them as Men, when vanquished; that so Valour may finish the Calamities of War, and Humanity augment the Advantages of Peace. “ But, you will say again, suppose he had got the Victory, would he have done the same? Why then should you spare him? Because it is my Practice to despise such Folly, not to imitate it.” If you understand this of the *Romans*, (which is very uncertain, since the Author often employs Reasons drawn from foreign Examples, or even such as are fictitious) it is absolutely repugnant to that which we meet with in the Panegyrick of *Constantine*, the Son of *Constantius*.⁷ “ Tho’ he be the more prudent Man, who by a Pardon gains the Affection of “ Enemies,

¹² *Neque enim ille [Dejotarus] odio tui progressus, sed errore communi lapsus est.* Orat. pro Reg. Dejot. Cap. III.

¹³ *Cetera multitudo vulgi, &c.* Orat. I. ad Cæsar. De Rep. ordinand. Cap. XXXIV. Lib. VI. Fragm. Edit. Waff.

¹⁴ *Scribis enim, acrius, &c.* CICERO, *Epist.* II. ad Brut. See BEMBO, *Hist.* Lib. IX. GROTIUS.

VII. (1) *Theodorick*, King of the *Goths*, said, that the most successful Wars he had made, were those in which he had used Moderation in Victory. Moderation, adds he, is a continual Victory to him who knows how to manage it. *Illa mihi feliciter bella provenerunt, quæ moderato fine peracta sunt, Is enim vincit adidue, qui novit omnia temperare.* CASSIODORUS, *Var.* II. 41. GROTIUS.

² *Et ignoscendo Populi Romani magnitudinem auxisse, &c.* Orat. L. Philipp. Fragment. I. 13.

³ *Verum ita majoribus placitum, &c.* Annal. Lib. XII. Cap. XX. Num. 4.

⁴ *Muliebres est, furere in ira: Ferarum vero, nec generosarum quidem, præmordere & urgere pro-jectos. Elephanti Leonesque transeunt, quæ impulerunt.* De Clement. Lib. I. Cap. V.

⁵ *Æneid*, Lib. X. ver. 528, 529.

⁶ *Item: Bene majores nostri, &c.* Lib. IV. Cap. XVI.

⁷ *Cautior licet sit, qui devinctos, &c.* (Panegy. Vet. VI. Cap. X. Edit. Cellar.) I am far from approving the Revival of the Custom the Orator speaks of. We see however that *Josua* caused the Kings he had taken to be put to Death. JOSEPHUS, *Antiq. Jud.* Lib. V. Cap. I. *Cajus Sossius*, having defeated *Antigonus* King of the *Jews*, caused him to be whipped, being fastened to a Cross. DION CASSIUS, who relates this, (*Lib.* XLIX. p. 463. D. Edit. H. Steph.) adds wisely, that no conquered King had ever been used so by the *Romans*. There is the same History in JOSEPHUS, *Antiq. Jud.* Lib. XV. (Cap. I.) EUTROPIUS tells us, that *Maximianus Herculus* [or rather *Constantine*] having made the Kings of the *Franks* and *Germans* Prisoners, exposed them to fight with wild Beasts, in the magnificent Games he had prepared to exhibit. *Qui [Constantin.] in Galliis, &c.* Lib. X. (Cap. II. Num. 9.) See what AMMIANUS MARCELLINUS says of one of the Kings of the ancient *Germans*, who was hanged, *Lib.* XXVII. (Cap. II.) *Theodorick*, King of the *Wisigoths*, caused *Athiulphus*, King of the *Suevi*, who had settled in *Spain*, to be put to Death, as JORNANDES tells us, in his History of the *Goths*, (Cap. XLIV.) These Examples ought to teach Kings

“ Enemies, yet he is the more valiant, who treads them under Foot when van-
 “ quished. You have revived, O Emperor! that antient Boldness of the *Roman*
 “ Empire, which always put the Generals of the Enemy, whom they had taken
 “ Prisoners, to Death. For then the captive Kings, after they had attended the
 “ triumphant Chariot of the Conqueror, from the Gates to the Forum, as soon as
 “ ever he turned his Chariot to the Capitol, were dragged to Prison, and there put
 “ to Death. Except only *Perseus*, who, by the particular Favour of *Paulus Æmi-*
 “ *lius*, (to whom he had yielded himself) escaped this severe Punishment. But
 “ the Rest, deprived of Life in a Prison, served as a Warning to other Kings, ra-
 “ ther to court the Friendship of the *Romans*, than provoke their Justice.” But
 this Author expresses himself too generally. *Josephus* indeed mentions the like Se-
 verity of the *Romans*, in the History of *Simon Barjora*, who experienced it; but
 he speaks of Generals, such as *Pontius the Samnite*, not of those who had the Title
 of Kings. The Meaning of his Words may be taken thus.⁸ “ The Conclusion of
 “ the Triumph was when they were come to the Capitol, the Temple of *Jupiter*,
 “ for there, by antient Custom, the Conqueror staid, till he had Notice of the
 “ Death of the Enemy’s General. It was *Simon* the Son of *Jora*, who was led
 “ among the Prisoners in triumph: He then having a Halter about his Neck, was
 “ hurried to the publick Place, his Keepers also whipping him on: For in that
 “ Place it is the Custom of the *Romans* to put to Death, those that are condemned
 “ for capital Crimes. As soon then as it was declared that he was dead, they first
 “ offered up Vows, and then Sacrifices.” *Cicero*⁹ almost writes the same of Pu-
 nishments, in his Oration against *Verres*.

3. We have many Examples of Generals thus executed, and some of Kings, as
¹⁰ of *Aristonicus*, ¹¹ *Jugurtha*, ¹² *Artabasdus*. Yet besides *Perseus*, *Syphax*¹³,

Kings to be moderate and discreet in Prosperity, and to reflect, that when God pleases, they are sub-
 ject, as well as others, to the most unhappy Vicis-
 situdes of human Events; in a Word, that accord-
 ing to *Solon’s* Thought, which *Croesus* called to
 mind in a like Danger, nobody can be deemed hap-
 py before Death. GROTIUS.

The last Fact is related by *HERODOTUS*, *Lib. I. Cap. LXXXVI*. As to *Antigonus*, King of the
Jews, his Head was cut off by the Order of *Mark*
Antony, whose Lieutenant *Sossius* was in *Syria*, and
 who, in favour of *Herod*, did not reserve that un-
 fortunate Prince for the Day of his Triumph; and
 it is in this Kind of Death by which no conquered
 King had ever been punished before, that *STRABO*,
 whose Words *JOSEPHUS* has preserved, makes the
 Novelty of the Example consist; as appears also by
PLUTARCH, *Vit. Anton.* p. 932. C. As to the
 Words of the antient Panegyrist, in which our
 Author corrects the manifestly corrupt Reading:
 The same had been done before him by the Jesuit
JULIUS CÆSAR BOULANGER, in his Book *De*
Spoliis bellicis, trophæis, arcubus triumphalibus, &
pompâ triumphi, *Cap. XXVIII.* p. 76. *Edit. Paris.*
 1610. which is followed by the later Editions.
 The learned Civilian *PETER DU FAURE*, in his
Semestria, *Lib. II. Cap. III.* p. 35. proposes an-
 other, which is not so natural. *GRONOVIVS* is also
 for having *calcat STRATOS*, instead of *calcat IRA-*
TOS, read in the Beginning of the Passage.

⁸ *De Bell. Jud. Lib. VII.* p. 979. E. F.

⁹ *Tamen quum de Foro in Capitolium, &c.* In
Verr. Lib. V. Cap. XXX.

¹⁰ He was the Bastard of *Eumenes*, King of
Pergamus, and, notwithstanding the Will of his
 Brother *Attalus*, the legitimate Son, who had ap-
 pointed the *Roman* People his Heirs, had taken Pos-
 session of the Crown. But he reigned in such a
 Manner that he was afterwards acknowledged law-
 ful King, as *JUSTIN* insinuates, *Quum multa secun-*
da prælia adversus civitates, quæ metu Romanorum
se ei tradere volebant, fecisset; justus Rex jam vide-

retur, &c. *Lib. XXXVI. Cap. IV. Num. 7.* So
 that the Remark made here by *GRONOVIVS*, in
 Vindication of the antient *Romans*, is not entirely
 just. See *VELLEIVS PATERCULUS* concerning
 this Prince’s Death, *Lib. II. Cap. IV.* And *EUT-*
TROPIUS, *Lib. X. Cap. I.*

¹¹ See upon the Death of this King of *Numi-*
dia, *LIVY, Epitom. Lib. LXVII.* and *EUTROPIUS,*
Breviar. Lib. IV. Cap. XI. in fin.

¹² Or rather *Artavases*, for so the *Roman* Au-
 thors write this King of *Armenia’s* Name. Here
 the learned *GRONOVIVS* remarks with Reason,
 that *Mark Antony* caused *Artavases* to be put to
 Death, by his own Authority, and without the
 Senate’s Approbation, after having taken him by
 Treachery, and led him in Triumph, not at
Rome but *Alexandria*. *TACITUS* exclaims highly
 against that Perfidy. *Infida [Armenia] ob scelus*
Antonii, qui Artavasten Regem Armeniorum, specie
amicitiæ inleclum, dein catenis oneratum, postremo
interfecerat, *Annal. Lib. II. Cap. III. Num. 2.*
 See *VELLEIVS PATERCULUS*, *Lib. II. Cap.*
LXXXII.

¹³ The Historians do not agree about the Man-
 ner of this Prince’s Death, who was King of Part
 of *Numidia*. Several make him die near *Rome*, be-
 fore the Day of the Triumph, [at *Tibur* or *Tivoli*.
 See *LIVY*, at the End of the thirtieth Book. *Cap.*
ult. Num. 4.] *POLYBIUS* on the contrary says,
 that he was led in Triumph. *APPIANUS ALEXAN-*
DRINUS relates, that he died of a Distemper, whilst
 they were debating what to do with him. [*De*
Bell. Punic. p. 15. Edit. Steph.] *GROTIUS.*

POLYBIUS says, that this conquered Prince died
 in Prison some Days after having been led in Tri-
 umph. *Lib. XVI. Cap. XII.* *SILIUS ITALICUS*
 seems to insinuate that only the Effigy of *Syphax*
 was carried in Triumph, *Punic. Lib. XVII. ver.*
 630. where the Reader may see *CELLARIUS’s*
 Note, and that of Mr. *DRAKENBERG*, the last
 Edition.

Gentius,

Gentius ¹⁴, *Juba* ¹⁵, and, in the Time of the *Cæsars*, *Caractacus*, ¹⁶ and others, escaped this Punishment; whence it appears, that the *Romans* had Respect to the Causes of the War, and the Manner of prosecuting it; whom yet *Cicero*, ¹⁷ and other antient Authors, do acknowledge to have been too cruel in their Victories. Therefore *M. Æmilius Paulus*, in *Diodorus Siculus*, well advised the *Roman* Senators, in the Case of *Perseus*. ¹⁸ *Tho' they fear not the Power of Man, yet they ought to dread the Divine Vengeance, which is ready to fall on them who insolently abuse their Victories.* And ¹⁹ *Plutarch* observes, that in the *Grecian* Wars, the very Enemies refrained all Violence to the *Lacedemonian* Kings, in Respect to their Dignity.

4. An Enemy then who hath not Respect purely to what human Laws allow, but what is really his own Duty, and what the Rules of Virtue require, will spare even his Enemy's Life; and will put no Man to Death, unless to save himself from Death, or something like it, or to punish personal Crimes that deserve Death. Nay, and to some of those that deserve it, either from a Principle of Humanity, or some other good Reason, he will either remit all Punishment, or at least the capital Part. The same forementioned *Diodorus Siculus* ²⁰ excellently observes, "The taking of Cities, successful Battles, and other Prosperities of War, are often more owing to Fortune than Valour. But to shew Mercy to the Vanquished is purely the Effect of Wisdom." We read in *Curtius* ²¹, "Tho' *Alexander* had just Reason to be angry against the Authors of the War, yet he forgave them all."

VIII. We must take all possible Care that the Innocent be not, tho' against our Intention, kill'd.
a Chap. 1.
of this Book,
§ 4. Num. 5.

VIII. As to Persons who are killed accidentally, and not on purpose, we are to remember what we said ^a above, that if not for Justice, yet for Pity, we must not attempt any Thing which may prove the Destruction of Innocents, unless for some extraordinary Reasons, and for the Safety of many. *Polybius* is of the same Opinion, who, in his first Book, thus speaks ¹, "It is the Part of a good Man not to prosecute a War to the utmost, against those that are wicked, but only so far, till they have made Satisfaction for, and amended their Crimes, and not promiscuously to involve the Innocent in the Punishment of the Guilty, but, for the Sake of those Innocents, even to pardon the Guilty."

IX. Children to be spared, and Women, unless highly criminal, and also old Men.

IX. 1. These general Principles being laid down, it will not be difficult to infer more particular Rules. ¹ *Tender Age must excuse the Child, and her Sex the Woman,*

¹⁴ He was a King of *Illyria*. See *Livy*, *Lib. XLV. Cap. XLIII.*

¹⁵ He was the Son of the King of *Numidia*, and part of *Mauritania*. *Julius Cæsar*, in the room of his Father, who was killed in a single Combat, led this young Prince, then an Infant, in Triumph. See *PLUTARCH*, in *Cæsar*. p. 733. and *APPIANUS ALEXANDRINUS*, *De Bell. Civ. Lib. II. p. 491*, *Edit. H. Steph.* His Life was not only spared, but he was so well educated, that he became more celebrated for his Writings than his Birth, and the Shadow of Royalty conferred on him by *Augustus*. See upon that Head the Treatise of *VOSSIUS*, *De Historic. Græcis*, *Lib. II. Cap. IV.*

¹⁶ A petty King of the antient People of *Great Britain*.

¹⁷ Where he speaks of the Destruction of *Corinth*, *De Offic. Lib. I. Cap. XI.* and *Lib. III. Cap. X.*

¹⁸ *Excerpt. E. Lib. XXXI.*

¹⁹ *Vit. Agid. p. 804. E.*

²⁰ *Lib. XVII. Cap. XXXVIII. p. 582. Edit. H. Steph.*

²¹ *Alexander, quamquam belli, &c. Lib. IX. Cap. I. Num. 22.*

VIII. (1) In the latter Part of this Passage, read *ἀναλίσκεις* instead of *ἐναλίσκεις*, as in the Editions. *Lib. V. Cap. XI. GROTIUS.*

IX. (1) *Puerum ætas excuset, Fæminam sexus. De Ira, Lib. III. Cap. XXIV.* The Lion, when enraged, falls upon Men rather than Women, and

does not hurt Children but when pressed with extreme Hunger, as an antient Naturalist observes. *Et ubi sævit* [*Leo*] &c. *PLINY, Lib. VIII. Cap. XVI.* *HORACE* representing *Achilles*, as a Warrior void of Pity, that did not spare even Infants, without excepting those in their Mother's Womb; professes by a lively Exclamation, that he looks upon this as an horrible Excess of Fury.

Sed palam captis gravis, heu nefas heu!
Nescios fari pueros Achivis
Ureret flammis, etiam latentes
Matris in alvo.

Lib. IV. Od. VI. ver. 17. & seqq. An antient Scholiast observes upon this Passage, how much the Poet expresses his Dislike of such Barbarity, [*HEU NEFAS*] *Dolenter exclamat in sævitiam Achilles, qui si per Apollinem vivere licuisset, adeo sævus erat, ut nec infantibus, nec in utero gestantibus pepercisset.* *PHILO* the Jew says, that it was a Rule of War with his Nation, to release the Maids and Wives taken Prisoners, without doing them any Hurt, and he gives this Reason for it; that it would have been great Inhumanity to have destroyed with the Men that Sex, which their natural Weakness made incapable of War. *De Princip. constitut.* (p. 734. A. B. *Edit. Paris.*) He observes elsewhere, that between Persons at Years of Discretion, a thousand specious Reasons may be found to justify Quarrels and Enmity; but that as to Infants lately come into the World, Malice itself cannot make those inno-

cent

man, (says *Seneca*, in his Books against Anger). GOD himself, in the Wars of the *Hebrews*, even after Peace offered and refused, would have Women and Infants spared, (*Deut. xx. 14.*) only some few Nations excepted by a special Command, against whom the War was not a human War, but a War of GOD, as it was commonly called. And when he ordered the *Midianitish* Women to be slain for their own personal Crimes, he yet excepted those that were pure Virgins. (*Numb. xxxi. 18.*) Nay, when he denounced fearful Judgments on the *Ninevites*, for their enormous Sins, he was pleased to delay the deserved Vengeance, in Compassion of so many thousands, who could not distinguish between Good and Evil. (*Jonah iv. 2.*) Like to which is that in *Seneca*,² *Can any one be angry with Children, whose Age as yet understands not the Difference of Things?* And in *Lucan*,³

Crimine quo parvi cædem potuere mereri?

How could young Infants ever merit Death?

If then GOD, who, as the Author and Lord of Life, may, without Injustice, take it away when he pleases, and without any other Reason, from Persons of whatsoever Sex or Age, has, nevertheless, commanded, and acted himself towards Women and Children, in the Manner we have now seen; what ought Men (to whom he hath given no other Right over their Fellows, than what is necessary to preserve the Safety and Society of Mankind) to do in this Case?

2. We might add here, first, in Regard to Children, the Judgment of those Nations and Times wherein Justice most prevailed: ⁴ *We carry Arms* (says *Camillus*, in *Livy*) *not against that tender Age, which is spared, even at the taking of Cities, but against those who are in Arms.* He adds, that this is one of the Laws of War, that is, one of the Rules of natural Right, which take Place here. *Plutarch*, treating on the same Subject, tells us, ⁵ *Good Men observe even some Laws of War.* Where, pray observe, he saith *Good Men*, that you may distinguish this Right from that allowed by Custom, and which only implies a bare Impunity. So *Florus*⁶ says, it cannot in Honesty be otherwise. And *Livy* has it in another Place⁷,

cent Creatures guilty of any Thing, with the least Appearance of Reason. *De special. Leg. Lib. II.* (p. 795. D.) *JOSEPHUS* speaking of *Manahem*, who, after taking the City of *Thapsus*, spared not even the Infants, calls that the utmost Excess of Cruelty and Barbarity. That Usurper, adds he, treated the People of his own Nation in a Manner that would have been unpardonable, even tho' he had had to do with conquered Strangers. *Antiq. Jud. Lib. II. (Cap. XI. p. 320. D.)* The same Jewish Historian informs us, that *Judas Maccabæus* having taken the Cities of *Bosra* and *Ephron*, put all the Males to the Sword, with all those who were capable of bearing Arms. [*Ibid. Lib. XII. Cap. XII. p. 417. B. G.*] In another Place he calls the Fury of *Alexander*, surnamed the *Thracian*, an inhuman Revenge, in causing the Wives and Children of the *Jews* to be put to Death with them, and before their Eyes. [*Lib. XIII. Cap. XXII. p. 461. C.*] *AGATHIAS* makes this Reflection upon the *Romans*, whatever just Reason they might have for punishing the *Missipians*, they were inexcusable, for having been so unmerciful to murder the Children at their Mother's Breasts, and who, consequently, could have no Share in their Father's Crimes: Nor did such Cruelty remain unpunished. (*Lib. IV. Cap. VI.*) *NICETAS*, or the Person who continues his History to the Reign of *Henry*, condemns in stronger Terms a like Excess of Hostility, committed by the *Scythians*, in taking the City of *Atyra*. They spared, says he, not even Infants at the Breast; those young Plants were cut

down like Grass, or tender Blossoms, by those merciless Victors, who did not know that it is sinning against Nature, and violating the common Right of Men, to extend Rage beyond Victory, and to act with Fury against a reduced Enemy. (*In Vit. Balduin. Cap. IX.*) See also what *BEDE* says, *Lib. II. Cap. XX.* concerning the Cruelty of *Carevella*; and the merciful Orders given by Queen *Elizabeth*, according to *CAMDEN*, upon the Year 1596. (p. 668.) *SIMLER* recites a good Law instituted by the *Swiss*, [which prohibits the doing any Injury to the Women, unless a Woman has furnished the Enemy with Arms, thrown Stones, or exercised some other Act of Hostility. *De Rep. Helvet. Lib. II. p. 302. Edit. Elzevir.*] *GROTIUS*.

² *Num quis irascitur, &c. De Ira. Lib. II. Cap. IX.*

³ *Pharsal. Lib. II. ver. 108.*

⁴ *Sunt & belli, sunt pacis jura, &c. [Lib. V. Cap. XXVII. Num. 7.]*

⁵ *Vit. Camill. p. 134. B.*

⁶ In the Passage of that Historian, which our Author has in View, the Reading is *integra dignitate*. The Whole is as follows, *Eam namque vir sanctus & sapiens veram sciebat victoriam, quæ, salva fide, & integra dignitate, pareretur.* *Lib. I. Cap. XII. Num. 6.* It relates to *Camillus* also, who would not take the Advantage of a School-maister's Treachery.

⁷ *Puellis, ut saltem parcerent, orare institit; a qua ætate etiam hostes iratos abstinere, &c. Lib. XXIV. (Cap. XXVI. Num. 11.)*

Which Age the Enemy, tho' highly provoked, should spare. And again, ⁸ Their savage Cruelty and Rage reached even to harmless Infants.

3. There is no Exception here with Respect to Children, who have not as yet the Use of Reason. But as to Women, the Thing takes Place only in general, that is, unless they have committed some Crime which deserves a particular Punishment, or have usurped the Offices of Men. For that is, as *Statius* expresses it,

⁹ *Sexus rudis insciusque Belli,*

A Sex unskill'd, and ignorant of War.

The Prefect in the Tragedy, replies to *Nero*, calling *Octavia* his Enemy,

— *Femina hic nomen capit?*

¹⁰ *Can a Woman deserve that Name?*

And *Alexander*, in *Curtius*, ¹¹ *I use not to make War with Captives and Women. He must be in Arms that I take for an Enemy.* So *Grypus*, in *Justin*, ¹² *None of his Ancestors after Victory did ever, in all their Wars, either foreign or domestic, shew Cruelty to Women, whom their very Sex did fully secure from the Hazards of War, and the Fury of the Conqueror.* And another, in *Tacitus*, ¹³ *That he never made War against Women, but only those that were actually in Arms against him.*

4. *Valerius Maximus* ¹⁴ calls the Behaviour of *Munatius Flaccus* against Women and Children, a barbarous Cruelty, and not fit to be mentioned; *Diodorus* ¹⁵ tells us, that the *Carthaginians*, at *Selinus*, killed old Men, Women, and Children, *without any Manner of Compassion.* And in another Place he calls this Act *a savage Cruelty.* *Latinus Pacatus* ¹⁶ filed Women, *A Sex which the Wars spare.* And so did *Statius* of old Men.

¹⁷ — *Nullis violabilis armis*

Turba jenes —

Old Men should be from Violence secur'd.

X. Priests and
Scholars to be
spared.

X. 1. What we have said (of Women and Children) may be generally said of all Men, whose Manner of Life is wholly averse to Arms. ¹ *By the Laws of War, only those that are in Arms, and do resist, are to be killed,* according to *Livy*, that is, that Law which is agreeable to Nature. So says *Josephus*, ² *It is just that they should suffer by Arms, who have taken up Arms, but the Innocent should not be*

⁸ *Trucidant inermes juxta atque armatos, feminas pariter ac viros, usque ad infantium cædem ira crudelis pervenit.* Lib. XXVIII. Cap. XX. Num. 6.

⁹ Lib. I. Sylv. VI. ver. 53.

¹⁰ NER. *Quod parcis hosti.* PRÆ. *Femina hoc nomen capit?* OCTAV. (ver. 864.) For this Reason *Tucca* and *Varus* were for striking out of the *Æneid*, the Verses where *Æneas* deliberates whether he shall kill *Helen.* GROTIUS.

The Passage begins at the 567th, and ends at the 588th Verse. *Jamque adeo super unus eram, &c. Talia jactabam & furiosa mente ferebar.* The Reader may see the Notes of Father CATROU, the last French Translator.

¹¹ *Bellum cum captivis & feminis gerere non solum: Armatus sit oportet, quem oderim.* Lib. IV. (Cap. XI. Num. 17.)

¹² *Contra Gryphus orare, &c.* Lib. XXXIX. Cap. III. Num. 7.

¹³ The Historian makes *Arminius* say this in regard to Women with Child. *Non enim se prodi-*

tione, &c. Annal. Lib. I. Cap. LIX. Num. 4.

¹⁴ *Efferatam crudelitatem suam, &c.* Lib. IX. Cap. II. Num. 4.

¹⁵ Lib. XIII. (Cap. LVII. p. 360. Edit. H. Steph.)

¹⁶ *Et in sexum, cui bella parant, in pace servitum,* (Cap. XXIX. Edit. Cellar.)

¹⁷ *Thebaid.* Lib. V. ver. 258, 259.

X. (1) *Atque hæc tamen hostium, &c.* Lib. XXVIII. Cap. XXIII. Num. 1.

² This Reflection the Jewish Historian ascribes to *Vespasian* and *Titus*, who, notwithstanding the Instances of the People of *Alexandria* and *Antioch*, would not deprive the Jews settled in those two Cities of the Rights and Privileges they had enjoyed till then. Those of that Nation, said they, who took up Arms against us, have been sufficiently punished by the unfortunate Event of their Rebellion: For the Rest, who have done no Ill, it would be unjust to deprive them of what they possess. *Antiq. Jud.* Lib. XII. Cap. III. p. 398. D.

touched.

touched. When *Camillus* had taken the City of *Veii*, ³ he ordered, that they should not hurt those that were not in Arms. In the first Rank of these ought to be held, those who are engaged in *holy Things*. For as it was in all Ages the general Custom of Nations to excuse them from bearing Arms, ⁴ so were they excused also from the Violence of Arms. Thus the *Philistins*, tho' professed Enemies of the *Jews*, spared the ⁵ College of Prophets at *Gaba*, as you may find, *1 Sam. x. 5.* and *10.* And so to another Place where was a like College, as it were set apart and privileged from all Violence, did *David* flee with *Samuel*, *1 Sam. xix. 18.* *Plutarch* ⁶ informs us, when the *Cretans* were engaged in Civil Wars, they mutually forbore all manner of Violence ⁷ to the Priests, and those who had the charge of burying the Dead. To this we may apply the *Greek Proverb*,

οὐδὲ πυρφόρος ὑπελείφθη.

Not a single Priest escaped.

⁸ *Strabo* observes, when all *Greece* was up in Arms, the *Eleans*, as sacred to *Jupiter*, and those that sojourned among them, enjoyed a secure Peace.

2. They also have justly this same Privilege, as the Priests, who have embraced a like Sort of Life, as Monks, and ⁹ Lay-Brothers, that is, *Penitents*, whom the ¹⁰ *Ecclesiastical Canons*, according to natural Equity, would have spared equally as Priests. To these we may justly add those who apply themselves to the Study of Sciences and Arts beneficial to Mankind.

XI. Next to these, the Canons ¹ privilege Husbandmen. *Diodorus Siculus* XI. And also
² highly commends the *Indians*, *In their Battles they kill one another (without Mercy)* Husbandmen.

³ *Et Dictator [Camillus] &c. LIVY, Lib. V. Cap. XXI. Num. 13.*

⁴ This merits particular Observation. The Security of Persons of this Kind, and of all others, whose Manner of Life has in itself no Relation to the Business of War, is founded upon the Supposition that they act nothing in any Manner against an Enemy. But if an Ecclesiastick abandons his Prayer-Book, to enter into the Councils of Princes, if he is the first Promoter of a War, and even takes the Field, and commands Troops, either directly or indirectly, he deserves to be spared the less, as he acts contrary to the Engagements of his Character. See *FELDEN's* Note upon this Place; and what is observed above, concerning the *Canons* prohibiting Ecclesiasticks to carry Arms. *B. I. Chap. V. § 4. Note 2.* and *B. II. Chap. I. § 13. Note 5.*

⁵ The Rabbins say, that *Hyrcaus*, at the very Time he besieged *Jerusalem*, sent Victims into the Temple. *PROCOPIUS* praises the *Goths*, for having spared the Priests of the Churches of *St. Paul* and *St. Peter*, which were at some Distance from *Rome*. *Gothic. Lib. II. (Cap. IV.)* See the Supplement of *CHARLEMAGNE* to *The Law of the Bavarians and Lombards*, *Lib. I. Tit. XI. Num. 14. GROTIUS.*

⁶ *Quæst. Græc. XXI. p. 296. C.*

⁷ *SERVIVS* informs us, that in *Italy* they paid this Regard to Priests and Priestesses, as well as to old Men, *Quia vatem. Nam eam defendebat a bellis, si non ætas, saltem religio Sacerdotis.* *Ad Æneid. Lib. VII. (ver. 442.) GROTIUS.*

The Passage of *SERVIVS* does not relate to the Safety of Priests in Time of War; but he means that their Character excuses them from being concerned in Affairs of War. The Reader need only see the Sequel of the Discourse in the Verses of the Poet, to be assured that this must be the Commentator's Sense. As to the *Greek Proverb*, which our Author repeats, he took it from *SUIDAS*, at the Word *Πυρφόρος*. According to that Lexicographer,

to express that no Quarter was given to any one, it was usual to say, *that not a single Priest had escaped*, that is not one of those who marched in the Front of the two Armies. They carried a Torch in their Hands, as the Scholiast upon *EURIPIDES* informs us in the *Phænissæ*, *Ver. 1386.* from whence they were called *Πυρφόροι*, *Fire-bearers*: And in Consideration of their Character, no Hostility was exercised against them. *ERASMUS*, in his *Adages*, upon the Proverb, *Ne ignifer quidem reliquus est factus*, cites *EUSTATHIUS* in this Place, in *Iliad*, *Lib. XII. Ver. 73.* See also the Commentators upon *POL-LUX*, *Lib. VIII. § 116. Edit. Amst.*

⁸ *Geogr. Lib. VIII. (p. 358. Edit. Casaub. Paris.)* See also *POLYBIUS*, *Hist. Lib. IV. (Cap. LXXIII.)* and *DIODORUS SICULUS*, *Excerpt. Peiresi. (p. 225.)* Those who went to Combat in the *Olympick*, *Pythian*, *Nemæan*, or *Isthmian* Games, enjoyed also an entire Security in Time of War. *THUCYDID. Lib. V. and VIII. PLUTARCH, Vit. Arat. (p. 1040. B.) GROTIUS.*

⁹ *Conversi*, *Converts*, which is not so common and intelligible in the Sense it is here used as *Lay Brother*, which is also derived from the *Latin Frater laicus*. These are Persons, who retire into Convents, but are not in Orders, do not sing in Choirs, nor make the Vow of Poverty. Our Author styles them *Penitents*, because they were originally secular Persons converted, who engaged in that way of Life by way of Penance. See the Authors cited here by *GRONOVIVS*.

¹⁰ *Innovamus, ut Presbyteri, Monachi, Conversi, Peregrini, Mercatores, Rustici, euntes vel redeuntes, vel in agricultura existentes & animalia, quibus arant & semina portant ad agrum, congrua securitate lætentur.* *Decretal. Lib. I. Tit. XXXIV. De Treuga & Pace, Cap. II.*

XI. (1) See the Canon cited in the last Note of the preceding Paragraph.

² *Lib. II. Cap. XXXVI. p. 86. Edit. H. Steph.*

but

but they do not Harm to the Husbandmen, as being necessary for the publick Good. Plutarch says of the antient Corinthians³ and Megareans, None of them would in any wise hurt the Husbandmen. And Cyrus sends to the Assyrian King, ⁴ He was desirous that Husbandmen should be secure and indemnified. And Suidas⁵ says of Belisarius, He was so favourably inclined to Husbandmen, and took such a particular care of them, that whilst he was General, there was no manner of Violence done to them.

XII. Merchants and the like.

XII. Next to these the Canon¹ includes Merchants, which is not to be understood only of those who sojourn for a Time in an Enemy's Country, but also such as are natural and perpetual Subjects, because the manner of the Life they use is entirely averse from War: And under this Denomination are comprehended all Sorts of Mechanicks and Tradesmen, whose immediate Interest makes them more inclinable to Peace than War.

XIII. And Captives.
^a Ch. 10. § 1.
Note 1.
^b Sect. 9. of this Chapter,
Note 8.

XIII. 1. That we may come to those that bore Arms, I have^a already mentioned that of Pyrrhus in Seneca,¹ who said that Honour, that is, a regard to Equity, does not permit us to take away the Life of a Prisoner. We have quoted^b a Saying of Alexander to the same Purpose, who allows Captives the same privilege with the Women. We may add that of St. Augustin,² In fight we ought not to kill the Enemy but through Necessity, and against our Will. But as Violence is allowable against one that is in Arms, and in a Case of Resistance, so is Mercy due to the Vanquished, or Captive, especially where there is no danger of the Disturbance of the Peace thereby. Xenophon³ reports of Agesilaus, He ordered his Soldiers not to punish their Prisoners as Malefactors, but to preserve them as Men. And we find in Diodorus Siculus, All the⁴ Greeks in general engaged stoutly against those that resisted, but shewed Mercy to the Vanquished. The same Author also informs us of the Macedonians⁵ under Alexander, They were more severe to the Thebans, than the Laws of War allowed.

2. Sallust,⁶ in his History of Jugurtha, speaking of young Men, who were put to Death, after they had surrendered, says, it was done against the Law of Arms,

³ Quæst. Græc. p. 295. B.

⁴ He offered the King of Assyria to spare his Husbandmen, provided that on his Side he did no Hurt to the Husbandmen of those Provinces that had engaged in his Party. Cyrop. Lib. V. Cap. IV. § 12. Edit. Oxon.

⁵ Voc. Βελισάριος. GROTIUS.

XII. (1) See the Canon cited, § 10. Note 10.

XIII. (1) Et in mancipio cogitandum est, non quantum illud impune pati possit, sed quantum tibi permittat, æqui bonique natura: Quæ parcere etiam Captivis & pretio paratis, jubet. De Clement. Lib. I. Cap. XVIII.

² Hostem pugnantes necessitas, &c. Ad Bonifac. Epist. CCV. GRATIAN, in repeating this Passage, says in the beginning, necessitas deprimat, and not perimat, (Caus. XXIII. Quæst. I. Can. III. ex Epist. CCVII.) Epaminondas and Pelopidas, when they gained a Victory, never put any of the Conquered to Death, nor deprived any City of its Liberty: So that it was said of them, had they been present, the Thebans would never have treated the Orchomenians as they did: This PLUTARCH tells us, Vit. Marcell. (p. 316. D.) Marcellus acted with the same Lenity, at the taking of Syracuse, as the same Historian testifies, Ibid. (p. 308. D.) See also what he says in the Life of Cato Uticensis, (p. 787. C. D.) TACITUS says of Primus Antonius, and Varus Arrius: Quos [Primum Antonium Varumque Arrium] recentes, clarosque rerum fama, &c. Hist. Lib. V. (Cap. XXXIX. Num. 4.) Cabades, King of Persia, having taken the City of Amida, as his Troops made a great Slaughter of the Inhabitants, a Priest represented to that Prince, that it was unworthy of a King to massacre the Conquered. PROCOPIUS. Persic. Lib. I. (Cap. VII.) The Author who relates this says elsewhere, that it is a vile Action to discharge one's Fury upon Prisoners of War. Lib. II. (Cap. IX. in the Speech of Cosroe to the Roman Embassadors.) See also, in the same Historian, the fine Speech of Belisarius to his Soldiers, after the taking of Naples. Gothic. Lib. I. (Cap. IX.) when Somebody advised the Emperor Alexis to put his Scythian Prisoners to Death, he replied: That the Scythians, tho' Scythians, were however Men: And their having been our Enemies does not make them unworthy of our Compassion. ANNA COMNENA, (Lib. VIII. Cap. IV.) NICEPHORUS GREGORAS says, that whatever is done in the heat of Fight is excusable in some manner, because at that Time Men are not their own Masters, and act with a blind Impetuosity: But that when the Danger is over, and the Mind in its natural Situation has Time and Liberty to examine all Things aright, if they do not restrain their Power, it is a sign they pay no regard to what Decency requires, and trample upon all Considerations of Duty, Lib. VI. (p. 92. Edit. Colon. 1616.) See another Passage of the same Historian, which we have cited in a Note at the End of the seventh Chapter of this Book, and what CHALCOCONDYLAS says of a certain laudable Custom amongst the Poles, Lib. V. The Emperor JULIAN, in his Praise of Constantius, to give an Idea of a good Prince says, that when he had gained a Victory he put an immediate stop to the Slaughter, convinced that it was infamous to deprive People of their Lives, when they defended themselves no longer. (Orat. p. 86. C. Edit. Spanheim.) GROTIUS.

³ De Agesil. Cap. I. § 21. Edit. Oxon.

⁴ Lib. XIII. (Cap. XXIV. p. 434. Edit. H. Steph.)

⁵ Lib. XVII. (Cap. XIII. p. 568.)

⁶ Numidæ puberes interfecti, &c. Bell. Jugurth. Cap. XCVI. Edit. Waff.

that is, against the Law of natural Equity, and the known Practice of all civilized Nations. And we read in *Lactantius*, ⁷ *They spare the Vanquished, and even in Arms there is room for Mercy.* *Tacitus* commends *Primus Antonius* and *Varus*, two Generals of *Vespasian*, *That after the Battle was over, they exercised no Cruelty to any.* So *Aristides* ⁸ says of the *Lacedemonians*, that *They fought vigorously against those who resisted, but shewed Mercy to them when conquered.*

The Prophet *Elisba* asks the King of *Samaria* this Question about Prisoners of War, *Wilt thou kill those whom thou hast taken Captive, with thy Sword, and with thy Bow?* 2 Kings vi. 22. In *Euripides*, ⁹ when one asked in the *Heraclidæ*,

Does your Law forbid the killing of an Enemy?

The Chorus answers,

Yes; when taken Prisoner in a Fight.

In the same Author *Eurytheus* the Captive says,

My Murderer shall be rank'd among the Guilty.

In *Diodorus Siculus*, ¹⁰ the *Byzantians* and *Chalcedonians*, because they had slain many of their Prisoners, were branded with this Character, *They committed Acts of abominable Cruelty.* The same Author in another Place calls ¹¹ to spare Captives, *The Law of Nations.* And they who transgress this Law, he says, without doubt, are guilty of a great Crime. Equity teaches us to be merciful to Prisoners, as we mentioned before out of the philosophical Treatises of *Seneca* ¹². And Historians ¹³ highly commend those, who when the Multitude of their Prisoners has been so great, that the Number would be either chargeable or dangerous, have chose rather to send them all away freely, than to kill them.

XIV. 1. For the same Reasons, ¹ they that either in a Battle, or a Siege, shall demand Quarter, are to be accepted. Wherefore *Arrianus* ² says, that the *Thebans* killing of their Prisoners that had yielded, was not done according to the *Grecian* Custom, ἐκ Ἑλληνικῆν σφαγῆν. Likewise *Thucydides*, ³ in his third Book, *You received us unto Mercy, who voluntarily, and with Hands lifted up, craved a Surrender. And it is the Custom of the Greeks not to put such to Death.* And the *Syracusan* Senators, in *Diodorus Siculus*, ⁴ tell us, *It is the Part of a great Soul to spare a Suppliant.* And *Sopater* ⁵ says, *It is the Law to preserve Suppliants in the Wars.*

XIV. Those to be accepted who surrender upon fair Terms.

2. In besieged Towns, the *Romans* observed this Custom before the battering Ram struck the Walls. *Cæsar* ⁶ declares to the *Aduatici*, he would save their City,

⁷ *Instit. Divin.* Lib. V. GROTIUS.

⁸ *Orat.* II. De Pace, (p. 80. C. Vol. II.)

⁹ Ver. 965, 966.

¹⁰ *Lib.* XII. Cap. LXXXII. p. 328.

¹¹ *Lib.* XIII. Cap. XXVI. p. 344. CAPITOLINUS praises the Emperor *Marcus Antoninus* for observing the Rules of Equity even with regard to his Prisoners of War: *Æquitatem etiam circa captos hostes custodivit*, Cap. XXIV.

¹² See Note (1) on this Paragraph.

¹³ Our Author makes this Reflection after ALBERICUS GENTILIS, (*De Jure Belli*, Lib. II. Cap. XVI. p. 344.) The latter alledges two Examples of this Kind, the one taken from BUCHANAN, and the other from PAULUS JOVIUS. In the first, we see, in the Reign of *Robert I.* King of *Scotland*, the Earl of *Mar*, having almost as many Prisoners as Troops of his own, contented himself with making them swear, that they would lie still, when the two Armies came to Blows, and should continue Prisoners even tho' the *English* should be strong enough to set them at Liberty. *Rerum Scotic.* Lib. IX. p. 320. Edit. *Amstel.* 1643. The Historian makes many Reflections in the same Place upon the Generosity and Humanity with which the Prisoners were treated. As to that of PAULUS JOVIUS, he speaks

of the Duke *D'Anguien*, who after the Battle of *Cerisoles* released all the Prisoners, to rid his Camp of useless Mouths, that consumed his Provisions; and required only from them, that the *Spaniards* should return into *Spain*, and the *Germans* into *Germany* by the Way of *France*. *Hist. Lib.* XLV. seu ult. circa init. p. 267. Vol III. Edit. *Basil.* 1556.

XIV. (1) The *Romans* informed the *Perfians* besieged in the Citadel of *Petra*, that resolved as they seemed to perish, they chose rather to preserve their Lives, out of a Compassion worthy of *Romans* and *Christians*. PROCOPIUS. *Gothic.* Lib. IV. (seu *Hist. Miscell.* Cap. XII.) See SERRANUS in the Life of *Francis I.* and in that of *Henry II.* GROTIUS.

² *De Expedit. Alexandr.* (Lib. I. Cap. IX.)

³ Cap. LVIII. Edit. Oxon.

⁴ *Lib.* XI. in fin.

⁵ Νόμος ἐστὶ τοὺς ἐκέτας σώζειν ἐν τοῖς πολέμοις.

⁶ *Ad hæc Cæsar respondit, Se magis consuetudine suâ, quam merito eorum, civitatem [Aduaticorum] conservaturum, si prius, quam aries murum attigisset se dedidissent, &c.* De Bell. Gall. Lib. I. Cap. XXXII.

if they surrendered themselves before the Ram touched the Wall ; which is still observed, *viz.* in weak Towns, before the playing of the Batteries ; and in fortified Cities, before the giving of a Storm. But *Cicero* ⁷ considering not so much what is done, as what ought in Equity to be done, gives his positive Opinion thus : *As we ought to take Care of those we conquer, so we should take them into our Protection, who laying down their Arms, surrender to our Generals, tho' our Rams have battered their Walls.* The Hebrew Expositors ⁸ observe, that it was a Custom among their Ancestors, when they laid Siege to a Town, not to encompass it quite round, but to leave one Place free for them to escape, that desired to flee, that they might have less Occasion to shed Blood.

XV. They are also to be spared that surrender without Conditions.

XV. The same Equity commands us to spare those, who surrender to the Conqueror without Conditions in a suppliant Manner. ¹ *To kill those that have yielded, (says Tacitus) is barbarous.* And *Salust* ² relating how *Marius* put to Death the young Men of *Campsia*, who had surrendered, calls it, *An Act against the natural Right of War.* And the same Author in another Place, *He put to the Sword not those that were in Arms, and in Battle, by the Right of War, but the very Suppliants that cried for Mercy.* And (as I beforementioned) in *Livy*, ³ *Killing of armed Men, and those that resist, is allowed by the Right of War.* And the same *Livy* again, ⁴ *He made War upon those that had submitted, against all Equity and Justice.* Nay, the chief Business of a General should be rather to force his Enemies thro' Fear to a Surrender, than to put them to Death. It was highly commendable in *Brutus*, ⁵ *He suffered not his Men to fall on the Enemy immediately, but surrounding them with his Horse, bid his Soldiers spare those who shortly would be their own.*

XVI. Provided they were not guilty of some enormous Crime before, and how this is to be understood.

XVI. 1. Against these Rules of natural Right and Equity, some Exceptions use to be made, no way just, *viz.* If it be done by way of Retaliation ; if by way of Terror, to frighten others ; or if they have been obstinate in their Resistance. But no Man can look upon this enough to justify a Slaughter, who has seriously weighed what has been said before of the just Causes of killing Enemies : For there is no Danger from Prisoners, or from those who have actually surrendered themselves, or desire to do it. That they may therefore be justly put to Death, there ought to be a previous Crime, and that such a one, as an impartial Judge shall think Capital. And so we sometimes see Prisoners, and those that have surrendered themselves, put to the Sword, and their yielding upon Condition to have their Lives spared, not accepted ; if they being satisfied of the Injustice of the War, ¹ have still continued in Arms ; if they have ² abused the Conqueror with slanderous Reproaches, if they have

⁷ *Et cum iis, quos vi deviceris, consulendum est, &c. De Offic. Lib. I. Cap. XI.*

⁸ See on that Head the Passages cited by *SELDEN*, *De Jure Nat. & Gent. secundum discipl. Hebr. Lib. VI. Cap. XV. in fin.* Our Author observes here in a short Note, that *Scipio Æmilianus*, at the Time he was preparing to destroy *Carthage*, made Proclamation, that whoever would, might quit it with Safety. He cites *POLYBIUS* to prove this in general, without referring to any Passage. But I can find nothing like it in that Historian, and am very much mistaken, if our Author had not in his Thoughts what he had read in *FLO-RUS*, upon the Summons made to the *Carthaginians*, when the *Romans* had resolved that they should quit their Country : *Tum evocatis principibus, si salvi esse vellent, ut migrarent finibus, imperatum, Lib. II. Cap. XV. Num. 8.* And perhaps his Memory at the same Time had recalled a confused Idea of the Proposals, *Scipio* caused to be made to *Asdrubal* by *Gulussa*, as *POLYBIUS* relates, *Excerpt. Peiresc. p. 178.* from whence arose this mixture of two Facts, and the confounding of two Authors.

XV. (1) *Quod aspernati sunt victores, quia tradere deditos sævum, &c. Annal. Lib. XII. Cap. XVII. Num. 2.*

² The Passage is cited in Note 6. upon § 13. of this Chapter. The other which our Author cites is : *Alios item non armatos, neque in prælio belli jure, sed postea supplices, per sumum scelus in-*

terfectos. Orat. de Rep. ordin. Cap. XXXVI. Edit. Waff.

³ In the beginning of § 10.

⁴ *Qui [C. Popilius] deditis, contra jus ac fas bellum intulisset, &c. Lib. XLII. Cap. XXI. Num. 3.*

⁵ *Vit. Brut. p. 996. A.* I do not know, why our Author translates the Word *περίπλεως* by *equitatu circumdedit*. It only signifies, that *Brutus* rode about on all Sides to give Orders to his Troops not to charge the Enemy, and not that he invested them with his Cavalry.

XVI. (1) Our Author here had *ALBERICUS GENTILIS* in View, *De Jure Bell. Lib. II. Cap. XVIII.* where that Lawyer adds some other Cases. But I find no Example of this, unless that of Subjects, who have unjustly taken Arms against their lawful Sovereign, without any plausible Reason whatsoever, may be intended. See below, *Chap. XIX. § 6. Num. 1.* It was principally for this Reason, that in the War of the Peasants of *Germany*, which began in 1525. Count *Truchses* punished with an exemplary Death most of the Rebels, whom he had reduced to surrender. See the History of that Insurrection by *PETER GNODAL*, p. 292. & seq. Edit. Basil. 1570.

² As the *Thebans* did when besieged by *Alexander the Great*, (*DIOD. SICUL. Lib. XVII. Cap. IX. and XIII.*) and the *Athenians*, besieged by *Sylla*. *PLUTARCH, De Garrulitate, Vol. II. p.*

have ³ broke their Faith, or any other Law ⁴ of Nations, as the Privilege of Ambassadors; or if they have ⁵ deserted their Colours.

2. But Nature doth not allow Retaliation, unless against the personal Offenders; neither is it enough to pretend, that the Enemies are but one entire Body engaged against us, as may easily be understood from what hath been already ^a said concerning the Communication of Punishments. We find in *Aristides*, ⁶ *Is it not perfectly absurd, to imitate as just, what we ourselves condemn as wicked and unjust?* Wherefore *Plutarch* ⁷ blames the *Syracusans*, for putting to Death the Wives and Children of *Hicetas*, purely because *Hicetas* had before killed the Wife, Sister, and Son of *Dion*. ^{a B. 2. ch. 21. § 18.}

3. The Benefit which may follow from hence, by striking a Terror for the future, does by no Means give a Right to put to Death. But if we are otherwise authorised to put to Death, this Consideration may engage us not to abate of our Right.

4. Further, an eager Desire to maintain our own Party, if the Cause itself be not absolutely dishonest, cannot really deserve Punishment, as the *Neapolitans* argue in *Procopius*; or if there were any Punishment due, it could never amount to that of Death, before an equitable Judge. When *Alexander* had commanded all the young Men ⁸ in a certain Town to be put to the Sword, because they had made an obstinate Defence, he seemed to the *Indians* to make War like a Robber; whereupon the King to avoid for the future such Reflections, shewed more Mercy in his Victories. He more honourably spared some *Milesiens*, because they appeared brave and faithful to their own Country, which are the very Words of ⁹ *Arrian*. When *Phyto*, Governor of *Rhégium*, was hurried away to Torments and Death, for stoutly defending his City against *Dionysius*, he cried out, that he was thus barbarously used, because he would not betray his Country, and that Heaven would quickly revenge his Death. *Diodorus Siculus* calls it, ¹⁰ *unjust Punishment*. I much approve that Wish in *Lucan* ¹¹,

—*Vincat, quicumque necesse*
Non putat in Victos seivum dstringere ferrum
Quique suos cives, quod signa adversa tulerunt,
Non credit fecisse nefas.—

—*May he be crown'd with Victory,*
Who thinks it base to kill th' unhappy Vanquish'd;
Tho' in the Battle, with Minds truly brave,
They flood against him.—

But we must understand by the Word *Cives*, not the Inhabitants of this or that Country, but all those who are Members of that great State, which comprehends all Mankind. Much less can the Resentment for a Loss received by War, render the shedding of Blood just and lawful; as we read that *Achilles*, *Æneas*, and *Alexander*, celebrated the Obsequies of their deceased Friends with the Blood of their Prisoners, or those that had yielded themselves; therefore *Homer* justly expresses it,

¹² *Κατὰ δὲ φρεσὶ μῆδεσσι ἔργα.*

And in his Mind did evil Things devise.

XVII. But

505.) GRONOVIVS gives us the first of these Examples. The latter had been cited before by ALBERICUS GENTILIS, (*ubi supra*, p. 377.) where the Reader may find several others. See also Dissertation XIX. of OBRECHT, intitled, *Hostis delictitius*, § 24.

3 So *Julius Cæsar* caused *Publius Ligarius* to be put to Death, who was perjured and perfidious. *HIRTIVS*, *De bello Africano*, Cap. LXIV. See other Examples in ALBERICUS GENTILIS, p. 379. & seq.

4 See also ALBERICUS GENTILIS here, p. 382.

5 Examples of this may be found in the same Author, p. 383. & seq.

6 *Orat. II. De Pace*, p. 75. C. Vol. II.

7 He calls this the most inhuman of *Timoleon's* Actions, who might if he had pleased have prevented that unjust Punishment. *Vit. Timoleon.* p. 252. C. See also *DION's* Life, p. 983. E. and *DIODORUS SICULUS*, *Biblioth. Lib. XIV. Cap. XLVII.*

8 POLYÆN. *Strateg. Lib. IV. Cap. III. Num. 30.*

9 *De Exped. Alex. Lib. I. Cap. XX.*

10 *Lib. XIV. Cap. CXIII. p. 453. Edit. H. Steph.*

11 *Pharsal. Lib. VII. Ver. 312. & seq.*

12 *Iliad. Lib. XXIII. Ver. 176.* SERVIVS observes, that the Custom of putting Prisoners of War to Death upon the Tombs of the bravest Warriors,

XVII. Of-
fenders may be
pardoned on
account of their
Multitude.
^a See B. 2.
c. 13. § 4.

XVII. But where the Crimes are such, as they really deserve Death, yet the Greatness of a Multitude may be some Plea to mitigate the Severity of the Punishment; a Pattern of which forbearing Mercy we have from GOD himself, who ^a ordered a Peace to be offered to the Canaanites, and their Neighbours, tho' notoriously wicked, with the Promise of Life under the Condition of being Tributaries. To this agrees that of ¹ Seneca, *Generals rigorously punish a Soldier, who alone commits any Fault; but where a whole Army is unanimously engaged in a Mutiny, a general Pardon is requisite. What abates then the Anger of a wise Man? The Multitude of Offenders.* And in Lucan ²,

*Tot simul infesto juvenes occumbere Letho,
Sæpe fames, pelagique furor, subitæque ruinae,
Aut Cæli, Terræque lues, aut bellica clades,
Nunquam pœna fuit.—*

*At once so many Youths to hurry into Death,
Hunger may do it, or Shipwrecks, or the quick
Amazing fall of Buildings, or poison'd Air,
Or blasting Damps, or War; it can't be Punishment.*

Therefore (Cicero ³ tells us) to prevent the shedding of too much Blood, they brought in the casting of Lots. And Salust ⁴ thus addresses Cæsar, *Neither does any one provoke you to severe Punishments, or fearful Judgments, which rather tend to depopulate a State, than to correct the Guilty.*

XVIII. Hos-
tages to be
spared, unless
personally
faulty.
^a B. 2. ch.
21. § 2. B.
3. ch. 2. § 6.

XVIII. 1. From what has been already ^a mentioned, may easily be understood, what is allowable by the Law of Nature concerning Hostages. As it was formerly believed every one had the same Right over his own Life, as over other Things wherein he had a Propriety; and that this Right, by the Consent, either express, or tacit, of the Individuals, was transferred to the State, it was the less to be admired, if Hostages, personally innocent, were (as we ¹ read) put to Death for the Crimes of their Country, whether by Vertue of their own particular Consent, or of the Publick, which may be inclusive of their own. But since a truer Wisdom has informed us, that GOD has reserved to himself the Power of our Lives, so that no Man can solely by his own Consent bestow upon another a Power either over his own Life, or that of his Subjects. Therefore (as Agathias writes) that good General Narsès abhorred putting innocent Hostages to Death, as a brutish and cruel Act. So also have others done; witness the Example of Scipio, who used to say ² that he would severely punish those who had rebelled, but not the innocent Hostages; neither would he take Revenge of an unarmed Person, but of an Enemy actually in Arms.

2. But what our modern Lawyers, and those not inconsiderable, maintain, that

rriors, seem'd in process of Time to have something cruel in it: *Sane mos erat in sepulchris virorum fortium captivos necari: Quod postquam crudele visum est, placuit, &c.* In Æneid. X. (Ver. 519.) GROTIUS.

See the Parrhasiana of Mr. LE CLERC, Vol. I. p. 12, 13.

XVII. (1) *In singulos severitas Imperatoris, &c.* De Ira, Lib. II. Cap. X. The Scholiast upon JUVENAL cites a Passage from LUCAN, where he says, that Crimes committed by a Multitude pass with Impunity:

—*Quidquid multis peccatur inultum est.*

[Pharsal. Lib. V. Ver. 260.] Livia, the Wife of Augustus, represented, that if every Thing were to be punished as it deserved, the greatest Part of Mankind would be destroyed. *Apud XIPHILIN. ex DION. CASS. (p. 87. Edit. Rob. Steph.)* St. AUSTIN says, that Crimes committed by a few Persons should be punished with Rigour: But when a Multitude are criminal, they should be instructed ra-

ther than commanded, and Reprimands preferred to Menaces: *Non ergo asperere, quantum existimo, &c.* Epist. LXIV. See GAILIUS, *De Pace publica*, Lib. II. Cap. IX. Num. 37. GROTIUS.

² Pharsal. Lib. II. Ver. 198. & seq.

³ *Ne autem nimium multi pœnam capitis subirent, ideo illa sortitio comparata est.* Orat. pro Cluent. Cap. XLVI. See what I have said in my *Dissertation upon the Nature of Chance*, § 20.

⁴ *Neque quisquam te ad crudeles pœnas, aut acerba judicia, invocat, quibus civitas vastatur magis, quam corrigitur, &c.* Orat. II. *Ad Cæsar.* De Republ. ordinand. Cap. XL. p. 119. Edit. Waff.

XVIII. (1) See above, Chap. IV. of this Book, § 14. and ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIX. p. 395.

² *Neque se in obsides innoxios, sed in ipsos, si deserint, sæviturum: Nec ab inermi, sed ab armato hoste pœnas expetiturum.* LIVY, Lib. XXVIII. Cap. XXXIV. Num. 10. The Emperor Julian made the same Declaration as EUNAPIUS relates, *Excerpt. Legat. I.* (p. 213. Edit. Commelin.) GROTIUS.

such Agreements are valid, if authoris'd by Custom, I allow, if they mean by Right, only an Impunity ; which in this Case often comes under that Denomination. But if they suppose, that they who take away a Man's Life, only by virtue of such an Agreement, are really blameless, I am afraid they are both mistaken themselves, and by their own Authority dangerously mislead others. Indeed, if he that comes as an Hostage, is then, or was before, a notorious Offender, or has afterwards falsified his Faith given in weighty Affairs, his Punishment may then be just.

3. Yet when *Clelia*, who ³ not of her own accord, but by the Order of the State, went an Hostage, escaped by swimming over the *Tyber*, ⁴ *The Etrurian King not only did her no Harm, but even commended her on account of her Bravery* : To use *Livy's* own Words in the Affair.

XIX. This also is to be added, that all *Combats*, which are not of Use for the obtaining of Right, or concluding a War, but merely for vain Ostentation of Strength, that is, as the *Greeks* call it, *Rather a shew of Strength, than a warlike Action*, are wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose Vicegerents they are ; *Sallust* ², tho' a Pagan, commends those Generals, who purchase Victory with the least Blood. And *Tacitus* ³ writes of the *Catti*, a People of known Valour, *They seldom made Excursions, or had Skirmishes with the Enemy*.

XIX. *All needless Combats to be avoided.*

³ Some Persons, who had hid themselves to avoid being sent as Hostages, were punished for it as *Nicetas* informs us, *Lib. II. (Cap. VII. in Vit. Isaac. Angel.)* GROTIUS.

⁴ *Apud Regem Etruscum, non tuta solum, sed & honorata virtus fuit : Laudatamque virginem parte obsidum se donare dixit*, *Lib. II. Cap. XIII. Num. 9.* See what will be said below, *Chap. XX. § 54.*

XIX. (1) These are *ARRIAN's* Words, *De Ex-*

pedit. Alex. Lib. I. Cap. XXII. GROTIUS.

² *SALLUSTIUS duces laudat, qui victoriam incruento exercitu deportarent*, *EX SERVIO*, in *ÆN. XI. Frag. p. 102. Edit. Waff.*

³ *Rari excursus & fortuita pugna.* German. (*Cap. XXX. Num. 5.*) *PLUTARCH* blames *Demetrius*, for exposing his Soldiers, rather for the sake of acquiring Glory by Combats, than any real Advantage. *Demetr. p. 908. C. GROTIUS.*

C H A P. XII.

Concerning Moderation in regard to the spoiling the Country of our Enemies, and such other Things.

I. I. **T**HAT one may destroy the Things of another without the Imputation of Injustice, one of these three Things should necessarily go before. 1. Either such a Necessity as may be supposed to have been excepted in the primitive Establishment of Property. As when a Man, purely for his own Safety, shall throw the Sword of another Person, which a Madman was going to seize on, into a River; yet in that very Case he lies under an Obligation to make Satisfaction for it to the full Value ; as I have ^a shewed in another Place, according to the most reasonable Opinion. 2. Or some Debt arising from an Inequality, that so what is wasted may be reputed, as taken in Satisfaction of that Debt, for otherwise it could not be lawful. 3. Or some Injury, that may merit such a Punishment, or which such a Punishment does not proportionably exceed. For as a judicious ^b Divine well observes, there is no manner of Justice, that a whole Kingdom should be laid waste, for the driving away of a few Cattle, or the burning of some Houses. Which is also allowed by *Polybius*, ¹ who would not have the Rigour of War be exercised without Controul, but just so far, that Wrongs and Punishments may be equally balanced : And for these Reasons, and with these Limitations, it may be done without Injustice.

I. *What Spoil is just, and how far.*

^a *B. 2. ch. 2. § 9.*

^b *Vic. de Jure bel. n. 52. and 56.*

I. (1) Our Author has already recited the Passage of that Historian, which he has here in View, in the preceding Chapter, § 8.

2. But unless it be for some Advantage, it would be very foolish to do another a Damage, without any Profit to ones self. Wherefore wise Men always propose to themselves some Advantage thereby, the principal whereof *Onosander* has observed, ² *Let him destroy, burn, and lay waste his Enemy's Country : For the want of Money and Provisions shortens the War, as Plenty lengthens it.* To which agrees that of *Proclus*, ³ *It is the Duty of a good General to straiten his Enemies as much as possible.* And thus says *Curtius* of *Darius*, ⁴ *He expected that he should be overcome by Famine, having nothing to sustain him, but what he could get by Spoil and Plunder.*

3. And that Waste and Desolation cannot be condemned, which quickly forces an Enemy to Peace : This way of making Wars did *Halyattes* use against the *Milefians*, the *Thracians* against the *Byzantians*, the *Romans* against the *Campanians*, *Cape-nates*, *Spaniards*, *Ligurians*, *Nervians*, and *Menapians*. But if we rightly weigh the Matter, such Things are for the most Part managed rather out of Spite than wise Counsel : For very often either those inducing Reasons cease, or there are others more powerful, that advise to the contrary.

II. No wasting of Things that may be profitable to us, and out of the Enemy's Power.

II. 1. This happens first, when we have got such Possession of a Thing belonging to the Enemy, that he cannot any more enjoy the Fruits of it. To which the divine Law ¹ does properly refer, which allows wild Trees and unfruitful to be cut down, to make Fortifications and Engines of War ; but those that bear Fruit to be preserved for Subsistence, giving this Reason, because Trees cannot, as Men may, rise up in Arms against us. Which ² *Philo*, by a Parity of Reason, extends also to fruitful Fields ; and by a pathetical Fiction introduces the Law itself thus speaking to those who ought to observe it. *Why are you angry with Things inanimate, particularly*

² *Stratagem*. Cap. VI. (p. 15. Edit. Rigalt. 1590.) GROTIUS.

The Reader upon this Passage of *ONOSANDER'S* may see the Note of *JOHN CHOKIER*, p. 18, 19. of his Edition in 1610. but especially the first Part of *JANUS GRUTERUS'S* Dissertations, printed as a Supplement to the Edition of *REGAULT* in 1604. with this Title : *Varii discursus, sive prolixiores Commentarii ad aliquot insigniora loca TACITI atque ONOSANDRI.* Our Author perhaps might have made Use of this Collection : For almost all the Passages which he cites in this Chapter, are in it, (p. 138. & seq.) with others in a much greater Number than in *ALBERICUS GENTILIS, De Jure Belli*, Lib. II. Cap. XXIII.

3 *PHILO Judæus* insinuates that it is customary to ravage the Lands of the Enemy, that the Want of Necessaries may reduce them to surrender. *De Vit. contemplat.* (p. 891. D. E.) The same Author speaking of the Ravages occasioned by an Irruption of the Enemy, says it is a double Misfortune to those who are exposed to it, as their Friends on the one Side suffer by Famine, and the Enemy on the other profits by the abundance of Provisions he carries off. *De Diris*, (init. p. 930. A. Edit. Paris.)

4 *Quippe credebatur [Darius] inopiam debellari posse nihil habentem nisi quod rapiendo occupasset.* Lib. IV. Cap. IX. Num. 8.

II. (1) There is great Reason to believe, that this Law regards only the Siege of the Cities, which were in the Land of *Canaan*, intended for the Abode of the *Israelites*, as *Mr. LE CLERC* observes. So that it was not out of Consideration for the Conquered, that the Law-giver prescribed the Moderation here meant ; since the Conqueror not only might, but was bound in Duty to put all to the Sword, without Distinction of Sex or Age, in the Cities of the seven Nations devoted to utter Extirpation ; and in regard to the more remote Places, all the Favour the Besieged had to hope for, was that their Women and Children should be reserved for Slavery : Besides, it is doubtful, whether the male Infants were not included in the general Term of *Males*, for whom there was no Quarter, Ver.

13. What Probability is there then, that *GOD* should have in View any respect to the Goods of these People, over whose Lives he had given the *Israelites* such Power. This does not hinder however, in my Opinion, but that a good Argument may be drawn from hence to our Author's Purpose. For if the Creator and supreme *LORD* of Mankind did not approve, that the *Israelites* should lay waste without Necessity the Lands of the People, against whom he had armed them in an extraordinary Manner, and had made them as it were the Executors of his terrible Judgments ; much more would he not approve our doing so in ordinary Wars, often unjust, and undertaken without much Necessity, and wherein the Party, who boasts the most of the Justice of his Cause, is sometimes in the wrong.

2 *De creation. Magistrat.* (p. 734. C.) There is another Passage of that Jewish Author, which tho' long, merits a Place here. *MOSES*, says he, *Extends Moderation and Lenity so far, that next to rational Creatures he makes Beasts the Object of it ; and after them, even Plants ; of which we must now speak, as we have sufficiently explained what regards Men and all animate Beings.* The Lawgiver then forbids the cutting down of any Fruit Tree, the reaping of Fields of Corn before the Season, in a Word the spoiling of any of the Fruits of the Earth : And that in order that Mankind might have not only abundance of Food, and Things necessary for Life, but also of those for Pleasure. The Provision of Grain is indeed necessary for the Subsistence of Man, and the infinite Variety of Fruits, which the Trees bear, contributes to his Delight : Which Fruits also at certain Times of Dearth, may supply the Place of the most necessary Aliments. But *MOSES* goes farther : He even forbids wasting the Lands of an Enemy. He enjoins us to abstain from cutting down the Trees upon them, holding it unjust to discharge the Resentment, with which we are animated against Men, upon innocent Things. Besides which, it was his Design to teach us not only to think of the present, but extend our Views to the future, and to consider that in the Vicissitudes, to which all human Things are liable, it might easily happen, that those who are to Day our Enemies will to morrow be our Allies, by the Effect of an happy Conference. Now in this

larly those that are mild, and yield grateful Fruit? Do they, like Men, discover any hostile (or disobliging) Intentions against you? Do they deserve to be entirely rooted up, for what they do, or threaten to do against you? But they are very beneficial to the Conqueror, and afford a large plenty of Things immediately necessary, and even contribute to our Pleasures; Men do not only pay Tribute, but even Trees, and that of more Value in their proper Seasons, and also such as Man cannot live without. And Josephus³ to the same Purpose says: If Trees could speak, they would cry out, and reproach us with Injustice, for making them suffer the Punishment of War, who were no Occasion of it. And hence it is, in my Opinion, that the Pythagoreans have derived their Maxim,⁴ That we ought not to destroy or hurt a cultivated Plant or Fruit-Tree.

2. And Porphyry⁵ describing the Manners of the Jews (in his fourth Book of not eating living Creatures) esteeming their Custom to be (I suppose) the best Interpreter of their Law, enlarges it even to all Beasts serviceable to Husbandry, for he says Moses commanded to spare also these in War. But their Talmud Writings, and Hebrew Interpreters extend it yet farther,⁶ declaring that this Law ought to reach to every Thing that may be destroyed without Cause, as the burning of Houses, the spoiling of Eatables and Drinkables. The wise Moderation of Timotheus the Athenian General agreed with this Law, who (as Polycenus⁷ relates it) would not suffer a House or Village to be destroyed, or a Fruit-Tree to be cut down. There is a Law also in Plato,⁸ in his fifth Book *De Republica*, forbidding to waste Lands or burn Houses.

3. Much less ought it then to be allowed after a compleat Victory. Cicero⁹ blames the destroying of Corinth, though they had in a gross Manner abused the Roman Embassadors. And in another Place¹⁰ he calls that War, horrid, abominable, and spitefully malicious, which was made¹¹ against Walls, Houses, Pillars and Gates.

Case, it would have been cruel to deprive our Friends of necessary Things, of which they might not have made Provision for the future. The Antients have indeed said with great Reason, that we ought to live with our Friends in such a Manner, as if we were not ignorant that they might one Day become our Enemies, and on the contrary that we ought so to act in regard to those with whom we are at Variance, as if we had Reason to hope for a Reconciliation. By the first a Resource is preserved for our own Security, and we guard against having Cause to repent too late of our too great Facility in discovering more, than is proper, by our Actions and Discourse. A most important Maxim, which states ought also carefully to observe; in providing during Peace for what is necessary in War, and during War for what regards Peace: So that, on the one Side, they do not confide too much in their Allies, as if no Change could happen, to induce them to become Enemies, and on the other, not entirely despair of an Enemy, as if it were not possible for him to become a Friend. But tho' we ought not to do any Thing in favour of Enemies, in hopes of a Reconciliation, we should not therefore vent our Rage upon Plants and Trees. Nothing of that Kind is at War with us: On the contrary all such Things are at Peace, and conduce to our good. Fruit Trees especially and cultivated Plants are very necessary to us, as their Fruits serve for our Nourishment, or something equivalent to it. We ought not therefore to make War upon what neither would nor could do us any Hurt. We ought not to cut down, burn, or root up Things, which Nature herself takes care to form and raise by the Waters with which she moistens them, and the Temperature of the Seasons, which she regularly brings on, in order that each revolving Year should pay tribute to Men, as to so many Kings. That wise and good Mother gives perpetual Force and Vigour not only to Animals, but Plants, especially such as are cultivated, that require the greatest Care, and are not so fruitful as those that are wild, *De Humanitate*, (p. 712, 713.)

GROTIUS.

3 He extends the Prohibitions of that Law so far, that he does not seem to except even the Case,

wherein no other Wood could be found for forming the necessary Machines of War. *Antiq. Jud. Lib. IV. Cap. VIII. p. 130. B.*

4 *De Vit. Pythagor.* § 99. Edit. Kuster. See also *DIAGENES LAERTIUS, Lib. VIII. § 23.*

5 That Philosopher speaks of the Sect of the Essenes in particular. *De abst. Animal. Lib. IV. p. 394. Edit. Ludg. 1620.*

6 On the contrary, they are for having this Exception added: Unless the Fruit Trees are in a Suburbs, or hinder shooting and throwing Darts against the Enemy. GROTIUS.

See the learned SELDEN's Treatise, *De Jure Natur. & Gent. secundum discipl. Hebræorum, Lib. VI. Cap. XV.*

7 *Strateg. Lib. III. Cap. X. Num. 5.*

8 *De Repub. Lib. V. p. 471. A. Vol. I. Edit. H. Steph.*

9 *Nollem Corinthum [Funditus sublatam.] De Offic. Lib. I. Cap. XI. See also Lib. III. Cap. XI.*

10 *Sed quid ego vestram crudelitatem, &c. Orat. pro domo sua. Cap. XXIII.*

11 There is a remarkable Letter of Belisarius on this Subject to Totilas, Gothic. III. It was formerly esteemed an Effect of the Wisdom and Genius of great Politicians, to raise noble Structures; and to destroy them after they were built, the Part of Fools, not blushing to transmit to Posterity Tokens and Monuments of their Folly. It is manifest, that Rome is the biggest and most beautiful City of all the World (or that the Sun beholds) and that it could not arrive to that Greatness and Splendor, by the Labour of one single Man, nor in a short Time; but many Kings and Emperors, an infinite Number of illustrious Persons, many Ages, and a prodigious Mass of Treasure, had drawn thither, as other Things, so also the most curious Artificers in the World. Thus Rome was formed by little and little, such as you now see it, full of the Monuments which each of those that contributed to its Improvement, has left of his Wisdom and Ingenuity. Wherefore to ruin or destroy it, would be injurious to Mankind of all Ages;

Gates. *Livy* much commends the Mercy of the Romans, at the taking of *Capua*, that they did not exercise their Cruelty ¹² on the innocent Houses and Walls, by burning and demolishing them. *Agamemnon* says in *Seneca*,

¹³ *Equidem fatebor (pace dixisse hoc tuâ
Argiva tellus liceat) affligi Phrygas
Vincique volui : ruere, & æquari solo
Etiam arcuissem.—*

'Tis true, the Trojans (and I hope my Country
Forgives my Clemency) I thought to conquer;
But to apply th' Extremities of War,
Or raze their City, this I ne'er intended.

4. Indeed holy Writ informs us, that some Cities were by GOD's especial Command entirely rased, *Joshua* vi. even against that general Law which we have mentioned, the Trees of the *Moabites* were ordered to be cut down, *2 Kings* iii. 19. But that was not done in Hatred to the Enemy, but in just Detestation of their Impieties, which were either publickly notorious, or esteemed worthy of such Punishment in the Sight of GOD.

III. If there
be probable
Hopes of a
speedy Victory.

III. 1. This will likewise happen, where the Possession is yet in Dispute, if there be great Hopes of a speedy Victory, of which those Lands and Fruits will be the Reward. Thus *Alexander the Great*, as *Justin* relates it, hindered his Soldiers from wasting *Asia*, ¹ declaring to them, that they should spare their own, and not destroy those Things, which they came to possess. Thus *Quintius*, when *Philip* overrun *Thessaly*, wasting it with Fire and Sword, exhorted his Soldiers (as *Plutarch* ² informs us) to march thro' the Country, as if it were now entirely their own. *Cræsus* ³ advising *Cyrus* not to give up *Lydia* to be plundered by his Soldiers, tells him, *You will not ruin my Cities, nor my Lands, they are no longer mine, they are now become yours, they will destroy what is yours.*

2. They who do otherwise, may apply to themselves the Words of *Jocasta* to *Polynices* in *Seneca's Thebais*.

⁴ *Patriam petendo perdis : Ut fiat tua,
Vis esse nullam : Quin tuæ causæ nocet
Ipsam hoc, quod armis uris infestis solum
Segetesque adultas sternis, & totos fugam
Edis per agros : Nemo sic vastat sua.
Quæ corripit igne, quæ meti gladio jubes,
Aliena credis.*

*You ruin your Country whilst you seek it ; to make it yours
Its Being you destroy ; it defeats your Claim*

*Ages ; to rob our Ancestors of the Memory of their just Praise ; and future Ages the Pleasure of so glorious a Sight. Since Things then are thus, consider that one of these two must certainly happen ; either you will be conquered or Conqueror in this War. If you be Conqueror, then by destroying the City, you destroy not what is another's, but your own ; and by preserving it, you will enjoy the most beautiful Possession in the World : On the other Side, if you should be vanquished, the preserving the City of Rome will be a great Argument to incline your Conqueror to shew Mercy to you, but if it be destroyed your Affairs will be lost beyond any Hopes of Mercy. And you will not only get no Advantage by doing it, but you will have such a Name from all Mankind, as such a Fate deserves. So it is in your Will to have Fame make her Report of you ; for as the Actions of great Men are, so is their Reputation. See the Law of Frederick I. in *CONRAD. Abbot of Ursperg*, and concerning Frederick Count Palatine, *MELANTHON'S Chronicle*. *GROTIUS*.*

¹² *Ita ad Capuam res composita, &c. Lib.*

XXVI. Cap. XVI. Num. 11, 12.

¹³ *Troad. Ver. 276. & seq.*

III. (1) *Inde hostem petens milites, &c. Lib. XI. Cap. VI. Num. 1.*

² *Vit. T. Quint. Flamin. p. 371.* So *Gelimer*, and the *Vandals* under his Command when they besieged *Carthage*, avoided plundering, and laying waste the Country, preserving it as their own, as *PROCOPIUS* informs us, *Vandalic. Lib. II. init. (Cap. I.)* *HELMOLDUS* has a Reflection to the same Effect : *Nonne terra quam devastamus, nostra est ; & populus, quem expugnamus, populus noster est ? Quare ergo invenimur hostes nostrimet, & dissipatores veltigalium nostrorum ?* *Lib. I. Cap. LXVI.* See something of the same Kind in *BEMBO, Hist. Lib. IX. (Fol. 149. Ver. 1. Edit. Venet. 1551.)* and in *PARUTA, Lib. VI, concerning the Germans.*

³ *HERODOT. Lib. I. Cap. LXXXVIII.*

⁴ *Phæniss. (five Thebaid.) Ver. 558. & seq. Edit. Gronov.*

*To level, thus in Arms, the ripen'd Harvest ;
Is Fire and Sword, the Vengeance of an Enemy,
Applied to Spoil and Ravage what's ones own ?
No, our deadliest Foes we thus afflict.*

To the same Sense are the Words of ⁵ Curtius, *Whatsoever they did not waste, they owned to be their Enemies.* Agreeable hereunto is that which Cicero, in his Letters to Atticus, says against the Design that Pompey had formed of taking his Country by Famine. Upon this Account Alexander the *Isian* blames Philip (in the 17th Book of Polybius) whose Words Livy ⁶ has thus rendred : Philip *dared not engage in a fair Field-fight, nor come to a pitch'd Battle, but flying away burned and plundered Cities ; so that the Conquered rendered useless to the Conquerors what should have been the Recompence of Victory.* But the old Kings of Macedon did not use to do so, they used to come to a fair Engagement, to spare Cities as much as possible, that they might have the more wealthy Dominion. For it is not a strange Conduct, to make War in such a Manner, that at the same Time, we dispute the Possession of a Thing, we leave nothing for ourselves but War.

IV. 1. In the third Place, this happens, if the Enemy can be supplied elsewhere, either by Sea or Land. Archidamus in Thucydides, ¹ in his Speech to dissuade his Subjects the Lacedemonians from a War with Athens, puts this Query, What Hopes had they to succeed in the War, whether, because they excelled in Number of Soldiers, they pretended to waste the Athenian Lands ? But consider (says he) they have other Countries under their Dominion, (meaning Thrace and Ionia) and they might easily supply themselves by Sea, with whatsoever they wanted. Wherefore in that Case it were best to protect Husbandry even in the Frontiers of each Side : Which we have lately seen practised in the Wars of the Low-Countries, by paying Contributions to both Parties.

V. *If the Enemy can be supplied otherwise.*

2. And this is agreeable to the antient Custom of the Indians, among whom, as Diodorus Siculus ² relates, *Husbandmen are indemnified and as it were sacred, so that they follow their Labour even close by the Camp, and near the Troops.* And he adds, *They do not burn the Enemies Lands, nor cut down the Trees.* And again, *No Soldier will willingly wrong Husbandmen, but esteeming them as common Benefactors, forbear doing them any manner of Injury.*

3. Xenophon ³ informs us, that it was agreed between Cyrus and the Assyrian King, *That the Husbandmen should enjoy Peace, and that War should be made only against those that were in Arms.* Thus Timotheus, as Polyænus ⁴ relates, *Let out the fruitfullest Lands of the Country where he had entered with his Army :* Nay, (as Aristotle ⁵ adds) *sold the very Corn to his Enemies, and with that Money paid his own Soldiers.* Which Viriatus also practised in Spain, as Appian witnesseth. And this very Thing we have seen done in the aforesaid Low-Country War, with great Prudence and Profit, to the Admiration of all Foreigners.

4. These Customs do the Canons, which are full of Lessons of Humanity, propose to our Christian Imitation, as being obliged to, and professing more Humanity than others ; therefore they ⁶ enjoin us to put not only the Husbandmen beyond the hazard of War, but also their Cattle with which they plow, and their Seed which they carry to the Field ; it is undoubtedly for the same Reason that the Civil Law ⁷ forbids

to

⁵ *Nullum desperationis illorum magis indicium esse, quam quod urbes, quod agros suos urerent : Quidquid non corrupissent hostium esse confessi.* Lib. IV. Cap. XIV. Num. 2.

⁶ *In bello non congregi [Philippum] æquo campo, &c.* Lib. XXXII. Cap. XXXIII. Num. 11, 12.

IV. (1) Lib. I. Cap. LXXXI.

² Lib. II. Cap. XXXVI. p. 86. Edit. H. Steph. Cap. XL. p. 88.

³ *Cyrop.* Lib. V. Cap. IV. § 13. Edit. Oxon.

⁴ *Stratag.* (Lib. III. Cap. X. Num. 9.) PLUTARCH says the same Thing of the Megarians, *Quæst. Græc.* (XVII. p. 295. B.) *Totilas*, when he marched to besiege Rome, hurt none of the Peasants of Italy : On the contrary he commanded them to till the Land as before, paying him the or-

dinary Contributions. *PROCOPIUS*. *Gothic.* Lib. III. Cap. XIII. *CASSIODORUS* says, it is the highest Praise to those who defend a State by Arms, to act in such Manner during a War, that the Husbandmen should not discontinue their Labours in the Field : *Defensorum maxima laus est, &c.* Var. Lib. XII. Cap. V. *GROTIUS*.

⁵ *Oeconomic.* Lib. II. p. 507. A. Vol. II. Edit. Paris.

⁶ See the Canon cited at the End of § 10. in the preceding Chapter.

⁷ Besides the Advantage of Agriculture, Regard was had also to the Interest of the Revenue, which required, that the Debtors to it should not be rendered incapable of paying the Taxes in due Time : *Exsequutores, a quocumque judice dati, ad exigenda debita*

to take in pawn any Thing belonging to Agriculture. And it was formerly prohibited among the *Phrygians* and *Cyprians*, afterwards³ with the *Athenians*, and then the *Romans*, to kill a plowing Ox.

V. If the Things be of no Use for War.

V. There are some Things of that Nature, that they can no way contribute either towards the making or maintaining of a War, which Things even common Reason will have spared during a War. To this Purpose is the Speech of the *Rhodians* to *Demetrius*, the Taker of Towns, with regard to the Picture of *Ialytus* (one of the Founders of their Nation) translated by *A. Gellius*.¹ *What Reason can you have to desire to destroy so excellent a Peace, by burning our Houses? For if you vanquish us, and take the City, this Picture will also be entirely your own; but if you are forced to raise the Siege, pray consider, what a Disgrace it will be to you, because you could not overcome the Rhodians, you must needs make War with Protogenes a dead Painter.* *Polybius*² called it an Act of extream Madness to destroy those Things, which by being destroyed do not weaken the Enemy, nor advantage the Destroyer. Such are Temples, Portico's, Statues, and the like. *Cicero*³ much commends *Marcellus*, because he took such a particular Care to preserve all the Buildings of *Syracuse* both publick and private, sacred and prophane, as if he had been sent with an Army, rather to defend than take the City. And the same Author⁴ again, *Our Ancestors used to leave to the Conquered, what Things were grateful to them, but to us of no great Importance.*

VI. This especially ought to take in Things sacred, or there-
to belonging.
² Ch. 5. of this Book, § 2.

VI. I. But as this Maxim ought to be observed in regard to publick Ornaments, for the Reason aforesaid, so more especially in regard to Things dedicated to sacred Uses, for, although these also (as we have said^a elsewhere) are in some Sort publick, and therefore by the Law of Nations may be damaged or destroyed with Impunity, yet if no Danger can arise from the preserving of such Buildings, and their Appurtenances,¹ the Reverence due to holy Things may be a sufficient Plea, especially with those who worship the same GOD according to the same Law, tho' they may differ in Opinions and Ceremonies.

debita ea quæ civiliter possuntur, servos aratores, aut boves aratorios, aut instrumentum aratorium, pignoris causa de possessionibus non abstrahant, ex quo tributorum illatio retardatur. Cod. Lib. VIII. Tit. XVII. Quæ res pignori obligari possunt, &c. Leg. VII. See *Cujas*, *Observ.* IV. 20.

8 *ÆLIAN.* Var. Hist. Lib. V. Cap. XIV. See also *COLUMELLA*, *De Re Rust.* Lib. VI. Princ. *PORPHYRIUS*, *De non usu Animal.* Lib. II. (p. 173, & seq.) This was also the Custom in *Peloponnesus*, as *VARRON* informs us, *De Re Rustica.* Lib. II. (Cap. V.) In regard to the *Romans*, see *PLINY*, *Hist. Natur.* Lib. VIII. Cap. XLV. *VEGETIUS*, *De arte Veterinaria*, Lib. III. *GROTIUS*.

V. (1) *Mittunt Rhodii ad Demetrium*, &c. *AUL. GELL.* Noct. Attic. Lib. XV. Cap. XXXI. See *PLINY* upon this Head, *Hist. Natur.* VII. 38. XXXV. 10. and *PLUTARCH.* Vit. Demetr. (p. 898. E.) The Letter of *Belisarius*, which we have given above, § 2. Note II. includes the same Thought. *GROTIUS*.

2 The Passage will be cited below, at the End of § 7.

3 *Itaque ædificiis omnibus*, &c. In *Verr.* Lib. IV. Cap. I. IV.

4 *Apud eos autem quos*, &c. Ibid. Cap. LX.

VI. (1) It is, according to *POLYBIUS*, a Sign of excessive Folly to insult the Divinity, because you are angry with Men. Excerpt. *Peiresc.* That Author is in the Right: For, as the Emperor *Alexander Severus* said, it were better to pay the Divinity a religious Worship, whatever it be, in a Temple, than to give the Place to People, who make a Vicrualling-house of it: *Quum Christiani quemdam locum, qui publicus fuerat occupassent, contra Popinarij dicerent, sibi eum deberi, rescripsit, Melius esse, ut quomocunque illic Deus colatur, quam Popinariis dedatur.* *LAMPRIID.* Alex. Sever. (Cap. XLIX.) The famous *Hannibal* spared the Temple of *Diana*

at *Saguntum*, out of Respect for Religion: *Cui [Templo Dianæ Sagunti] pepercit, religione, inductus, Hannibal, &c.* *PLINY*, *Hist. Natur.* Lib. XVI. Cap. XL. *APPIANUS Alexandrinus* makes *Brutus* say, that it was the Custom of the *Romans* to leave even their foreign Enemies the Temples of their Gods. *De Bell. Civ.* Lib. III. (p. 516. Edit. H. Steph.) *PLUTARCH* relates, that the *Amphyctyons* objected to *Sylla's* Manner of treating them, the Moderation of *Flaminius*, *Manius Aquilius*, and *Paulus Æmilius*, the first of whom, when he had drawn *Antiochus* out of *Greece*, and the two others, after having conquered the Kings of *Macedonia*, not only spared the *Grecian* Temples, but adorned and enriched them with magnificent Presents. *Vit. Syll.* (p. 459. C. D.) The same Author praises *Agésilas* for a like Respect to sacred Places: And before him, the *Latin* Author, who had writ the Life of that famous King of *Lacedæmonia*, affirms the same of him, and also that he held it Sacrilege to hurt those who had taken Refuge in Temples, and thereby implored the Protection of the Gods: *Tamen ante tulit iræ religionem.* — *Itaque prædicabat, mirari se, non sacrilegorum numero haberi, qui supplicibus Deorum nocuissent; aut non gravioribus pœnis adfici, qui religionem minuerent, quum qui sana spoliarent.* [*CORNELIUS NEPOS*, *Agésil.* Cap. IV.] See also *VITRUVIUS*, *De Architect.* Lib. II. (Cap. VIII.) *DION CASSIUS*, Lib. XLII. *PLUTARCH*, *Vit. Cæsar.* (p. 720.) *J. BRODÆUS*, *Miscell.* Lib. V. (Cap. XXIX.) *Gabaon*, King of the *Moors*, tho' a Pagan, disapproved the Conduct of the *Vandals*, who profaned the Churches of the *Christians*, and made them make Amends for their Irreverence. He hoped, that the Impiety of those People would be punished by the God of the *Christians*, whoever he were; as *PROCOPIUS* informs us, *Vandalic.* Lib. I. (Cap. VIII.) *Chosroes*, King of *Persia*, tho' no more a Christian than the other, spared the Church of the

*Thucydides*² says, it was a Law observed by the Greeks in his Days, *When they invaded the Lands of an Enemy, they mutually spared holy Places.* When *Alba* was destroyed by the Romans,³ *Livy* says the Temples were preserved. And *Silius* in his 13th Book thus writes of the Romans taking *Capua*.

*Ecce repens tacito percurrit pectora sensu
Religio, & Sævas componit Numine mentes,
Ne flammam tædasque velint, ne templa sub uno
In cinerem sedisse rogo.*

*Religion, by insensible Degrees
Steals on the Mind, and soothes the Breasts of Conquerors,
Lest in the universal Wrack of Cities,
The Temples of the Gods fall undistinguish'd.*

The same *Livy*⁵ tells us, it was objected to *Q. Fulvius* the Censor, *That he had involved the People of Rome in the Crime of Sacrilege, by the Destruction of Temples, as if the immortal Gods were not the same in all Places, but that they of one Place should be honoured, and adorned with the Spoils of those of another.* But *Marcius Philippus* being arrived at *Dius*, caused the Troops to encamp near the very Temple of that City, in order to secure it and all that was in it from Hostilities. *Strabo*^b writes, that the *Tectosages*, who with others had robbed the Temple of *Delphos*, to appease the injured God, did consecrate those Spoils, with some Addition, when they returned Home.

^b *Geogr.* l. 4.
p. 188. Ed.
Par. Casaub.

3. To come now to the *Christians*. *Agathias* relates, that the *Franks* spared the Temples of the *Greeks*, as being themselves of the same Religion with them. Nay, it was customary to save the Persons of Men in respect to Churches, which (not to quote Examples of Heathen Nations, whereof there are many, for Writers⁶ call this Custom, *A Law amongst the Grecians*) *St. Augustin* thus commends⁷ in the *Goths*, *when they took Rome.* The⁸ Churches consecrated to (the Memory of) *Martyrs and Apostles*, in that general Devastation, secured all those that fled to them for

the *Christians* at *Antioch*. *Idem*, *Perfic.* Lib. II. (Cap. IX.) The Emperor *Justinian*, having found amongst the Spoils taken from the *Vandals*, the Things, which *Vespasian* had formerly taken out of the Temple at *Jerusalem*, and *Gizerich* had afterward carried from *Rome* into *Africa*, did not dare to keep them, and sent them back to *Jerusalem* to be placed in the Church of the *Christians*. *Idem*, *Vandalic.* Lib. II. (Cap. IX.) The Rabbi *BEN-JAMIN*, in his *Itinerary*, relates the Respect which the *Mahometans* have retained for the Place where the Bones of *Ezekiel*, and the three Companions of *Daniel* were buried. *GROTIUS*.

I do not find in any Part of *POLYBIUS*, the exact Words cited by our Author in the beginning of this Note. But there is the same Sense in two Passages of the *Excerpta Peiresciana*, p. 66. and 169.

² *Lib.* IV. Cap. XCVII.

³ *Templis tamen Deum (ita enim editum ab Rege fuerat) temperatum est,* Lib. I. Cap. XXIX. in fin.

⁴ *Punic.* Lib. XIII. Ver. 316. & seq. Edit. Drakenborg.

⁵ *Et obstringere religione Populum, &c.* Lib. XLII. Cap. III. Num. 9.

⁶ *Diod. Sicul.* Lib. XIX. Cap. LXXII. p. 705. Edit. H. Steph.

⁷ *Testantur hoc Martyrum loca, & Basilicæ Apostolorum, quæ in illa vastatione urbis ad se confugientes, suos, alienosque receperunt. Hucusque cruentus sæviebat inimicus: Ibi accipiebat limitem trucidationis furor: Illo ducebantur a miserantibus hostibus quibus, [qui] must undoubtedly be read in this Place: For *St. Augustin* distinguishes between those, who were moderate, and the less merciful; and *OROSIUS*, who relates the same Fact, Lib. VII. Cap.*

XXVIII. confirms this manner of reading:] *Etiam extra illa loca pepercerant, ne in eos incurrentes, qui similem misericordiam non haberent: Qui tamen ipsi alibi truces, atque hostili mare sævientes: Posteaquam ad loca illa veniebant, ubi fuerat interdictum, quod alibi jure belli licuisset, tota sæviendi refrænabatur immanitas, & captivandi cupiditas frangebatur.* *De Civit. Dei.* Lib. I. Cap. I. *ISIDORUS* has copied this Passage in *Chronic. Gotth.* upon the Year 447. The Fact happened under *Alarick*, an *Arian* Prince, of whom *CASSIODORUS* has preserved another memorable Action, by which he signalized himself upon the same Occasion. It was this; when the consecrated Vessels taken out of the Church of *St. Peter* were brought to him; he asked what they were, and upon being informed, he ordered them to be carried back into the Church by the same Persons, who had taken them out of it: *Nam, quum Rex Alaricus, &c.* *Var.* Lib. XII. Cap. XX. *GROTIUS*.

If *GRONOVIVS* may be believed, whose Note the Reader may see, there is nothing to be corrected in the Passage of *St. AUSTIN*.

⁸ The *Goths*, who besieged *Rome* under King *Vitiges*, spared also the same Churches, as *PROCOPIUS* informs us, *Gothic.* Lib. II. Cap. IV. Even the *Barbarians*, not *Christians*, found an Asylum in these sacred Places. See *ZOSIMUS*, Lib. IV. Cap. XL. in regard to the *Tomitani*. The *Swiss* have a good Law upon this Head, recited by *SIMLAR*, *De Rep. Helvet.* (p. 302. Edit. Elzevir.) See also *NICETAS*, in the History of the Emperor *Alexis Comnenus*, (Cap. IV.) and the Place where that Historian blames the *Sicilians* for having profaned the Churches of *Antioch*. In *Andronic.* (Cap. IX.) *GROTIUS*.

Refuge,

Refuge, whether Natives or Foreigners. So far the Rage of the Enemy extended without Controul, but here the Fury of Slaughter stopt; to these Places did the compassionate Soldiers convey their Prisoners, whom they had spared even without the Bounds of these Sanctuaries, from the Fury of their own Companions, that had less Tendernefs than themselves; and they who otherways were inhumanly cruel, as soon as ever they came near any of those Places, where they were forbid to make use of their Right of War, immediately restrained their Eagerness to kill, and their Desire of making Prisoners.

VII. *Also burial Places.*

VII. 1. What I have said of sacred Things, the same may also be understood of Sepulchres, and even of Monuments that have been erected in Honour of the Dead. For even those (tho' the Law of Nations hath not exempted them from the Fury of the Conqueror) cannot be violated without Breach of common Humanity. The Lawyers maintain ¹ that whatever engages a religious Respect to burial Places, ought to be of very great Weight. There is a pious Saying of *Euripides* in his *Troades*, in regard to Sepulchres, as well as sacred Things,

² ΜῶρϞ ἡ θνητῶν ἕσις ἐκπορθεῖ πόλεις,
Ναῖς τε τύμβος θ' ἱερὰ τῶν κεκμηκότων,
Ἐρημία δὲς αὐτὸς ὕπερον.

*Whoever ravages the silent Dead,
Or impiously profanes their sacred Urns,
Unwise I'll call him; for he ne'er reflects,
That his own Dust may once be so disturb'd.*

Apollonius Tyanens ³ thus interpreted the Fable of the Giants fighting against Heaven, ὑβρίσαι εἰς τὰς νεῶς αὐτῶν, καὶ τὰ ἔδη, *That they violated the Temples and Habitations of the Gods.* *Hannibal* is called sacrilegious by *Statius*, ⁴ for burning the Altars of the Gods.

2. *Scipio*, at the taking of *Carthage*, presented his Soldiers with large Donatives, χωρὶς τῶν εἰς τὸ Ἀπολλώνειον ἀμαρτόνων, says *Appian*, ⁵ *Except those who had profaned the Temple of Apollo.* The Trophy erected by *Mithridates*, *Cæsar* (as *Dion* ⁶ relates) durst not demolish, as consecrated to the Gods of War. *Marcus Marcellus* ⁷ (as *Cicero* observes in his fourth Oration against *Verres*) would not out of Conscience touch those Things which Victory had rendered profane. And the same Author ⁸ adds, that there were some Enemies, who in War observed the Right of Religion, and of Customs. And he in another Place calls the Acts of Hostility which *Brennus* exercised against the Temple of *Apollo*, an ⁹ abominable War. *Livy* ¹⁰ calls the Action of *Pyrrhus* in plundering the Treasure of *Proserpine*, vile and insolent against the Gods. So does *Diodorus* ¹¹ that of *Himilco*, ἀσέβειαν, καὶ εἰς θεῶς ἀμαρ-

VII. (1) *Nam summam esse rationem, quæ pro religione facit.* Digest, Lib. XI. Tit. VII. De Religiosis & sumptibus funerum, &c. Leg. XLIII.

2 Ver. 95. & seq.

3 PHILOSTRAT. De Vit. Apoll. Tyan. (Lib. V. Cap. XVI. Edit. Olear.) Thus DIODORUS SICULUS explains another antient Fable in this Manner, I mean that of *Eropeus*. GROTIUS.

It was in the *Excerpta*, published by HENRY DE VALVIS, our Author found the Passage he speaks of. But the Fable, which the Historian explains, is not there: He only relates that *Eropeus*, King of *Sicyone*, destroyed Temples and Altars: And he calls that, making War upon the Gods. The Passage is: Ὅτι Ἐρωπεὺς βασιλεὺς, &c. p. 221.

4 *Præcipue quum sacrilegus [Hannibal] face miscuit arces
Ipsius [Herculis]*

Sylv. Lib. IV. Sylv. VI. Ver. 82. Our Author, who does not mark the Place from whence he took these Words, probably quoting by Memory, changes

arces into aras, and makes the Poet say: Deum face miscuit aras.

5 De Bell. Punic. p. 83. Edit. H. Steph.

6 Lib. XLII.

7 The Passage has been cited above, Chap. V. of this Book, § 2. Note 2.

8 A little before: Quæ [ædes Minervæ] ab eo [Verre] sic spoliata atque direpta est, non ut ab hoste aliquo, qui tamen in bello, religionis & consuetudinis jura retineret, sed ut a barbaris prædonibus vexata esse videatur. In Verr. Lib. IV. Cap. LV.

9 Quod contigisse Brenno dicitur, ejusque Gallicis copiis, quum fano Apollonis Delphici nefarium bellum intulisset. De Divinat. Lib. I. Cap. XXXVII.

10 Qui [Pyrrhus] quum ex Sicilia rediens Locros classe præterveheretur, inter alia sæda—facinora—thesauros quoque Proserpinæ intactos ad eam diem, spoliavit—Quæ tantâ clade edoctus, tandem Deos esse superbissimus Rex, pecuniam omnem conquistam in thesauros Proserpinæ referri jussit, Lib. XXIX. Cap. XVIII. Num. 4, 6.

11 Lib. XIV. (Cap. LXIV. p. 430. Edit. H. Steph.)

τημα,

τιμὰ, impious, and sinful against the Gods. The same *Livy* ¹² terms the War of *Philip* execrable, as if made against both the celestial and infernal Deities; nay, he calls it Madness and a Series of Crimes. And *Florus* on the same, ¹³ *Philip, contrary to the Right of Victory, vented his Cruelty on the Temples, Altars, and even the Sepulchres of the Dead.* *Polybius* ¹⁴ speaking of the same, passes this Judgment, *Who can call it any Thing else but an Act of downright Madness, to destroy those Things which can be of no Advantage to us, nor Prejudice to our Enemies, particularly Temples, Images, and such like Ornaments?* And here he doth not permit the Law of Retaliation, as a sufficient Excuse.

VIII. I. Tho' it be not properly my Design to enquire, what it is advantageous to do or not to do, but to reduce the extravagant Licence of War to what natural Equity allows, or what is best among Things lawful; yet Vertue itself, little esteemed in this Age, ought to forgive me, if, whilst she is by herself, neglected, I endeavour to render her valuable on the account of her Advantages. First then, Moderation observed in preserving those Things which do not lengthen out the War, takes from the Enemy a powerful Weapon, Desperation. *Archidamus* thus speaks in *Thucydides*, ¹ *Look upon the Enemy's Country as an Hostage, and so much the surer the better it is cultivated, and with the more Reason to be spared, lest Despair should render the Enemy more invincible.* ² The same was the Advice of *Agefilaus*, when against the Opinion of the *Achæans*, he gave the *Acar-nanians* free Liberty to sow their Corn, saying, the more they sowed, the more desirous they would be of Peace. And to this Purpose in the Satyr,

VIII. The Advantages mentioned, which arise from this Moderation.

³ *Spoliatis arma supersunt.*

The Plunder'd still have desperate Arms.

Livy tells us, when the *Gauls* ⁴ had taken *Rome*, their chief Commanders would not let all the Houses be burnt; that what they left standing of the Town, might be as a Pledge to bend the Minds of the Besieged.

2. Besides, the sparing of an Enemy's Country during a War, looks as if we were pretty confident of Victory. And Clemency is of itself proper to soften and pacify the Minds of Men. *Hannibal* (according to ⁵ *Livy*) wasted none of the Lands of the *Tarentines*, not out of Moderation, either in General, or Soldiers, but to gain the *Tarentines* to his Party. For the same Reason did *Augustus Cæsar* ⁶ forbear plundering *Pannonia*. *Dion* gives the Reason, *He hoped to win them without Blows.* And *Timotheus* by doing what we have before mentioned of him, proposed to himself (as *Polyæ-nus* ⁷ relates) among other Things, to gain the Affections of his Enemies. *Plutarch* ⁸ speaking of the Moderation of *Quintius*, and the Romans that were with him (in Greece) adds this, *They quickly reaped the Benefit of this Forbearance, for as soon as he came into Thessaly, the Cities readily yielded to him. The Greeks also which dwelt within the Thermopylæ, earnestly desired his coming; and the Achæans renouncing the Friendship of Philip, immediately confederated with the Romans against him.* *Frontinus* ⁹ informs us, that a City of the *Lingones* having escaped the plundering they were afraid of, in the War made by *Domitian*, under

¹² *Adeo omnia simul divina humanaque jura poluerit, ut priore populatione cum infernis Diis, secunda cum Superis, bellum nefarium gesserit.* Lib. XXXI. Cap. XXX. Num. 4. *In Deos superos inferasque nefanda ejus scelera, &c.* Ibid. Cap. XXXI. Num. 3. *Præbuit huic furori materiam, &c.* Cap. XXVI. Num. 11.

¹³ *Quum ille [Philippus] ultra jus victoriæ in templa, aras, & Sepulcra ipsa sæviret,* (Lib. II. Cap. VII. Num. 4.) *POLYBIUS* relates, and at the same Time condemns in the strongest Terms, a like Action of *Prusias*, King of *Bithynia*. The Passage is in *SUIDAS*, at the Word *Προσέλας*, and in the *Excerpta Peiresciana*, (p. 169. Edit. Paris. p. 1468. Edit. Amstel.) *GROTIUS*.

¹⁴ Lib. V. Cap. XI.

VIII. (1) Lib. I. Cap. LXXXII.

² *XENOPH. Hist. Græc.* Lib. IV. (Cap. VI. § 13. Edit. Oxon. (*PLUTARCH* also mentions this

in his Life of *Agefilaus*, (p. 608. B. *GROTIUS*;

³ *JUVENAL* viii. 124.

⁴ *Et non omnia concremari testâ, &c.* Lib. V. Cap. XLII. Num. 2.

This is an Imitation of the Passage in *THUCYDIDES*, cited in Note 1. of this Paragraph, as *MATTHIAS BERNEGER* pretends in his *Observationes Miscellæ*, published at *Straßburgh* in 1669. *Obf. XII.* where he says many Things, and alledges many Authorities entirely the same as in this Place, without however quoting our Author, who had writ long before him.

⁵ *In Tarentino domum agro pacatum, &c.* Lib. XXIV. Cap. XX. Num. 10.

⁶ Lib. XLIX. p. 472. D. E. Edit. H. Steph.

⁷ *Strateg.* Lib. III. Cap. X. § 9.

⁸ *Vit. Flamin.* p. 371. D.

⁹ *Auspiciis Imperatoris Cæsaris Domitiani, &c.* *Strateg.* Lib. IV. Cap. III. Num. 14.

the Conduct of *Cerealis*, against *Civilis* the *Batavian*, and his Associates; *Because beyond their Expectation, they had lost nothing of their Goods, submitting to his Obedience, they furnished him with 70.000 Men well armed.*

3. Contrary Counsels have met with contrary Success. *Livy* ¹⁰ gives an Instance in *Hannibal*, Giving himself up to Covetousness and Cruelty, he destroyed what he could not keep, that he might leave nothing to the Enemy but wasted Lands. And this Counsel was wretched both in the beginning and in the End. For he not only lost the Affections of those whom he thus barbarously used, but of all others also, who were afraid of being exposed to the like Desolation.

4. I readily agree to what has been observed by some Divines, that it is the Duty of supreme Powers, and of Commanders who desire to be thought *Christians* by *G O D* and Man, to prevent the merciless plundering of Towns, and the like Acts of Hostility, as cannot be done without infinite Loss to Multitudes of innocent People, and be but of little Advantage in regard to the principal Affairs of War. Such Sort of Violence is almost always contrary to Christian Charity, and commonly to Justice itself. There is certainly a greater Bond among Christians, than there was formerly among the *Grecians*, in whose Wars it was enacted by a Decree of the *Amphietyones*, ¹¹ that no *Grecian* City should be pillaged. And some antient Writers ¹² affirm, that *Alexander* the *Macedonian* repented of nothing more than his destroying of *Thebes*.

¹⁰ *Præcepta in avaritiam & crudelitatem, &c. male obita legat.* p. 262. A. Edit. Basil. 1572. Lib. XXVI. Cap. XXXVIII. Num. 3, 4.

¹² See *PLUTARCH*, in the Life of that famous

¹¹ This the Orator *ÆSCHINES* informs us: *De Conqueror*, p. 671. B.

C H A P. XIII.

Moderation about Things taken in War.

I. That so much of the Goods of the Enemies Subjects taken in War, may be detained, as comes to the Value of what is due to us.

I. 1. **B**UT the taking away of our Enemies Goods in a just War, is not to be reputed wholly innocent, or clear from the Obligation of Restitution. For ¹ if we respect that which is done rightly, it is not really lawful to take, or keep from the Enemy more than may be justly due from him, except what Things (beyond the same due) we are obliged to detain for our own necessary Security; but when the Danger is over, they are also to be restored, either in Kind, or to the full Value; according to the Principles we have laid down in the second Book, Chap. II. For what we may lawfully do with the Goods of those that are at Peace with us, we may do it much more to those of our Enemy. This then is a Sort of Right to take, without a Right of acquiring.

² Chap. 2. of this Book.

2. But since a Debt may arise to us, either from the Inequality of Things, ² or by way of Punishment, we may on either of these accounts seize on the Goods of the Enemy, but with some Difference; for as we said ² before, from that former Obligation, not only the Goods of the Debtor, but also those of his Subjects by the allowed Law of Nations (as by way of Suretyship) stand engaged; which Law of Nations we look upon to be of another Kind, than that which consists in a bare Impunity, or of which the Use is maintained and authorized only externally, by the Effect of a Sentence, whether just or unjust. For as by our own personal Consent, our Dealer does not only acquire an external Right, but also an internal one; (that

I. (1) See the Opinion of Pope *Innocent* related by *BEMBO*, *Hist.* Lib. I. *GROTIUS*.

This was Pope *Innocent* VII. whose Nuncio's declared in his Name at *Trent*, that the Emperor *Sigismund*, having been the Aggressor in the War with the *Grisons*, and the *Venetians* at great Expences to support that War; the latter had a Right to keep two Forts, which they had taken from the Emperor: But however, that the Holy Father prayed the Se-

nate of *Venice*, that they would consent to restore those Places, to avoid giving Occasion for a Rupture between the Emperor and the Holy See, &c. *Hist. Venet.* Lib. I. Fol. 12. Edit. *Venet.* 1551.

² The *Romans* condemned *Prusias*, King of *Bithynia*, not only to make *Attalus*, King of *Pergamus* amends, but to pay him a Sum of Money, by way of Penalty. *APPIAN.* *Alexand.* De Bell. *Mithridat.* (p. 172, 173. Edit. *H. Steph.*)

is, which he may in Conscience make use of.) So also by a certain general Consent, which virtually comprehends in it, the Consent of each Individual. In which Sense the Law is called ³ *πόλεως συνθήκη κοινή*, *A general Convention of the State*. And it is the more probable, that it was thought proper by Nations, that in such a Case, such a Right might be allowed, because this Law of Nations ⁴ was intended, not only to prevent greater Mischiefs, but also to enable every Person to recover his Due.

II. But if the Prince's Debt be penal, I do not see that by the Consent of Nations, such a Right is allowed on his Subjects Goods. For such an Obligation upon another Man's Goods is odious, and therefore not to be extended beyond the manifest Intention of those who authorise it. ¹ Besides, there is no Reason of Utility so weighty, as could have induced Nations to establish in regard to the latter Sort of Debt, what they established in regard to the former. For that which is due to us on account of any Damage, makes Part of our Goods; but not that which is due to us in form of Punishment; so that the Prosecution of the latter may, without any Damage, be omitted. Neither does what I have already ^a mentioned of the *Attic* Law at all contradict it: For in that Case Men stood engaged not strictly because the State could be punished, ² but only to force the State to do what it ought to do; that is, to judge the Guilty: Which Obligation founded on a Duty, has Relation to the former Sort of Debt not to the latter. For it is one Thing to be obliged to punish, and another Thing to be liable to Punishment. Tho' this is commonly the Consequence of an Omission about that; but still they are two different Things, since the one is the Cause, and the other the Effect. Therefore the Goods of the Enemies Subjects cannot be acquired under the Notion of Punishment, but only those of Offenders themselves, among whom are included the Magistrates, that do not (according to their Duty) punish Offences.

III. Moreover, the Goods of an Enemy's Subjects may be taken and acquired, not only to reimburse ourselves of the primary Debt, which was the Occasion of the War; but also to make Satisfaction for the subsequent Charges, according to what we have said in the beginning of this Book. And thus we must understand what some Divines have written, that Things taken in War are not to be compensated by the principal Debt. For this is to be understood, till, according to sound Judgment, Satisfaction be made for the Damage done in that War. Thus in the Treaty with *Antiochus*, the *Romans* (as *Livy* ¹ relates) judged it equitable, that the

II. But not for the Punishment of another Man's Crime.

^a *Ch. 2. § 3. of this Book.*

III. By Debt is here understood the Charges in War. Examples of this.

³ See above, *B. II. Chap. XI. Num. 5.*

⁴ We have shewn above, *Chap. II.* of this Book, § 2. *Note 1.* that this is founded upon Reasons independent of this Consent of Nations, which is supposed, but not proved.

II. (1) These Reasons would only prove, that so much Rigour ought not to be used with regard to the Subjects for the latter as the former Sort of Debt. For if there be any just War merely penal, as our Author acknowledges there is, and that in such War, there be no Means of getting Satisfaction for the Offence received, or the Crime committed, without having recourse to the Effects of the Subjects themselves, who have no Share in it, and without keeping those Effects; I see no Reason, why the Subjects in that Case should not answer for the Fact of the State, as well as upon Refusal of what is Due, for Instance, by Virtue of a Treaty. The Reasons, which I have alledged elsewhere, founded upon the Constitution itself of Civil Societies, (*Chap. II.* of this Book, § 2. *Note 1.*) subsist in this Case in all their Force, and that without having Occasion for a tacit Consent of Nations.

² But even by seizing these Persons, it was supposed at least, that the State might render itself culpable by a Refusal to do Justice, without which it would not have been necessary to have proceeded so far. Besides, when the State had actually refused to punish or deliver up the Murderer, and had thereby rendered itself worthy of Punishment, without doubt the Persons, who had been seized on that

Account, were not released: Otherwise to what Purpose would they have been seized? Why then might the Liberty of the Subjects be answerable for the Crime of the State, rather than their Effects? Are the latter dearer to them than the former? It is in vain to say, that the Subjects were only deprived of their Liberty for a Time, that is, till the State had done what it ought. For it might easily happen, that the Prisoners might die before that: And it will be said also, in regard to Goods, that they are seized till the State has made, either out of its own Effects or otherwise, a Satisfaction answerable to the Punishment it deserves.

III. (1) *Ea, quæ Legato magna ad pacem impetrandam videbantur, parva Romanis visa. Nam et impensam, quæ in bellum facta esset, omnem præstare Regem æquum censebant; cujus culpa bellum excitatum esset.* Lib. XXXVII. (Cap. XXXV. Num. 8.) POLYBIUS mentions this, *Excerpt. Legat.* XXIII. The People of *Asia* were condemned to the same Thing by *Sylla*, as APPIANUS ALEXANDRINUS relates, *De Bell. Mithridat.* (p. 213. Edit. H. Steph.) The King of *Poland* alledges this Custom in his Favour. THUANUS, *Hist.* Lib. LXXIII. upon the Year 1591. The Scholiast of HOMER explaining wherein the Amends demanded by the *Greeks* from the *Trojans* for the Expences of the War consisted, makes it the Moiety of the Riches of the City. In *Iliad.* Lib. III. (Ver. 286.) GROTIUS,

King should bear the Charges of the War, who by his Fault had been the Occasion of it. So *Justin*² calls it a *reasonable Condition*. The *Samians* are condemned in *Thucydides*,³ To bear the Charges of the War. And elsewhere we find a great Number of the like Examples. But whatsoever is justly imposed on the Conquered, may be exacted in a just War.

IV. *Humanity bids us not use this Right to the utmost.*

IV. 1. But we must observe, which we have elsewhere mentioned, that the Rules of Charity reach farther than those of Right. He that abounds in Wealth is guilty of gross Inhumanity, if he strip his poor Debtor of all that ever he is worth, by the Rigour of the Law, to satisfy his own Debt; but more particularly, if that Debtor contracted that Debt by his Kindness to another; as if he had engaged for his Friend, but had received none of the Money to his own proper Use. *Very miserable is the Condition of a Security*, says *Quintilian the Father*. Yet such a hard hearted Creditor acts nothing against Right, properly so called.

2. Wherefore² Humanity requires us to spare the Goods of those who are in no Fault concerning the War, and who are no otherwise concerned than by Way of Suretyship, which we may better be without than they; but especially if it appear, that they shall receive no Reparation for them from their own State. Agreeably to this, said *Cyrus* to his Soldiers, at the taking of *Babylon*,³ *What ye get (from your Enemies) is justly your own, but if you leave them any Thing, it will be an Act of Humanity*.

3. This is also to be observed, since this Right of seizing the Goods of innocent Subjects is but Subsidiary, or by Way of Suretyship, as long as there are any Hopes of recovering our own from the principal Debtor, or from those who, by refusing to render Justice, make themselves Debtors, to prosecute those who are wholly innocent, tho' it does not contradict the Rules of strict Justice, yet it is far distant from the Rule of Humanity.

4. Examples of this Humanity are very frequent in History, especially the *Roman*; as when, upon conquering the Enemy, their Lands were returned to them,⁴ upon this Condition, that they should from thenceforth belong to the conquered State. Or when a small Part of those Lands were, for Honour's Sake,⁵ left to

² *Impensas belli lege justa suscepturus* [*Perseus*] *Lib. XXXIII. Cap. I. Num. 5.* So our Author cites this Passage, I know not from what Edition: For all that I have seen say without any Variety of Reading whatsoever: *Lege VICTI*. That is to say, according to the Condition generally imposed on the Conquered by the Victor.

³ *Lib. I. Cap. CXVII. Edit. Oxon.*

IV. (1) *Etiam quum istud periculum est Sponsoris, miserabile est: Bonitate labitur, humanitate conturbat.* [Declam. CCLXXIII.] The same Author adds, that the Creditor cannot, with Honesty, sue a Surety, unless there is no Means of recovering the Debt from the Principal himself. *Non enim aliter, salvo pudore, ad Sponsorem, venit Creditor, quam si recipere a Debitore non possit.* He has Reason for saying, *salvo pudore*, with Honesty; for as *CICERO* observes, there is a Kind of Shame and Dishonour in suing a Surety. *Et si Sponsores adpellare, videtur habere quamdam, δυσωπτιαν.* *Lib. XVI. Epist. ad Attic. XV. GROTIVS.*

What our Author observes here is the more proper, as, in *CICERO's* and *QUINTILIAN's* Time, the Creditor could chuse whether he would sue the Security or the Principal first. But the Emperor *Justinian* abolished that Permission, and decreed in his *Novel. IV. Cap. I.* that the Surety should not be proceeded against, except in Default of the principal Debtor. See the *Julius Paulus* of Mr. *NOODT, Chap. XI.* where he cites several Examples of this Kind.

² *Ptolemy* having gained a Victory over *Demetrius*, the Son of *Antigonos*, sent back his Tent, and the rest of his Baggage, with the Money also

which he had taken from him, telling him, that their Dispute was for Empire and Glory, and not for every Kind of Things. This *PLUTARCH* relates, in the Life of *Demetrius*, (p. 891. A. The last Words of which Passage are cited above, in in *Chap. XI. of this Book, § 6. Num. 2.*) See also what *Sancho King of Navarre* did, in *MARIANA, Hist. Lib. XI. Cap. XVI. GROTIVS.*

³ *XENOPHON, De Cyri Instit. Lib. VII. Cap. V. § 26. Edit. Oxon.*

⁴ *Et TREBATIUS ait agrum, qui hostibus devictis ea conditione concessus sit, ut in civitatem veniret, habere adluvionem, neque esse limitatum, &c. Digest, Lib. XLI. Tit. I. De acquir. rerum Domin. Leg. XVI.* The Lands spoken of in this Passage, were not purely and simply restored, but upon Condition of paying a certain Tribute, which was exacted from the Body of the conquered State, and not from every individual; for which Reason the Lands are said to be given to the State. See the Notes of the late Mr. *GOES* upon the *Auctores Rei Agrariæ*, p. 198.

⁵ *Item si forte ager fuit, &c. Digest. Lib. VI. Tit. I. De Rei vindicat. Leg. XV. § 2.* It relates to some private Persons, to whom this Mark of Distinction was given, when the Rest of the Lands were divided amongst the Soldiers. An ancient Author speaks of it thus, *Nec tamen omnibus personis victis ablatis sunt agri: Nam quorundam dignitas aut gratia, aut amicitia, victorem ducem movit, ut eis concederet agros suos.* *SICULUS FLACCUS, De conditionib. agror. p. 16. Edit. Goes.* See *CUJAS*, upon the Law here quoted, *Recit. in Digest, p. 278, 279. Edit. Fabrott.*

the antient Possessors. Thus *Livy* tells us, that the *Veientes* ⁶ were punished by *Romulus*, with the Loss of part of their Lands only. So *Alexander* the *Macedonian* restored their Lands to the *Uxii* under a Tribute. Thus we often read that surrendered Cities were not pillaged. And we said before, ^a that not only the Persons, but also the Goods of Husbandmen, were by a laudable Custom, and conformable to the Canons, spared, at least with a Tribute laid upon them; and a Liberty of Trade was allowed to Merchants, upon their paying Custom for their Commodities.

^a Chap. 12.
of this Book,
§ 4. Num. 3.

⁶ APPIANUS ALEXANDRINUS says in general, that the antient *Romans* acted in this Manner, with Regard to their conquered Enemies. *De bell. Civ. lib. II.* (p. 516. Edit. H. Steph.) We find

in History, that the *Vandals* observed the same Maxim in *Africa*, and the *Goths* in *Italy*. GROTIUS.

C H A P. XIV.

Of Moderation concerning Captives.

I. 1. **I**N what Places the taking of Men Prisoners, and making them Slaves, is yet allowed, if we respect internal Justice, it is to be thus limited; that is, it may be so far lawful, till Satisfaction be made for the Debt, either principal, or accessory; unless it should happen, that the Persons taken be guilty of such Crimes as may justly forfeit their Liberty. Hitherto therefore, and no further, he that wages a just War, has a Right over the Subjects of his Enemy taken Prisoners, and a Power to transfer it firmly to others.

I. How far, in Conscience, we may make Prisoners of War.

2. But we are taught by Equity and Humanity to put the like Differences, as before ^a observed, when we treated concerning killing our Enemies. *Demosthenes*, in his Epistle for *Lycurgus's* Children, highly commends *Philip* of *Macedon*, because that he did not make all that were found among his Enemies Slaves. ¹ For he did not think to use all alike, either just or honest; but duly weighing the Merits of each Person, he acted rather the Judge (than Conqueror).

^a Chap. 11.
of this Book,
§ 4. & seq.

II. 1. But ¹ we must observe again here, that the Right which arises, as it were, ² from Suretyship for a State, is not of so large an Extent, as that which is derived from the personal Offences of those that are made ³ Slaves of Punishment, as they are called. Whereupon a certain *Spartan* ⁴ said he was a Prisoner, but not a Slave.

II. What may be done to Slaves by the Right of internal Justice.

I. (1) (P. 714. Edit. Basil. 1572.) *Alexander the Great*, that Prince's Son, when he took the City of *Thebes*, excepted out of the Number of Prisoners that were to be made Slaves, the Priests, and such as had not given their Consent to the publick Ordinances made against him. Which *PLUTARCH* tells us in his Life, (p. 670. E.) GROTIUS.

II. (1) There is here, in the Original: *Sed primum notandum est*, &c. In the first Edition this was annexed to Num. 2. of the preceding Paragraph; the Author added afterwards what follows, without observing, that he had left a Connection here, which did not agree to what was put between. This I have altered, and take Notice of it, as an Instance of the small Amendments it was necessary to make in several Places, which it would have been too tedious to specify.

2 See the foregoing Chapter, § 1, and 2.

3 *Servi pœnæ*. A Term of the *Roman* Law, for which this is the Reason and Foundation. It was of old the Privilege of all the *Roman* Citizens,

as such, not to be deprived either of their Lives or Liberty, but by their own Consent. The Abuse of this Privilege, having produced great Licentiousness and horrible Disorders, Means were found to elude it by a Fiction of Right. When a *Roman* Citizen had committed a Crime that merited Death, or some other Punishment, amounting to a Privation of Liberty, he was not condemned as a Citizen, but before Condemnation declared to be no longer a Citizen; he was considered as a Slave, and had the Sentence executed upon him accordingly. See the *Probabilia Juris* of Mr. NOODT, Lib. III. Cap. XII. and the Observations of GRONOVIVS, Lib. I. Cap. VIII. p. 77. & seq.

4 *PLUTARCH*, *Apophthegm.* p. 234. C. Vol. II. Edit. Wech.] *PHILO* the Jew, speaking of those who have fallen into the Hands of Pirates, or have been taken by the Enemy, says, that the Laws of Nature, superior to those established amongst Men, declare such Persons free, tho' a Father or a Son are obliged to ransom them: (*Lib. Quod omnis Probus liber*, p. 870. E. Edit. Paris.)

a Slave. For if we rightly consider the Thing, this general Right over Prisoners in a just War, is not greater than that which a Lord hath over those Slaves, who by Reason of Poverty have sold themselves to him; excepting, that the Case of those is far more deplorable, who are brought into this Condition, not by their own proper Fact, but by the Fault of their Governors, ⁵ *It is a dreadful Thing* (says *Isocrates*) *to be made a Slave by the Right of War.*

2. This Bondage then is a perpetual Obligation to serve the Master, for a perpetual Maintenance. *Chrysippus's* ⁶ Definition does very well agree with this Sort of Slaves, *A Slave is a perpetual Hireling.* And the Law of the *Hebrews* does directly compare him to a Hireling, who compelled by Necessity, has sold himself for a Slave, *Deut. xv. 18. Levit. xxv. 40, 53.* and will have his Ransom paid by his Labour, ⁷ just as the Fruits of Land sold, shall redeem it for the antient Owner, *Lev. xxv. 49, 50.*

3. There is then a vast Difference between what may be done to a Slave by the Law of Nations, and what by natural Right. As we have it in the afore-quoted Place of *Seneca*, ⁸ *Tho' it be lawful to do any Thing to a Slave, there is something which the common Right of Animals forbids to be done to the Man.* So in *Philemon*,

⁹ *Κὰν δὲ λῶν ἦν τις εἰδὲν ἡτίον, δέσποζα
Ἀνθρώπου ἕτός ἐστιν ἂν ἄνθρωπος ἦ.*

*What tho' in Servitude, my Master,
He is still a Man as much as ever.*

So *Seneca*, in another Place, ¹⁰ *Are they Slaves? Yet they are Men. Are they Slaves? Yet our Companions. Are they Slaves? Yet our Friends. Are they Slaves? Yet fellow Slaves.* And what we read in *Macrobius* ¹¹ has the same Meaning with that of *St. Paul*, *Coloss. iv. 1. Masters, render to your Servants what is just and right, knowing that you yourselves have a Master in Heaven.* And in another Place he advises Masters not to terrify them with Threatnings, for the same Reason before-mentioned; *Because we have also a Master in Heaven, with whom is no Respect of Persons.* *Ephes. vi. 9.* In the Constitutions attributed to *Clemens Romanus*, we are advised, *Be not too* ¹² *severe to thy Man or Woman Slave. Clemens Alexandrinus* ¹³ would have us use our Slaves as our second Selves, being Men as well as we; in imitation of that wise *Hebrew*, ¹⁴ *If thou hast a Servant, use him as a Brother, for he is such a one as thyself.*

Thus *THEODECTES*, an antient Poet, makes *Helen* say,

*Θεῶν ἀπ' ἀμφοῖν ἐκόντων ῥιζωμάτων
Τίς ἂν προσεπτέιν ἀξιώσειεν λάτριν.*

*Dared they presume to call a Woman Slave,
On both Sides sprung from Gods——*

GROTIUS.

These two Verses are preserved in *ARISTOTLE*, *Politic. Lib. I. Cap. VI.* But they should be read in the Beginning, *Θείων δ' ἀπ', &c.* according to the *Paris Edition*, and that of *DANIEL HEINSIUS*.

⁵ *Orat. Plataic. p. 300. A. Edit. H. Steph.*

⁶ *Servus, ut placet CHRYSIPPO, perpetuus mercenarius est. De Benefic. Lib. III. Cap. XXII.*

⁷ That is to say, no Regard was had to the Years which had elapsed since the Slave had sold himself, because the Slave was deemed to have gained by his Work for his Master's Benefit, the Value of what his Master had given him for that Time: So that no more was reckoned than what the Slave might gain in the Years to come, till the *Sabbatical Year*, or *Jubilee*, which restored Slaves to their Liberty, without their being obliged to pay any Thing. In like Manner as Lands returned to their antient Owners, in the Year of *Jubilee*, if the Person, who had sold his Field, would redeem it be-

fore that Time, as he might, the Value of the Produce only for the Years which remained to the *Jubilee*, was reckoned. See the Passages cited in the Text.

⁸ *Chap. X. of this Book, § 1. Num. 3.*

⁹ *Apud STOBEUM, Tit. LXII.* Some learned Men are for reading *δὲ λῶν ἦ*, and in the second, *εἰν ἄνθρωπος, &c.*

¹⁰ *Servi sunt? Immo homines. Servi sunt? Immo contubernales. Servi sunt? Immo humiles amici. Servi sunt? Immo conservi, si cogitaveris tantumdem in utroque licere fortunæ. Epist. XLVII. init.*

¹¹ *Et ut primum de servis loquamur, joco an serio putas, esse hominum genus, quod Dii immortales, nec cura sua, nec providentiâ, dignentur? An forte servos in hominum numero esse non pateris? Saturn. Lib. I. Cap. XI.* The Reader may see the Rest of the Chapter, in which the Author expatiates very much upon this Subject.

¹² *Lib. VII. Cap. XIV.* There is the same Thought in the Letter of *St. BARNABAS*, where he says, that he who treats his Slave with Cruelty, shews, in doing so, that he does not fear him who is the God of both. GROTIUS.

¹³ *Pædagog. Lib. III. Cap. XII. p. 307. Edit. Oxon. Potter.*

¹⁴ The Author of *Ecclesiasticus*, Cap. XXXII.

III. The

III. The Power of Life and Death which is ascribed to a Master over his Slave, gives to the former a Sort of domestick ¹ Jurisdiction; but yet that Power is to be managed with the same Moderation, as do the publick Magistrates. This was Seneca's Meaning, when he said, ² *In thy Bondman consider, not what thou mayest inflict on him with Impunity, but what thou mayest do in Equity and Conscience, which requires that we should be merciful to our Captives and purchased Slaves.* And in another Place he says, ³ *What signifies it what Government one is under, if he be under a Supreme?* In which Place he compares the Subject with the Slave, and says, tho' they be under different Titles, yet the ⁴ Authority over them is the same; which is certainly very true, with Respect to this Power of Life and Death, and other Things that resemble it. And again, the same Seneca, ⁵ *Our Ancestors reputed every Family a little Commonwealth.* Also Pliny, ⁶ *A Man's House is a certain Republick, and as a State to his Slaves.* And Plutarch ⁷ tells us, that Cato the Censor would not punish any of his Slaves; no not for the most heinous Offences, unless he were found guilty by his own fellow Servants. To which agree the Words of Job, Chap. xxxi. Ver. 13. and so on.

III. It is not lawful to kill an innocent Slave.

IV. But as to lesser Punishments, viz. Blows, &c. Equity, and also Clemency is to be shewed to Slaves. ¹ *Thou shalt not oppress him, nor rule over him with Rigour,* says the Divine Law concerning a Hebrew Slave, Lev. xxv. which, as the Title of Neighbour is not now confined to one Nation only, should extend to all Slaves, Deut. xv. 12, &c. On which Place thus ² Philo, *Slaves indeed, as to Fortune are Inferiors, but as to Nature equal with their Masters; and, according to the Law of GOD, the Rule of just is not what comes from Fortune, but what is agreeable to Nature. Wherefore Masters ought not to use the Power they have over their Slaves, to gratify their Pride, Insolence, and Cruelty: For these are not the Signs of a meek and peaceable Spirit, but of a passionate and tyrannical Disposition.* Seneca

IV. Not to punish unmercifully.

III. (1) It is not as Master that he has this Power of Life and Death, but as Father of a Family. The reciprocal Engagement, which there is between the Master and the Slave, does not imply this of itself, whether the Slave has sold his Liberty, or has been deprived of it by a Consequence of the Right of War. The perpetual Service, to which the Prisoner of War engages himself, is a sufficient Reward for the Life which the Conqueror spares. The Consent of the Slave, either tacit or express, is necessary to the Master's having a Right of Life and Death over him; and this tacit Consent is presumed with Reason, when the Custom is such, as it took Place formerly, not only in the Independence of the State of Nature, where every Father of a Family was a Kind of Sovereign in his own House; but even in Civil Societies, as long as the Laws left to the Masters this Right over their Slaves.

² The Passage has been cited already, in Chap. X. of this Book, § 1. Note 8.

³ *Si non dat beneficium Servus Domino; nec Regi quisquam suo, nec Duci suo Miles? Quid enim, interest, quali quis teneatur imperio, si summo tenetur?* De Benefic. Lib. III. Cap. XVIII.

⁴ *Nam si servo quominus in nomen,* &c. Ibid.

⁵ *Et Domum pusillam Rempublicam esse judicaverunt [maiores nostri].* Epist. XLVII.

⁶ *Nam servis respublica quædam, & quasi civitas, Domus est,* Lib. VIII. Epist. XVI. Num. 2.

⁷ Vit. M. Caton. p. 349. A.

IV. (1) These Words, *Thou shalt not oppress him,* are ill applied. For, in the seventeenth Verse, from which our Author took them, there is, *Thou shalt not oppress one another.* And this does not regard Slaves, but the perpetual Alienation of Lands, which the Legislator forbids, under any Pretext whatsoever. The Author cited Deuteronomy in this Place also for Leviticus: From whence it appears, that all this was writ hastily in the first Edition,

without having ever been corrected in the Revivals of other Editions.

² Θεραποντες τύχη μὲν ἐλαττοῦσι ——— ἀλλ' οὐκ ἀρεσσίας ἢ ὑπεύθυνον (so it must be read, instead of ἀνέχθονον) κολαζέσθης καὶ τυραννικὴν δύναμιν. De Legib. Specialib. Lib. II. (p. 728. D. Edit. Paris.) St. CYPRIAN expresses himself very strongly upon this Head; he maintains, that those who exercise so tyrannical an Authority over their Slaves, do not acknowledge GOD for their Lord and Master. *Tamen nisi tibi pro arbitrio tuo serviat; nisi ad voluntatis obsequium pareatur, imperiosus & nimius servitutis exactor, flagellas, verberas, fame, siti, nuditate, ferro frequenter & carcere, adfligis, & crucias, & non agnoscis miser Dominum DEUM tuum, quum sic exerceas ipse in hominem dominatum.* Ad Demetrian. (p. 188. Edit. Fell. Brem.) See MOSES DE COTZI, Præcept. Jüb. CXLVII. CLXXV. CLXXVIII. and the Comparison between the Roman Laws and the Law of MOSES, Tit. III. PRISCUS, in the Excerptæ Legationes, where he prefers the Manners of the Romans of his Time to those of the Barbarians, observes, to the Advantage of the former, that they treated their Slaves with much more Humanity. They behave, says he, towards them, as if they were their Fathers or Preceptors. They only chastise them to prevent their doing any Thing dishonest, according to their Notions, and that as if they were their own Children; for they have not a Power of Life and Death over them, as Masters have amongst the Scythians. Besides, with the Romans, Masters have Power to make their Slaves free, as they often do in different Manners, not only during their Lives, but at their Deaths; that last Will being regarded as a Law. (p. 47. Edit. Hoefchel.) See also the Laws of the Wisigoths, Lib. VI. Tit. I. Cap. XII. GROTIUS.

puts

puts the Question, ³ *Is it equitable to exercise a more severe and cruel Authority over a Man, than is generally done over Beasts? but a skilful Manager that designs to break a Horse, does not pretend to do it by frequent Blows, for he will be fearful and headstrong, if he be not gently handled.* And again, the same Author, ⁴ *What can be more foolish, than to practise that brutish Cruelty upon a Man (that is our Slave) which we should be ashamed to do to Cattle, or Dogs?* On which Account the Hebrew Law ordered the Master to let his Bondman or Bondwoman go free, ⁵ *Not only for the Loss of an Eye, but even if he had struck out a Tooth,* Exod. xxi. 26, 27. that is, if there had been no just Cause to correct them.

V. Not to lay too hard Labour upon them.

V. 1. But ¹ we are also to enjoin them Labour with Moderation, having a Respect to their Strength and Constitution. To which, among other Things, the Hebrew Law pointed in the Institution of the Sabbath, viz. that all might have some Rest from their Labours, Exod. xx. 10. xxiii. 12. Deut. v. 14. And the Epistle of C. Pliny to Paulinus begins thus, ² *I see how gently you treat your Servants, wherefore I will more freely confess to you with what Tenderness I use mine:* Always remembering that Expression of Homer, *Like a Father he was indulgent to his Slaves,* and this our Pater-Familias, the Father of a Family.

2. Seneca ³ takes Notice of the Humanity of the Antients, in using that Word, *Do you not observe how careful our Forefathers were to prevent all Occasion of Envy to Masters, and Reproach to Slaves? When they called the Master Pater-Familias, The Father of the Family. And his Slaves Familiares, Domesticks.* Dion Prusseus, ⁴ describing a good King, says, *He is so far from taking a Pleasure in being called Lord and Master of his free Subjects, that he does not willingly receive that Title with Respect to his Slaves.* Ulysses declares in Homer, ⁵ *That those Slaves whom he found faithful, should be regarded by him as the Brothers of his Son Telemachus.* And in Tertullian, ⁶ *The Name of Goodness is more glorious than that of Power, and to be called the Father than the Master of a Family.* And Hierom, or Paulinus, thus speaks to Celantia, ⁷ *So govern and order your Family, that you may seem desirous to be accounted, rather the Mother than the Mistress, and engage your Servants to respect you, rather by Kindness than Severity.* And St. Augustine ⁸ makes this

³ Numquidnam æquum est, &c. De Clement. Lib. I. Cap. XVI.

⁴ Quid enim stultius quam in jumentis & canibus, &c. Ibid. Cap. XVII.

⁵ PHILO says, that the Master is hereby punished doubly, as he loses both the Slave's Service, and the Money he gave to purchase it. A third Punishment, adds he, and one still more mortifying than both the former, is the seeing himself compelled to do the greatest Good to a Person whom he hated, and desired perhaps to have Power to distress perpetually. The Slave, on the contrary, is doubly made amends for the Injuries he has suffered, as he not only recovers his Liberty, but is also delivered from the Yoke of so cruel a Master. De legib. special. Lib. II. (p. 808. A.B.) GROTIUS.

V. (1) See Chap. XIV. of the Letter of the Bishops to King Lewis, inserted in The Capitulary of Charles the Bald. The Athenians treated their Slaves with great Humanity, as XENOPHON observes to their Honour, in his Description of the Republic of Athens. SENECA blames those who work their Slaves too hard, as if they were Beasts of Burden, and not Men. Alia interim crudelia & inhumana prætereo, quod nec tamquam hominibus quidem, sed tamquam jumentis, abutimur, &c. Epist. XLVII. GROTIUS.

² Video quam molliter tuos, &c. Lib. V. Epist. XIX. The Verse of HOMER is in the Odyssey, Lib. II. ver. 47. and 234.

³ Ne illud quidem videtis, &c. Epist. XLVII. This has been copied by MACROBIUS, in the Place already cited, Saturnal, Lib. I. Cap. XI. p. 235. Edit. Gronov. Our Author observed here in a little Note, that EPICURUS called Slaves the Master's

Friends, and cites SENECA to prove it, Epist. CVII. But, on the contrary, Friends are put there in Opposition to the Slaves he mentions, who had run away. The Passage is in the Beginning of the Letter, where that Opposition immediately appears, though there is otherwise some Corruption in the Text.

⁴ Δεσπότην ὃ ἔχ' ὄπως τῶν ἐλευθέρων, &c.

⁵ Odyss. Lib. XXI. ver. 215. & seq.

⁶ Sed & gratius nomen, &c. Apologet. Cap. XXXIII.

⁷ Familiam tuam ita rege, &c. Epist. Vol. I. p. 114. Edit. Basil.

⁸ Domestica pax a justis, &c. De Civit. Dei, Lib. XIX. Cap. XVI. What St. AUSTIN says here of the Motives which Religion supplies, he repeats elsewhere, and remarks, that Slaves, for the same Reason, on the other Side ought to obey their Masters with the greater Alacrity. Tu Dominis servos non tam conditionis necessitate, quam officii delectatione doces adhærere. Tu Dominos servis, summi Dei scilicet, communis Domini, consideratione placabiles, & ad consulendum, quam ad coerendum, propensores facis. De Moribus Eccles. Catholicæ, Lib. I. Cap. XXX. St. CYPRIAN had before laid down as a Maxim, that Masters ought to use their Slaves, when converted to Christianity, with more Favour. Testimon. Lib. III. (§ 82. p. 85.) Which he proves by the Passage in the Epistle of St. PAUL to the Ephesians, vi. 9. LAC-TANTIUS, speaking of the Equality of Christians, as such; for which Reason they all call one another Brethren; extends that Appellation, even to Slaves, who, tho' of a different Condition, in Regard to the Body, are, as to the Mind and Religion;

this Observation, *Good Parents formerly so managed their Families, that as to temporal Things the Children had the Advantage of the Servants; but as to Affairs of Religion, there was no Distinction. Whence it came to pass, that every Master was called Pater-Familias, which in Time became so customary, that even severe Masters affected that Title. But they who are true Fathers of Families, do take the same Care of their whole Family, in Regard to the Worship and Service of GOD, as of their own Children.*

3. The same Tenderneſs *Servius* ⁹ observes to be in the Word *Children*, by which they meant Slaves, in his Remark upon that of *Virgil*,

Claudite jam rivos Pueri.

And thus did the *Heracleotæ* call their Slaves *Mariandyni*, ¹⁰ *Δωροφόροι*, *Carriers of Presents*; abating the Harſhneſs of the Name of Slave, as *Callistratus*, an old Interpreter, observed on *Aristophanes*. *Tacitus* ¹¹ commends the Germans, who treated their Slaves like Huſbandmen. And *Theana*, ¹² in an Epistle, ſays, *The right uſing of Slaves is not to over-work with hard Labour, nor enfeeble them for Want of neceſſary Suſtenance.*

VI. 1. As I ſaid before, we are obliged to maintain our Slaves for their Work. *Cicero* ſays, ¹ *We are to uſe Slaves as Mercenaries, by making them do their Work, and paying them their Due.* And in *Aristotle*, ² *A Slave's Wages is his Maintenance.* And *Cato* adviſes, ³ *Provide carefully for your Family, that it be not ſtarved with Cold or Hunger.* There is ſomething, ſays *Seneca*, ⁴ *that a Maſter owes to his Servant, viz. Food and Raiment.* *Donatus* ⁵ writes, that a Slave was allowed four Buſhels of Corn every Month, for his Maintenance. And *Martianus* the Lawyer informs us, that a Maſter is obliged to provide his Slave ⁶ Cloaths, and the like. ⁷ The *Sicilians* are blamed in Hiſtories for cruelly ſtarving the *Athenian* Priſoners.

VI. The Stock of the Slave, how far the Maſter's and how far his own.

2. Seneca

gion, Brothers, even of their Maſters; and Servants of one common Lord. *Dicit aliquis: Nonne ſunt apud vos alii Pauperes, &c.* *Inſtit. Divin. Lib. V. Cap. XV.* See alſo *ISIDORUS*, *Peliſſot. Lib. I. Epist. CCCCLXXI.* *GROTIUS.*

The Paſſage cited here by our Author, as Saint *CYPRIAN*'s, is only the marginal Summary, which answers to the Citation of the Paſſage in Saint *PAUL*.

⁹ Our Author gives this as ſaid upon the famous Verſe of *VIRGIL*, *Claudite jam rivos, pueri, &c.* *Eclog. III. ver. ult.* But there is nothing like it there. It is on *Eclogue VI.* that *SERVIVS* remarks barely, and without adding any moral Reflection that relates to the preſent Subject, that Domeſticks were called *Children*. *Utrum ergo ætate Pueros an miniſtros & familiares ſolemus communiter Pueros vocare?* In ver. 14.

¹⁰ It is *ATHENÆUS* who relates this, *Lib. VI. Cap. XVIII.* But the learned *GRONOVIVS* is of Opinion, that the Word *Δωροφόροι* ſignifies rather *Donors*, or *Tributaries*, and that their being called ſo is founded upon the Work which they do, either for their own Maſters, or ſuch as hire them, being a Kind of Tribute, which is looked upon as a Preſent. The grammatical Analogy favours this Explanation.

¹¹ *Frumenti modum Dominus, aut pecoris, aut veſtis, ut Colono injungit: Et ſervus hætenus paret.* German. *Cap. XXV. Num. 2.*

¹² She ſays at the ſame Time, that it is the Means of gaining the Friendſhip of Domeſticks, which is not bought with them: And gives for the Reaſon of the Humanity with which they ought to be treated, what has been mentioned upon this Head more than once, viz. that Slaves are Men as well as their Maſters. *Fragment. Pythagoreor. in*

Opusc. Mythologicis, Phyſ. Ethic. &c. Amſtel. 1688. p. 746, 747.

VI. (1) *Quibus [Servis] non male præcipiunt, qui ita jubent uti, ut mercenariis: Operam exigendam, juſta præbenda.* *De Offic. Lib. I. Cap. XIII.*

² *Oeconomic. Lib. I. Cap. V.*

³ *Familie male ne ſit, ne algeat, ne eſuriant.* *De Re Ruſtic. Cap. V.*

⁴ *Eſt aliquid, quod Dominus præſtare ſervo debeat, ut cibaria, ut veſtiarium.* *De Benefic. Lib. III. (Cap. XXI.) Familia veſtiarium petit victumque.* *De Tranquill. Anim. (Cap. VIII.)* The Romans, beſieged by the Goths, and preſſed by Famine, told *Beſſas* and *Conon*, who commanded the Army of the Beſiegers, “If you would have us ſurrender ourſelves as Priſoners of War, give us Proviſions, if not ſo much as we ſtand in need of, at leaſt enough to keep us from ſtarving.” *PROCOPIUS, Gothic. Lib. III. (Cap. XVII.)* St. *CHRYSOSTOM* conſiders the Obligation of Maſters to provide his Slaves with Food and Cloaths, as a Kind of Servitude; becauſe, if he does not diſcharge that Engagement, the Slaves are diſcharged from theirs, and no Law, in ſuch Caſes, can compel them to ſerve. In *Eph. v. 2.* *GROTIUS.*

⁵ *Servi quaternos modios accipiebant frumenti in menſem, & id Demenſum dicebatur.* In *TERENT. Phormion. Act. I. Scen. I. ver. 10.*

⁶ Thoſe Things, for that Reaſon, were not deemed to be a Part of the Slaves *peculium*, which belonged to his Maſter, tho' the Slave poſſeſſed it as diſtinct Effects, *Si vero tunicas, aut aliquid ſimile, quod ei Dominus neceſſe habet præſtare, non eſſe peculium.* *Digeſt, Lib. XV. Tit. I. De Peculio, Leg. XL.*

⁷ The Cruelty of the Emperor *Iſaacus Angelus*

2. *Seneca* ⁸ also, in the fore-mentioned Place, proves, that in Regard to certain Things a Slave has the same Rights as if he were free, and that he may even become a Benefactor to his Master, by doing for him something beyond the Services he owes him, provided he therein Acts, not through Fear and Constraint, but of his own free Will, and out of Affection; which the Philosopher explains at large. So likewise, if a Slave, (as it is in ⁹ *Terence*) save any Thing out of his own Belly, or earned ought in his spare Hours, that properly is his own. *Theophylus* justly defines the *Peculium*, *ἐξίαν φουσιαν*, ¹⁰ a natural Patrimony, as if you should call the Copulation of Slaves ¹¹ a natural Marriage. *Ulpian* expressly calls the *Peculium* a small Patrimony ¹². Nor does it import much, that his Master may, at his own Pleasure, take it away, or diminish it; for if he does it without Cause he will act unjustly. By a Cause I mean, either by way of Punishment, or for his Lord's Necessity. For the Interest of the Slave ought to give Place to that of the Master, even more than the particular Interest of Subjects to the Interest of the State. Agreeable to this is that of *Seneca*, ¹³ *It does not therefore follow that a Slave has nothing, because he cannot enjoy it unless his Lord pleases*.

3. Hence it is, that the Master cannot demand again any Debt due to his Slave, in the Time of his Slavery, which he pays him after his Release. Because (as *Tryphoninus* ¹⁴ says) in a personal Action, the Consideration of a Debt, or no Debt, is understood naturally. And the Master may possibly be a Debtor naturally to his Slave. Therefore, as we read that ^a Clients have contributed something to the Use of their Patrons, and Subjects to the Use of Princes, so have Slaves ¹⁵ to the Use of their

^a *Dion. Halic.*
Antiq. Rom.
l. 2. c. 10.

to the *Sicilians*, whom he had made Prisoners of War, is also censured by *Nicetas*, who recites a Letter writ by the King of *Sicily* to the Emperor, upon that Subject. *Vit. Isaac. Ang. Lib. I. Cap. III. Grotius*.

8 *Et eo perducam servum, &c. De Benefic. Lib. III. Cap. XIX. and XXI.*

9 *Quod ille unciatim vix de demenso suo
Suum defraudens genium, comparfit miser.*
Phorm. Act. I. Scen. I. ver. 9, 10.

10 *Institut. Lib. IV. Tit. VII. Quod cum eo qui in al. pot. &c. § 4.* *HOMER* makes *Eumæus* say, that if *Ulysses* had returned to his House, he would have given him a House, an Inheritance, a desirable Wife, in a Word, every Thing that a good Master could give a faithful and affectionate Domestick.

Ὅς κεν' ἐμὶ ἐνδουέως, &c.

Odyss. Lib. XIV. (ver. 62. & seq.) Ulysses himself makes a like Promise to *Eumæus*, and the other Shepherd *Philoetius*, *Lib. XXI. (ver. 214, 215.)* *VARRO* advises Masters to treat their Slaves with Humanity, to supply them plentifully with Food and Raiment, to give them Relaxation from Labour, and suffer them to feed some Cattle of their *peculium*, in their Grounds, in Order to encourage them to work with the more Zeal. *Studiosiores ad opus fieri, &c. (De Re Rustic. Lib. I. Cap. XVII.) Grotius*.

The learned Civilian *FRANCIS HOTMAN* observes, that the Word *Peculium* is derived from the Custom of giving Slaves some Herd to feed, as their own Property, Riches consisting at first in Cattle. And he cites upon it, (*Comm. in Tit. Digest, De Pecul. § 2.*) this other Passage of *VARRO*. *Tu, inquit, tibicen non solum adimis Domino pecus, sed etiam Servis Peculium, quibus Domini, dant ut pascant, &c. De Re Rustic. Lib. I. Cap. II.*

11 See above, *B. I. Chap. III. § 4. Num. 1.*

12 *Peculium dictum est, quasi pusilla pecunia,*

seu patrimonium pusillum. Digest, Lib. XV. Tit. I. De pecul. Leg. V. § 1. Very well: But this Patrimony, according to the Principles of the Roman Law, did not cease to belong entirely to the Master. (*Institut. Lib. II. Tit. XII. Quibus non est permittum facere Testament. princ.*) The Slave did not possess it by a civil Right. *Et Peculium, quod Servus civiliter, quidem possidere non posset, sed naturaliter tenet, Dominus creditur possidere. Digest, Lib. XLI. Tit. II. De acquir. vel amitt. Possessione, Leg. XXIV.* And he might make himself guilty of Theft, in Regard to his own Stock: *Quum autem Servus rem suam peculiarem, furandi consilio amovet — Si alii tradiderit, furtum faciet, Lib. XLVII. Tit. II. De Furtis, Leg. LVI. § 3.* All Acquisitions came also to the Master, *Institut. Lib. II. Tit. IX. Per quas personas nobis adquiruntur, § 1, 3.* So that a Slave is only improperly said sometimes to have a Kind of Patrimony. See the great *CUJAS*, in his Work *Ad Africanum, Tractat. II. upon Law CVII. § 1. Digest, De Legat. I.* Our Author seems here to have had that Passage in View. See also *LAURENTIUS PIGNORIUS, De servis, p. 4. Edit. Patav. 1656.*

13 He had just said, that tho' the *Peculium* and Person itself of the Slave, belonged to the Master, the Slave, however, might make his Master a Present, *Num quid dubium est, &c. De Benefic. Lib. VII. Cap. IV.*

14 *Si quod Dominus servo, &c. Digest. Lib. XII. Tit. VI. De conditione indebit. Leg. LXIV.*

15 The Example of Contributions for the Portion of a Daughter, or the Ransom of a Son taken Prisoner, is indeed confirmed in Regard to Clients, by the Authority of *DIONYSIUS HALICARNASSENSIS*, in the Place quoted in the Margin: But in Relation to Slaves, I am very much mistaken if our Author had any other Authority than what we read in the Scene of a Comedy in *TERENCE*, from which he has cited something before, *Note 9.* We there see a Slave makes a Present to the Bride his Master's Son had married, out of his Savings. He that speaks, who is himself a Slave, believes, that his Friend will be obliged to do as much when his Mistress shall be brought to bed, on the Child's Birth-

their Masters. As if a Daughter were to be portioned out, or a Son to be ransomed, or something like it should happen. *Pliny*, ¹⁶ as he himself relates in his *Epistles*, allowed his Slaves the Privilege of making a Sort of Will, that is so far as to distribute, to give, or bequeath within the Family. Among some Nations we read, that even a fuller Right of acquiring Things was allowed to Slaves, as we have before ^b explained, that there are different Degrees of Servitude.

^b B. ii. *ch.*

4. And even the Laws among many Nations have reduced the external Right of Masters unto this internal Justice, of which we are now treating. For among the *Greeks* it was lawful for Slaves, if they were hard used, ¹⁷ *To demand that they might be sold.* And at *Rome*, ¹⁸ to fly to the Statues (for Refuge) or implore the Assistance of the Governors of Provinces, in Case of Cruelty, Hunger, or intolerable Wrongs. But a Master is not obliged in Rigour to make his Slave free, after a long Service, or a Service whereby the Slave has done for him something of great Importance. If then he grants him his Liberty it is a Favour; tho' this Favour may be sometimes due by the Laws of Humanity and Beneficence. After that Bondage, says ¹⁹ *Ulpian*, prevailed by the Law of Nations, the Benefit of Release likewise was allowed. We have an Example of this in *Terence* ²⁰,

5. § 30.

Birth-Day, and that of his being initiated in certain Mysteries.

*Nam herilem filium ejus duxisse audio
Uxorem: Ei, credo, munus hoc conraditur.*

* * * * *

— Porro autem Geta
Ferietur alio munere, ubi hera pepererit:
Porro autem alio, ubi erit puero natalis dies,
Ubi initiabunt, &c.

Phormio. Act. I. Scen. I. ver. 5, 6, 12. & seq. For the Rest, I am surprized that our Author forgot one Thing in this Place, which makes very much for his Subject; that is, that amongst the *Romans*, a Slave might ransom himself by an Agreement with his Master, to whom he gave, as the Price of his Liberty, either what he had laid up by his Savings, or received from the Liberality of others, or got in any other Manner. This Custom was introduced early, as *SENECA* not only speaks of it, (*Peculium suum, quod compararunt ventre fraudato, pro capite numerant, &c. Epist. LXXX.*) but there are also Proofs of it in *PLAUTUS*, (*Aulul. Act. V. ver. 8, 9. Casin. Act. II. Scen. V. ver. 6. & seq. Rudent. Act. IV. Scen. II. ver. 23, 24.*) The Emperors *Marcus Antoninus* and *Verus*, confirmed afterwards the Validity of such a Convention, in giving the Slave Power to complain juridically, and obliging the Master to enfranchise him; in Default of which the Slave was declared free, as appears by the *Digest*, *Lib. V. Tit. I. De judiciis, Leg. LIII. and LXVII. Lib. XL. Tit. I. De manumissionibus, Leg. IV. V. &c.* See *JACOBUS RÆVARDUS, In divers. Reg. Juris, Leg. XVI. (p. 174. & seq. Edit. Wechel. 1622.)* *JUSTUS LIPSIUS*, upon *TACITUS, Annal. Lib. XIV. Cap. XLII. CUJAS, Recit. in Digest. Vol. IV. Opp. Edit. Fabrott. p. 164. and the President BRISSON, De Formulæ, Lib. VI. p. 559.*

¹⁶ *Alterum, quum permitto, &c. Lib. VIII. Ep. XVI.*

¹⁷ See *POLLUX, Lib. VII. § 13. and the Commentators upon it.*

¹⁸ *Nam Antoninus consultus a quibusdam Præfibus provinciarum de his servis qui ad Aedem sacram, vel ad statuum principum confugiunt, præcipit, ut si intolerabilis videatur servituta Dominorum, cogantur servos suos bonis conditionibus vendere. — Sed & Dominorum interest, ut auxilium contra servitiam, vel famem, vel intolerabilem injuriam, denegetur iis, qui juste deprecantur. Ideoque cognosce de*

querelis eorum, &c. Institut. Lib. I. Tit. VIII. De his qui sui vel alieni juris, § 2.

¹⁹ *Sed postea quam Jure Gentium Servitus invasit, sequutum est beneficium manumissionis. Digest, Lib. I. Tit. I. De Jussit. & Jure, Leg. IV.*

²⁰ (*Andr. Act. I. Scen. I. ver. 10, 11.*) I read *servibas* in these Verses, after the Manuscripts, and not *serviebas*. *VARRO* informs us, that in *Feronia's* Grove the *Romans* used to say to their Slaves, *Let those who have deserved well, sit down Slaves and rise up Freedmen.* It was customary in some Places to give Slaves their Liberty, when they had earned eight Times as much as they had cost their Masters. *GROTIUS.*

What our Author observes here upon *VARRO's* Authority, he certainly had from *SERVIVS*: But that Grammarian says it of his own Head, in speaking of the Goddess *Feronia's* Temple at *Terracina*: For she was the Goddess of Freedmen, and there was there a Stone Seat, where the Slaves were made to sit down, when the Cap was given them, as a Sign of their being made free. The Words in Question were cut on this Seat. *Hæc etiam [Feronia] Libertorum Dea est, in cujus Templo raso capite pilum accipiebant. — In hujus Templo Terracinae sedile lapideum fuit, in quo hic versus incisus erat: BENE MERITI SERVI SEDEANT: SURGANT LIBERI. In Aeneid, VIII. ver. 564.* Our Author's Mistake arose, from the Commentator's giving *VARRO's* Etymology of the Name of the Goddess, immediately after the Passage cited. *Quam VARRO libertatem [libertatis should be read] Deam dicit Feroniam quasi Fidoniam.* The Reader may see further, concerning this Goddess, the Notes of *TORRENTIUS* upon *HORACE, Lib. I. Sat. V. ver. 24.* The learned *JAMES GODEFROY*, proves from the Passage of *SERVIVS*, and other Authorities, that amongst the antient *Greeks* and *Romans*, the freeing of Slaves was often performed in the Temples consecrated to the false Divinities, and that it was from this Custom the Emperor *CONSTANTINE* took the Manner of enfranchising in Churches, which he established by a Constitution, come down to us. But this great Civilian, (in *Cod. Theodof. IV. 7. De Manum. in Eccl. L. unic. p. 355. Vol. I.*) quotes *PLUTARCH*, in the Life of *Publicola*, where I can find nothing that makes for the Subject. And in the Citation from *LIVY, Lib. II.* is quoted probably for *Lib. XXII. Cap. I.* towards the End. Which may be observed by the Way.

*Feci è servo ut esses Libertus mihi,
Propterea quod serviebas liberaliter.*

*When you were my Slave, I freed you,
Because you serv'd me with Integrity.*

Salvian ²¹ declares that it was daily practised, that Slaves, tho' none of the best, yet if they were not arrant Knaves, were presented with Liberty. And he adds, they were allowed to carry away what they had got in the Time of their Service; of which Generosity in Masters we have many Examples in the Martyrologies. And here I must commend the Lenity of the *Hebrew Law*, *Deut. xv. 13.* which absolutely commands, that a *Hebrew Slave* having served out such a certain Time, shall be set free; ²² and that he should not go away empty; the Contempt of which Law the Prophets grievously complain of. *Plutarch* ²³ blames *Cato* the Elder, that he sold his Slaves when they were old, forgetting the common Nature of Mankind.

VII. *If Slaves
may run away.*

^a *Respons. 16.*

VIII. *Whether
they that are
born of Slaves
are obliged to
the Master, and
how far?*

^a See B. ii. ch.
5. § 29.

VII. Here arises a Question, whether it be lawful for a Captive taken in a just War to flee away; I do not mean him who for some personal Fault had deserved that Punishment, but who, by the Fact of the State, has fallen into that Misfortune. According to the most reasonable Opinion he ought not, because, as we have said elsewhere, he is engaged, as a Member of the State, and in its Name, by Vertue of the ¹ general Convention among Nations; which yet is so to be understood, unless an intolerable Cruelty has forced him to it. You may see the Answer of *Gregory Neocæsariensis* concerning this Affair. ^a

VIII. 1. We have ^a in another Place debated the Question, whether, and how far, the Children of Slaves are engaged to the Master by internal Right, which, on the Account of the particular Relation it has to Prisoners taken in War, ought not here to be omitted. If the Parents for their own personal Crimes have deserved Death, their Children, for the saving of their Lives, are obliged to serve, because otherwise they had not been born. For Parents have a Power to sell their own Children for Bondslaves, when they are not able to maintain them, as we have remarked in the same Place. Such a Right did GOD himself give to the *Hebrews*, over the Posterity of the *Canaanites*, (*Deut. xx. 14.*)

2. But for the Debt of a State, Children already born, as being Members of that State, may be obliged, no less than the Parents themselves. But this Reason cannot hold for those that are yet unborn, but some other is required; as the express Consent of the Parents, joined to the Impossibility of having otherwise wherewithal to keep the Children that are born to them, on which Account they are even authorised to render them Slaves for ever. There may be also a tacit Convention between them and their Master, grounded on the Master's finding Victuals for the Children that are born: But in that Case they engage the Liberty of their Children only till the latter have, by their own Labour, satisfied for those Expences. If any Right beyond this be allowed to the Master over them, it seems to be granted by the Civil Laws, which sometimes give to Masters more than Equity permits.

IX. *What may
be done where
the Bondage of
Captives is not
in Use.*

IX. 1. Among those Nations where this Right of Bondage over Captives is not practised, the best Way will be to exchange Prisoners; and, next to that, to release them for a moderate Ransom. Neither can one positively rate the Sum. But common Humanity teaches us, that it should not be so extravagant, as not to leave the ransomed Person the Necessaries of Life. For the Civil Law allows this even to those, who, by their personal Act, are fallen into Debt. In some Places the Price is determined by Cartels, or regulated by Custom, as formerly among the *Greeks*, the Ransom was a ¹ Mina, and in our Days

²¹ *In usu siquidem quotidiano, &c. Ad Eccles. Catholic. Lib. III. p. 413. Edit. Paris. 1645.*

²² Custom interpreted this Law, so that no less than thirty Shekels ought to be given. See the Rabbi MOSES DE COTZI, *Præcept. Jubent. LXXXIV.* GROTIUS.

²³ *In Vit. M. Caton. p. 338, 339:* See what

follows, where the Reflection is extended, even to Beasts.

VII. (1) Or rather by Virtue of the Convention, express or tacit, which he has made with the Conqueror, for sparing his Life. See what I have said above, *Chap. VII.* of this Book, § 6. *Note 2.*

IX. (1) That is to say, about ten Crowns of French

Days a ² Month's Pay. *Plutarch* ³ tells us, that the Wars between the *Corinthians* and *Megarenses*, were waged mildly, and as became Kinsmen. If any one were taken Prisoner, he was entertained by his Captor as a Guest, and, upon his bare Word for paying his Ransom, he was sent Home: Whence came the Name of *δορυξένος*, a War Guest.

2. But more heroick is that of *Pyrrhus*, highly applauded by *Cicero* ⁴.

*Nec mi aurum posco, nec mi pretium dederitis,
Ferro, non auro vitam cernamus utrique.
Quorum virtuti belli fortuna pepercit,
Eorundem Libertati me parcere certum est.*

*No Gold I seek, no Ransom shall you pay.
The Sword alone our Difference shall decide:
But those whose Valour the Lot of War respects,
I am resolv'd their Liberty to spare.*

No Doubt *Pyrrhus* thought his War just, yet looked upon himself obliged to restore them their Liberty, whom plausible Reasons had engaged against him. *Xenophon* commends the like Act in *Cyrus*. And *Polybius*, that of *Philip* the *Macedonian*, after his Victory at *Cheronea*. *Curtius*, that of *Alexander* to the *Scythians*: And *Plutarch* observes, of King *Ptolemy* and *Demetrius*, that they strove who should prevail in Civility to the Prisoners, as much as in Battle. And *Dromichætes*, King of the *Getes*, ^a having taken *Lyfimachus* Prisoner, entertained him as his Guest, and thereby engaged him, being an Eye-Witness of both the Poverty and Civility of the *Getes*, ever after to desire such People for his Friends, rather than Enemies. ^{a Strabo, l. 7.}

French Money. Our Author has probably taken this from *ARISTOTLE*, who however does not ascribe this Custom to the *Greeks*; he gives it only as an Example of Things arbitrary in themselves, which are regulated in a certain Manner, by the Laws and Customs of States, but does not say amongst which it was established. *Ethic. Nicomach. Lib. V. Cap. X.* And that the Ransom of a Prisoner of War was not fixed at a *Mina*, according to the Custom of the *Greeks*, I find a clear Proof in *DEMOSTHENES*. For, in speaking of some *Greeks* taken by *Philip* of *Macedon*, he says, that one of those Prisoners borrowed for his Ransom three, another five, *Minae*, and others more or less, according as their Ransom was rated. *Orat. de male obit. legation. p. 222. A. Edit. Basil. 1572.*

2 In the War made by the *French* against the

Spaniards in *Italy*, the Ransom of an Horseman was a fourth Part of his Year's Pay, but the Captains, and other superior Officers, and Prisoners taken in a Battle, or a Siege, were not included in this Rate. This *MARIANA* tells us, *Lib. XXVII. Cap. XVIII. GROTIUS.*

3 *Quæst. Græc. p. 295. B. Vol. II. Edit. Wechel.*

4 (*De Offic. Lib. I. Cap. XII.*) *Tiberius*, the Christian Emperor, acted with the like Generosity in Regard to the *Persians*; and *MENANDER* the Protector praises him for it, (*Cap. XVII. p. 141. Edit. Hoefchel.*) *MARIANA* praises *Sisebutus* for the same Conduct, (*Lib. VI. Cap. III.*) as also *Sancho* King of *Castile*: *De rebus Hispanic. Lib. XI. (Cap. V.) GROTIUS.*

C H A P. XV.

Moderation in obtaining Empire.

I. IF there be some Rules of Equity which we cannot dispense with, and some Acts of Humanity which we laudably exercise towards private Persons, tho' not bound to it in Rigour, we are so much more obliged to observe the former, and it is so much more commendable to practise the latter, towards a whole Nation, or part of one, as the Injury done to a great Number of People is more enormous, and the good done to a Multitude is more considerable, than that which we do to a single Person. As other Things may be obtained in a just War, so the Right of

I. How far internal Justice allows the gaining of Empire.

the Sovereign over a People, and the Right which the People themselves have, in Regard to the Sovereignty, may be acquired; but only so far as the Degree of the Punishment due to their Crimes, or the Value of any other Debt, may justify. To which we may also add, the Necessity to avoid some extraordinary Danger. But this last Reason is for the most part joined with the other two, which yet, either in making Peace, or in managing a Victory, is chiefly to be considered. For in other Cases we may abate of our Right, from a Principle of Goodness and Indulgence, but in a publick Danger it is a cruel Compassion to trust too much to a conquered Enemy. Thus *Isocrates* addresses *Philip*, ¹ *It will be necessary for you so far to subdue the Barbarians, as to secure your own Country from all Danger.*

II. To forbear this Right over the Conquered is commendable.

II. 1. *Sallust* ¹ records of the antient Romans, *Our Ancestors, the most religious of all Men, took nothing from the Vanquished, but the Power to hurt.* A Reflection well worthy of a Christian: And to this Purpose he tells us in another Place, ² *Wise Men make War for the Sake of Peace, and undergo Labour in Hopes of Rest.* *Aristotle* often said, ³ *The Design of War is Peace, and Rest of Labour.* And this is the Meaning of *Cicero's* excellent Saying, ⁴ *War should be undertaken for no other Reason but to procure a firm Peace.* And the same Author again, *Wars are to be undertaken for this End, that we may live securely in Peace.*

2. Agreeably to this our Christian Divines teach us, that the End of War is to remove those Things which disturb Peace. Before the Days of *Ninus*, as we have before observed out of *Trogus*, ⁵ the Custom was rather to defend the Bounds of a State, than to enlarge ⁶ them. Every one's Dominion was limited within his own Country. Kings did not seek for Empire to themselves, but Glory to their People; and contenting themselves with the Victory, would not rule over the Conquered. To which State *St. Augustin* would reduce us, if possibly he could. ⁷ *Let them consider, says he, that it does not belong to good Men to endeavour at the enlarging their Dominion: To which he adds, It is a greater Happiness to have a peaceable Neighbour, than to subdue an ill one in War.* And the Prophet *Amos*, (Chap. i. ver. 23.) highly blames the *Ammonites*, for their eager desire to enlarge their Borders, by encroaching on their Neighbours.

III. Either by mixing the Conquered with Conquerors.

III. The prudent Moderation of the old *Romans* comes very near to this exemplary Innocence of the primitive Times. ¹ *What would our Empire now have been? (says Seneca) if a sound Policy had not intermixed the Conquered with the Conquerors.* Our Founder *Romulus*, (says *Claudius*, ² in *Tacitus*) *was so wise, that he made those that were his Enemies, the same Day Citizens; and he tells us, ³ That nothing so much contributed to the Ruin of the Lacedemonians and Athenians, as their excluding the Conquered as Strangers from the common Rights of their Citizens.* *Livy* ⁴ says, the *Roman Republick* was aggrandized, by giving the Freedom of Citizens to its Enemies, after they were conquered. Histories give us the Examples of the *Sabins*, *Albans*, *Latins*, and other *Italian Nations*; till at last, *Cæsar* led the *Gauls* ⁵

I. (1) *Epist. II. Ad Philip. p. 409. Edit. H. Steph.*

II. (1) *Neque victis quidquam, præter injuriæ licentiam, eripiebant, [nostri majores, religiosissimi mortales] Bell. Catilinar. Cap. XII. Edit. Waff.*

2 *Postremo sapientes, paucis causa bellum gerunt, laborem spe otii sustentant. Orat. I. ad Cæsar. De Reb. ordinand. Cap. XL.*

3 *Politic. Lib. VII. Cap. XV. See also the foregoing Chapter, and Ethic. ad Nichom. Lib. X. Cap. VII.*

4 *Bellum autem ita suscipiatur, ut nihil aliud, nisi pax quæsit videatur, De Offic. Lib. I. Cap. XXIII.*

5 *Fines imperii tueri, magis quam proferre, &c. JUSTIN, Lib. I. Cap. I. Num. 3, 4.*

6 The Emperor *Alexander* told *Artaxerxes* King of *Persia*, that every Prince ought to be contented with his own Possessions, and not undertake a great War, for the Sake of extending his Frontiers. *GROTIUS.*

This Passage is in *HERODIAN, Hist. Lib. VI. Cap. II. Num. 9. Edit. Boecler.* I see no Reason

for our Author's having put in the Beginning of it, *ἐν τοῖς ἰδίῳις ὅποις*, instead of *ἐν τοῖς ἰδίῳις ὅποις*. The Correction is not at all necessary, admitting our Author had believed the Reading faulty.

III. (1) *Quid hodie esset imperium, nisi salubris providentia victos permiscuisset victoribus? De Ira, Lib. II. Cap. XXXIV.*

2 *At Conditor noster Romulus tantum sapientia valuit, ut plerisque populos eodem die hostes, dein cives, habuerit. Annal. Lib. XI. Cap. XXIV. Num. 7.*

3 *Quid aliud exitio Lacedæmoniis & Atheniensibus, quamquam armis pollerent, nisi quod victos pro alienigenis arcerent? Ibid. Num. 6.*

4 *Vultis, exemplo majorum, augere Rem Romanam, victos in civitatem accipiendo? Lib. VIII. Cap. XIII. Num. 16.*

5 *Gallus Cæsar in triumphum ducit, idem in Curiam.* This is a Kind of a Song, made by Persons discontented with the Government, as *SUETONIUS* informs us, in the Life of *Julius Cæsar*, Cap. LXXX. from which our Author took this Verse.

in Triumph, and then introduced them into the Senate. *Cerealis*, in *Tacitus*, ⁶ thus addresses the *Gauls*, *You yourselves generally command our Legions, you govern these, and the other Provinces; you are denied or debarred nothing: And he adds, Wherefore love Peace, and reverence a City where you enjoy the same Right as the Conqueror.* Lastly, what is very admirable, all within the Compass of the Roman Empire, by the Decree of the Emperor *Antoninus*, ⁷ were made Citizens of *Rome*, which are the very Words of *Ulpian*. After that, as *Modestinus* ⁸ observes, *Rome* was the common Country of all that were under its Dominion. And thus said *Claudian* of it,

⁹ *Hujus pacificis debemus moribus omnes,
Quod cuncti gens una sumus.*

*We owe this Union of so many States
To her pacific Maxims.*

IV. 1. There is another Kind of Moderation in Victory, to leave to the Conquered, either Kings or People, their own Government. Thus *Hercules* to *Priam*,

¹ *Hostis parvi victus lacrymis,
Suscipe, dixit, Rector habenas,
Patrioque sede celsus solio,
Sed sceptrum fide meliore tene.*

*Won by the Tears of a disabled Enemy,
Once more (says he) receive the Reins of Empire,
Fill once again, the Throne of your Progenitors;
But keep your Faith with more Integrity.*

IV. Or by leaving the Sovereignty in the Hands of those that possessed it before.

The same *Hercules* having conquered *Neleus*, gave his Kingdom to his Son *Nestor*. Thus the *Persian* Monarchs left their Kingdoms to the conquered Kings. So did *Cyrus* to the King of *Armenia*, and *Alexander* to *Porus*. This ² *Seneca* much commends, *To take nothing from the vanquished King but Honour.* And *Polybius* ³ admires the Moderation of *Antigonus*, that when he had *Sparta* in his Power, he left to the Citizens, *Their antient Government and Liberty.* Which Act, he says, acquired him great Praise throughout *Greece*.

2. Thus the *Cappadocians* were permitted by the *Romans* to use what Form of Government they pleased; and several other Nations, after the War, were left free.

⁶ *Ipsi plerumque Legionibus nostris praesidentes: Ipsi has aliasque provincias regitis. Nihil separatim clausumve.* Hist. Lib. IV. Cap. LXXIV. Num. 3.

⁷ *In Orbe Romano qui sunt, ex Constitutione Imperatoris Antonini, cives Romani effecti sunt.* Digest, Lib. I. Tit. V. De Statu Hominum, Leg. XVII. This was the Emperor *Caracalla*, and not *Antoninus Pius*, as is said in *Novell.* LXXVIII. of *JUSTINIAN*, Cap. V. nor *Marcus Antoninus*, to whom *AURELIUS VICTOR* attributes the Constitution in Question, *De Caesaribus*, Cap. XV. Num. 13. upon whose Authority *GROTIUS* seems to determine in Favour of the latter Emperor, in his *Spartones Florum ad Jus Justinian.* p. 75. Edit. *Amstel.* Neither was it from a Motive of Moderation, or good Policy, that *Caracalla* made all the Subjects of the Empire, who were Freemen, Citizens of *Rome*; but to encrease his Finances, by multiplying the Profits and Echeats, which he derived only from *Roman* Citizens, upon Occasion of several Things that Strangers had no Share in. This the Learned have long ago observed, chiefly from the express Words of *DION CASSIUS*, Excerpt. *Peiresc.* p. 744. And after them the late Baron

SPANHEIM has exhausted the Subject, in his excellent Work, intitled *Orbis Romanus*, Dissert. II. Cap. I. & seq.

⁸ *Roma communis nostra patria, &c.* Digest, Lib. L. Tit. I. Ad Municipalem, &c. Leg. XXXIII.

⁹ *In secundum Consulatum, Stilichon.* ver. 154, 159. IV. (1) *Troad.* ver. 725. & seq.

² *Si vero regnum quoque suum tuto relinquere apud eum potuit, reponique eo unde deciderat: Ingenti incremento surgit laus ejus, qui contentus fuit, ex Rege victo nihil, praeter gloriam, sumere.* De *Clement.* Lib. I. Cap. XXI. The whole Passage is well worthy of being read: Especially what follows immediately, where the Philosopher says, that to act so is to triumph over Victory itself, and to shew, in the most evident Manner, that the Victor found nothing amongst the Vanquished worthy of him. *Hoc est etiam ex victoria sua triumphare, testarique, nihil se, quod dignum esset victore, apud victos invenisse.* *Pompey the Great* left *Tigranes*, King of *Armenia*, Part of his Dominions, as *EUTROPIUS* informs us, *Breviar. Hist. Roman.* Lib. VI. Cap. X. *GROTIUS.*

³ *Lib. V. Cap. IX.*

Carthage ⁴ was left free, to be governed by her own Laws, as the Rhodians pleaded to the Romans, after the second Punick War; and Pompey, (says ⁵ Appian) Of the conquered Nations he left some free. And Quintius answered the Ætolians, crying out that there could be no firm Peace, till Philip the Macedonian were driven out of his Kingdom; ⁶ they had perfectly forgot the Custom of the Romans, to spare those they had conquered; adding this, That a great Soul was always the most merciful to the Vanquished. And Tacitus informs us, ⁷ That nothing was taken away from Zorines when he was conquered ⁸.

V. Sometimes by placing of Garrisons.

V. Sometimes with the restoring of the Sovereignty, the Conqueror's Security is also provided for. ¹ Thus it was ordered by Quintius, that the City of Corinth should be restored to the Achæans, but a ² Garrison put into the Citadel. And that Chalcis and Demetrius should be detained, till all Fear of Antiochus were over.

VI. Or by Tributes, and the like Impositions.

VI. The imposing of Tributes is oftentimes not so much to reimburse the Charges of a War, as for the Security both of the Conqueror and Conquered, for the future. Cicero writes thus of the Greeks, ¹ Let Asia also consider, That she can never be free from a foreign War, or domestick Quarrels, if she be not secured by the Roman Empire, and since that cannot be done without Tributes; she may very reasonably part with some of her Wealth, to secure to herself a perpetual Peace. Petilius Cerealis, in Tacitus, thus pleads for the Romans, with the Lingones, and other Gauls. ² We, tho' so often provoked, yet, by the Right of Victory, exact of you only what is necessary to maintain Peace. For the Peace of Nations cannot be maintained without Arms, nor Arms without Pay, nor that without Tributes. Agreeable hereunto is that which we have said ^a before, when we treated of unequal Alliances, as to deliver up one's Arms, Fleets, Elephants, to keep no Fort nor Army.

^a B. ii. c. 15. § 7. n. 7.

VII. Profit arising from this Moderation.

VII. 1. But that their own Sovereignty should be left to the Vanquished, is not only agreeable to Humanity, but often also to Policy. This is commended among Numa's Laws, that he would have no Blood shed at the Rites of the God Terminus, thereby intimating, that nothing more contributed to a firm Peace than to live contentedly within our own Bounds. And Florus ¹ well observes, It is harder to keep Provinces, than to conquer them; they are gained by Force, but must be retained by Justice. Like to this is that of Livy, ² It is more easy to conquer several Countries, one after another, than to keep them all together. And Augustus says, in Plutarch, ³ It costs less to conquer a great Empire, than to govern it when conquered.

Darius's

⁴ This the Embassadors of Rhodes said to the Roman Senate, *Ne alios populos enumerem, Carthago libera cum suis legibus est.* LIVY, Lib. XXXVI. Cap. LIV. Num. 25. See what is remarked upon this Liberty, left by the Romans to conquered Kings and States, Book I. Chap. III. § 21. Note 21.

⁵ Bell. Mithridat. (p. 251. Edit. H. Steph.) To understand the Condition of those free States read POLYBIUS, Excerpt. Legat. Num. 9. and SÆTONTIUS, in the Life of Julius Cæsar, (Cap. XXV.) There are also some Things well worth reading upon this Head, in FRANCIS GUILLIMAN, *De Rebus Helvetiorum*, (Lib. I. Cap. VIII.) GROTIUS.

⁶ LIVY, Lib. XXXIII. Cap. XII. Num. 5, and 9.

⁷ Sic Zorfini victo nihil ereptum. Annal. Lib. XII. Cap. XIX. Num. 3.

⁸ Pepin left the Crown to Aistulphus the Lombard. GROTIUS.

King Pepin had neither in the first nor second Expedition he undertook against Aistulphus, made himself Master of all that the Lombards possessed in Italy. He had only besieged Pavia, the Capital of their Kingdom. It is true, that as he came into Italy, at the Solicitation of Pope Stephen, he was contended with demanding of Aistulphus, by the Treaty of Peace, the Restitution of the Exarchat of Ravenna. See EGINHARD, *De vita Caroli Magni*, Cap. VI. with the Note of the last

Edition; as also the Authors cited by Father DANIEL, *Hist. de France*, Tom. I. p. 371. & seq. Edit. Amster.

V. (1) Or rather by the ten Embassadors, sent by the Romans to conclude a Peace with Philip. *Postremo ita decretum est*, &c. LIVY, Lib. XXXIII. Cap. XXXI. Num. 2.

² But the same Flaminius afterwards gave up this Article, as POLYBIUS informs us, Excerpt. Legat. Num. 9. And PLUTARCH, *Vit. Tit. 2. Flamin.* (374.) GROTIUS.

VI. (1) *Simul & illud Asia cogitet*, &c. Lib. I. Epist. Ad Quint. frat. I. Cap. XI.

² Nos, quamquam totiens laceffite, &c. Hist. Lib. IV. (Cap. LXXIV. Num. 1, 2.) See what AGATHIAS says, concerning the Custom of the Persians, Lib. IV. (Cap. IX.) GROTIUS.

VII. (1) *Sed difficilium est provincias obtinere, quam facere.* Viribus parantur jure retinentur. Lib. IV. Cap. XII. Num. 29.

² *Parari singula acquirendo facilius potuisse, quam universa teneri posse.* Lib. XXXVII. Cap. XXXV. Num. 6.

³ Upon Occasion of Alexander the Great, who after having conquered a great Part of the World, at the Age of thirty-two Years, was in Pain about what he should do afterwards. *Apophthegm.* p. 207. D. So DION CASSIUS observes, that Augustus was praised for his Moderation, in contenting himself with the Dominions he possessed. GROTIUS.

The Passage of DION CASSIUS is in Lib. LIII. except

Darius's Embassadors tell *Alexander*, ⁴ *A foreign Empire is dangerous, it is hard to hold what one cannot grasp. It is easier to conquer some Places than to keep them. How much more easily do our Hands take than they can hold!*

2. Which ⁵ *Calanus* the *Indian*, and before him *Oebarus*, ⁶ *Cyrus's* Friend, explains, by the Comparison of dry Leather, which when pressed down with your Foot on one Side, rises up on the other. And *T. Quintius*, in *Livy*, ⁷ by the Similitude of a Tortoise, who when he draws himself into his Shell is safe from Harm; but as soon as ever he peeps out, is presently in Danger. *Plato* ⁸ in his third Book of Laws, thus applies the Saying of *Hesiod*, *Omni dimidium plus, One half is better than the whole.* And *Appian* ⁹ observes, that when some Nations desired to be admitted under the *Roman* Government, they were refused; and to some Nations they appointed Kings. In the Opinion of *Scipio Africanus*, the *Roman* Empire in his Days was so large, that to desire more would be but Covetousness; to keep quietly what they had, would be sufficiently happy. Wherefore that Prayer in which, at their solemn Purgations, the *Romans* used to intreat the Gods to prosper and enlarge their Empire, ¹⁰ he thus amended, that they would preserve it in perpetual Safety.

VIII. The *Lacedemonians*, and in the Beginning, the *Athenians*, never pretended to any sovereign Power over conquered Cities, they only insisted that they should use the same Form of Government with themselves. The *Lacedemonians* being under an Aristocracy, and the *Athenians* under a Democracy, as *Thucydides*, *Isocrates*, and *Demosthenes* inform us, and also *Aristotle* himself, in his eleventh Chapter of his fourth Book, and seventh of the fifth of the Republick; to which very Thing, *Heniochus*, a Writer of those Times, makes this Allusion in his Comedy,

VIII. Examples, and of the Change of Government among the Conquered.

¹ Γυναικας δ' αὐτὰς δὴ ἐταράττετον τινα
Ἀεὶ συνῶσαι Δημοκρατία βαλέραι

except the first Words, which our Author adds to it, no Doubt, from quoting by Memory; and which express the Approbation given by the Publick to the Moderation of *Augustus*. The Historian relates only what that Emperor believed his Duty to do, and the Advice he gave to the Senate upon it. p. 602. C. Edit. H. Steph. But *Tiberius*, his Successor, praised him for that, amongst other Things, in his funeral Oration, Lib. LVI. p. 684. E. 685. B. See also p. 678. A.

4 In the Passage cited by our Author in this Place, and which he takes from *QUINTUS CURTIUS*, there is not *peregrinum imperium*, but *prægrave*, that is to say, too weighty an Empire. *Periculosum est prægrave imperium: Difficile est continere, quod capere non possis. — Facilius est, quædam vincere, quam tueri. Quam hercule expeditius manus nostræ rapiunt quam continent.* Lib. IV. Cap. XI. Num. 8, 9. If the Reader desires a greater Number of Authorities to confirm the present Reflection, he may find an ample Collection in the *Varii Discursus* *JANI GRUTERI* in aliquot insigniora loca *ONOSANDRI* atque *TACITI*, Part I. p. 141, & seq.

5 By this Comparison the *Indian* Philosopher intended to signify, that *Alexander* ought not to remove from the Midst of his Dominions; for in treading upon the Extremity of the Leather the Motion was occasioned, which ceased when he put his Foot upon the Middle of it. *PLUTARCH*, *Vit. Alexandr.* p. 701. E.

6 Our Author cites nobody here: But he took this Fact from *Aristides*, which he relates in his Elogy of *Rome*. And the Comparison is said there to have been made in another Sense and View: For if the Rhetorician is to be believed, *Oebarus* used it, to give *Cyrus* to understand, when tired with travelling so much in his Dominions, that doing so was absolutely necessary, in Order to preserve Tranquillity and good Order; and that, if he con-

tented himself with visiting only some Places, leaving Things to go as they would in others, it would be like treading upon Leather only on one Side, which is thereby kept under, whilst the other Parts of it rise up. *Orat. in Romæ laudat.* p. 353, 354. Vol. I. Edit. Paul Steph. It is true the Panegyrist introduces this on Occasion of the antient *Persian* Kings, who neither knew how to push nor keep their Conquests in *Europe*. For the Rest, as I did not remember to have read any where this Saying of *Cyrus's* Favourite, and the Commentators upon *PLUTARCH* have not mentioned it, where he speaks of the *Indian* Philosopher: I should not have thought of looking for it in *ARISTIDES*, if I had not met with it by Chance, in running over the *Observationes Historico-Policæ* of *MICHAEL PICART*, formerly Professor at *Altorff*; in which he has collected (*Decad.* IV. Cap. VIII.) a great Number of Authorities, to shew that a Prince ought to reside in the Center of his Dominions, to have an Eye upon all Things from thence, and to maintain Order every where.

7 *Cæterum sicut testudinem, &c.* Lib. XXXVI. (Cap. XXXII. Num. 6, 7.) *PLUTARCH* has the same Thought. (*Vit. Flamin.* p. 378. D.) *GROTIUS*.

8 P. 690. E. Vol. II. Edit. H. Steph. The Passage of *HESIOD* is in his *Works and Days.* ver. 40.

9 He says, that he himself was witness to the Embassies of Nations which were rejected. *Præfatio.*

10 *Qui* [*Africanus posterior*] *quum lustrum conderet, &c.* *VALERIUS MAXIMUS*, Lib. IV. Cap. I. (Num. 10.) The Consul *Claudianus Julianus*, quotes this History, in his Letter to *Papianus* and *Balbinus*, (related by *CAPITOLINUS*, in *Maxim. & Balbin.* Cap. XVII.) *GROTIUS*.

VIII. (1) *Apud STOBÆUM*, *Serm.* XLIII.

Ὅνομα ἐστὶ, τῇ δὲ Ἀριστοκρατία θατέρω,
 δι' αὗς πεπαρωνήκασιν ἤδη πολλοί.

Two Women, turbulent in their Designs,
 Arriv'd amongst them: Democratia
 The one was call'd, Aristocratia th' other,
 These some Time since distracted them.

Tacitus mentions the same Thing done by Artabanus, in Regard to Seleucia², He established Aristocracy for his own Interest, because popular Government comes nearer to Liberty, and the Dominion of a few Nobles somewhat resembles arbitrary Power. But whether such Alterations³ make for the Security of the Conqueror, it is not my Business to determine.

IX. If the Sovereignty be assumed, part of it to be left to the Conquered.

IX. But if it be not perfectly safe to leave to the Conquered their entire Liberty, yet it may be so moderated, that some Part of the Government may be left to them, or their Kings. Tacitus¹ tells us, that it was the Custom of the Romans, to make even Kings Instruments of Subjection. So Antiochus is called, ² The richest of all the Kings that were subject to them. Kings, Subjects of the Romans,³ in the Commentaries of Musonius. And in Strabo,⁴ about the End of the sixth Book. Thus Lucan,

⁵ Atque omnis Latio, quæ servit purpura ferro.

And every Prince that serves the Roman State.

Thus the Government continued among the Jews, in the Sanhedrim,⁶ even after Archelaus had been stript of his Kingdom. And Evagoras,⁷ King of Cyprus, (as Diodorus relates) said, he would obey the King of Persia, but that as one King did another. And Alexander offered to Darius, after he had overcome him,⁸ That he should rule over others, provided he would obey him, his Conqueror. We have already^a treated of the Manner how a Government may be mixed. Sometimes conquered Kings had Part of their States restored to them, and at the same Time, Part of the Lands⁹ was left to the antient Possessors.

^a B. i. c. 3. § 17. and B. iii. c. 8. § 3.

X. Or at least some Sort of Liberty.

X. Yet when all Sovereignty is taken from the conquered, there may be left to them their own Laws, about their private and publick Affairs, of small Moment, and their own¹ Customs and Magistrates. Thus Pliny's Epistles tell us; that in Bithynia,

² Id nuper acciderat, &c. Annal. Lib. VI. Cap. XLII. Num. 3.

³ They may certainly be very much to his Prejudice, on Account of the particular Genius of every People; and their Attachment to that Form of Government to which they have been accustomed.

IX. (1) *Vetere ac jam pridem recepta Populi Romani consuetudine, ut haberet instrumenta servitutis & Reges.* Vit. Agricol. Cap. XIV. Num. 2.

² Antiochus — *inservientium Regum ditissimus.* Tacitus, Hist. Lib. II. Cap. LXXXI. Num. 1.

³ By POLLIO VALERIUS.

⁴ Geogr. p. 288. Edit. Paris. Casaub.

⁵ *Pharsal.* (Lib. VII. ver. 228.) See also the Panegyrick in Honour of Maximianus, (Cap. X.) GROTIUS.

⁶ That is to say, they judged according to their own Laws, as did most of the People dependent upon the Roman Empire. For the Rest, before Archelaus was banished to Vienna, the compleat Sovereignty was no longer in the Jewish Nation. See the Note of GRONOVII upon this Place, and what is said above, Book I. Chap. III. § 22. Note 3.

⁷ It was upon those Conditions he concluded Peace. *Bibl. Hist.* Lib. XV. Cap. VIII. p. 462.

Edit. H. Steph. See a little above, in the foregoing Chapter, and same Page.

⁸ In the same Manner the Great King, or King of Persia, had other Kings under him, as appears by this Verse of ÆSCHYLUS,

Βασιλεὺς βασιλέω; ὑποχοι μέγας.

Kings subject to a greater King.

In Persis. There were antiently such Kings, dependent upon other Kings, in Italy, as SERVIUS observes on B. X. of the *Æneid*, (ver. 655.) And there are still such amongst the Turks, as LEUNCLAVIUS relates, Lib. XVIII. GROTIUS.

⁹ See Chap. III. of this Book, § 4. Num. 4. or last.

X. (1) The Emperor Augustus, as PHILO the Jew observes, was as careful to preserve and confirm the Laws of every Nation, as to maintain those of the Romans: In Legat. ad Cajum. (p. 1014. B. Edit. Paris.) GROTIUS.

Mr. BYNKERSHOEK, in the ninth Chapter of his Dissertation upon the ninth Law of the *Digest*, *De Lege Rhod.* (p. 90.) is for translating here, instead of *The Laws of each People*, as our Author renders it, the *antient Establishments* of each People: But he confesses at the same Time, that this principally

Bithynia, a Proconsular Province, the City ² *Apamea* was indulged to govern their State as they pleased themselves. And in other Places, the *Bithynians* had their own Magistrates, and their own Senate. So in *Pontus*, the City of *Amisus*, by the Favour of *Lucullus* ³, was allowed its own Laws. The *Goths* left their Civil Law to the conquered *Romans*.

XI. 1. Another Privilege which ought to be allowed the Conquered, is ' the Exercise of their antient Religion; unless they themselves, being convinced, are desirous to change it; which *Agrippa*, in his Oration to *Cajus*, (which *Philo* gives in his Relation of his Embassy) proves to be both very agreeable to the Vanquished, and not prejudicial to the Victor. And in *Josephus*, both *Josephus* himself, and the Emperor *Titus* ², objected to the rebellious *Jews* at *Jerusalem*, that, by the Favour of the *Romans*, they might use their own religious Ceremonies with so much Liberty, that they might drive away Strangers from their Temple, even at the Peril of their Lives.

XI. Especially in Religion.

2. But if the Religion of the Conquered be false, the Conqueror ought to take Care, ³ that the true one be not oppressed; which *Constantine* did, by weakning *Licinius's* Party; and after him the antient Kings of *France*, and of other Nations.

XII. 1. The last Advice is, where the Empire is entirely and absolutely obtained, there we should treat the Conquered with Gentleness, and in such a Manner that their Interests may be blended with those of the Conqueror. *Cyrus* bid the conquered *Assyrians* be of good Courage, telling them that their Condition should be the same it was before, except only that they would have another King; that they should enjoy their Houses, Lands, their Authority over their Wives and Children, as before; and if any one wronged them, he and his would take Care to see them righted. We read in *Salust*, ' The Romans chose rather to gain Friends than

XII. At least we ought to use the Conquered with Mercy, and why.

principally regards the Laws. For the Rest, the Reader may see, and examine what the same Author advances in this Chapter; that the Nations, whom the *Romans* permitted to retain their own Laws, had this Liberty only so far as their Laws included nothing contrary to the *Roman* Laws.

2 *Habuisse* [*Apameam*] *privilegium & vetustissimum morem, arbitrio suo rempublicam administrare*. Epist. LVI. The City of *Sinope*, tho' dependent upon the *Persians*, was governed democratically, as *APPIANUS ALEXANDRINUS* informs us, *Bell. Mithrid.* So the *Greeks*, after their falling under the Dominion of the *Romans*, retained a Shadow of their antient Liberty. *Quibus* [*Athenis & Lacedæmoni*] *reliquam umbram, & residuum libertatis nomen erigere, durum, ferum, barbarumque est*. *PLINY*, *Lib. VIII. Epist. XXIV.* See also, *CICERO*, *Lib. VI. ad Attic. Epist. I.* (p. 584. and II. p. 603. *Edit. Grævii.*) It appears by one of the Epistles of the latter, that the People of *Cyprus* could not be obliged to quit their Island to appear before any foreign Tribunal. *Nam evocari ex insula Cyprios non licet*. *Lib. V. ad Attic. Epist. XXI.* *GROTIUS*.

What our Author observes in the Beginning of his Note, concerning the City of *Sinope*; the Historian, whose Authority he uses, says of another City of *Pontus*, or of that mentioned in the Text, named *Amisus*. The Passage proves also, what our Author says there of *Lucullus*, to whom he ascribes the Concession of that Privilege. *Ἀνεκκαλεῖται ὁ ἄρχηγος, &c.* *APPIANUS ALEXANDRINUS*, *Bell. Mithrid.* p. 228. *Edit. H. Steph.* As *Sinope*, and the *Sinopians* are spoken of in the Beginning, and at the End, of this Passage, our Author, in hastily reading it, did not observe that all the rest of it relates to *Amisus*. And that this City is meant, appears from its being said, that it had formerly been a Colony of the *Athenians*; for we find the same Thing in *STRABO*, *Geogr. Lib. XII. p. 547. Edit. Paris.* and in the *Peripl.* *ARRIAN.* p. 16. *Edit.*

Hudson. Vol. I. *Geogr. min.* who say nothing of this Kind in Relation to *Sinope*.

3 See the Passage referred to in the foregoing Note.

XI. (1) It is better that they should have some Kind of Religion than none at all; as we have observed above, in giving the Words of the Emperor *Severus*, (*Chap. XII. of this Book, § 6. Note 1.*) The *Goths* declared of old, that they would compel nobody to embrace their Religion. *PROCOPIUS, Gothic. Lib. II. (Cap. VI.) GROTIUS.*

2 *De Bill. Jud. Lib. VII. Cap. X. Græc. p. 949. G.*

3 Provided it be done by lawful Means, that is to say, without having Recourse to Violence, except to oppose those who use it first, to establish or advance their Religion: Otherwise, all Methods but that of Persuasion are unlawful, both by natural Right and revealed divine Right.

XII. (1) *Ad hoc Populo Romano, jam a principe, inopi, melius visum, amicos, quam servos, querere; tutiusque rati, volentibus quam coactis, imperitare.* (*Bell. Jugurth. Cap. CIX. Edit. Waff.*) The *Lacedæmonian* Embassadors say in *THUCYDIDES*, that the Method of extinguishing the Animosity which subsists between two Enemies, is not for the Victor to abandon himself to his Repentment, and to make the utmost of his Superiority over the Vanquished, but to be reconciled with the latter, upon just and reasonable Conditions: For then, being gained by the Victor's Generosity, he believes himself obliged in Honour to shew his Gratitude, and is far from having any Thoughts of violating his Engagements. *Lib. IV. (Cap. XIX. Edit. Oxon.) GROTIUS.*

The Collection of *GROTIUS*, already quoted, may be seen again in this Place, *Part II. p. 56. & seq.* where, upon a Passage of *TACITUS*, he cites a great Number of Authorities, which confirm the Reflections of our Author.

Slaves,

Slaves, and thought it safer to govern by Love than Fear. In the Days of Tacitus, ² the Britons readily made their Levies, paid their Tributes, and performed all Duties enjoined them by the Romans, whilst they were not ill-treated; but they could not easily bear Wrongs, being so far conquered, as to be Subjects, not Slaves.

2. The Privernian Embassador being asked in the Roman Senate, what Sort of Peace the Romans might expect from them, replies, *If you shall grant a good Peace, it will be firm and lasting; if a bad one, it will not hold long.* And he gives the Reason, ³ *Do not think that any People, or single Person, will ever continue longer in a Condition that he does not like, than he is absolutely forced to it.* So said Camillus, *That Empire is most secure, which is agreeable to those over whom it is exercised.* The Scythians told Alexander, *There is no true Friendship between the Lord and the Slave; and, in the midst of Peace, the Rights of War remain.* And Hermocrates, in Diodorus, *It is not so glorious to overcome, as to use the Victory with Humanity.* In Order to make a right Use of Victory, the Saying of Tacitus ought always to be remembred, that *We cannot finish a War in a more happy and glorious Manner than by pardoning the Vanquished.* Julius Cæsar, in a Letter he wrote when Dictator, says, *Let this be the new Way of conquering, to secure ourselves with Mercy and Liberality.*

2 *Ipsi Britanni delectum, &c.* Vit. Agric. Cap. XIII. Num. 1.

3 It is not he who gives this Reason, but the Senate itself, or the Majority of the Senate, who generously took in good Part, and considered as Sentiments worthy of a brave Man, and a Freeman, what some amongst them had censured as too

bold, and tending to excite other Nations to Rebellion. *Quid si pœnam inquit [Consul] remittimus, &c.* Lib. VIII. Cap. XXI. Num. 4. & seq. What follows will confirm our Author's Position. *Ibi pacem esse fidam, ubi voluntarii pacati sunt; neque eo loco, ubi servitutem esse velint, fidem sperandam esse.*

C H A P. XVI.

Moderation concerning those Things which, by the Law of Nations, have not the Benefit of Postliminy.

I. That internal Justice requires that what is taken away by an Enemy in an unjust War, be restored.

^a Chap. 13.

of this Book.
^b Ch. 10. § 3,
&c.

I. 1. **H**OW far Things taken in a just War may be the Captors, I have declared ^a above, from which are to be deducted, what are recoverable by the Right of Postliminy; for these are to be esteemed as not taken. But Things taken in an unjust War, I have already ^b said, are to be restored, not only by the immediate Captors, but by others also, who shall happen to be possessed of them on any Account. For no Body can make over to another more Right than he has himself, say the ¹ Roman Lawyers; which Seneca briefly explains, ² *No Man can give what he has not to give.* If the first Captor did not become lawful Proprietor of them, according to the Rules of true Justice, then he cannot possibly be so, who derives all the Title he can have from him. Therefore the Right of Property which the second or third Possessor may have, is what we call external, that is, he is entitled to Defence by all judiciary Power and Authority, as if he were the right Owner; yet if he makes Use of this Right against him from whom the Things were unjustly taken, he acts dishonestly.

2. For what some eminent Lawyers ³ have decided concerning a Slave, who being taken by Robbers, afterwards fell into the Hands of the Enemy, that he was to be considered as a Thing stolen, though he had been Slave to the Enemy, and returned by Right of Postliminy. The same may be an-

I. (1) *Traditio nihil amplius transferre debet, vel potest, ad eum, qui accipit, quam est apud eum, qui tradit.* Digest, Lib. XLI. Tit. I. De acquir. rer. domin. Leg. XX. princip. See also, Lib. IX. Tit. IV. De noxalibus actionib. Leg. XXVII. § 1.

2 *Quoniam nemo potest, quod non habet, dare.* De Benefic. Lib. V. Cap. XII.

3 The Law is cited above, Chap. IX. of this Book, § 16. Note 3.

swered from the Law of Nature, concerning him, who being taken in an unjust War, and afterwards, by a just War, or some other Accident, comes into the Power of another. For by internal Right, there is no Difference between an unjust War and downright Robbery. And *Gregorius Neo-Cæsariensis*, being consulted, made a correspondent Answer, when some of the Inhabitants of *Pontus* ⁴ had recovered some Goods taken away by the Barbarians.

II. 1. Therefore Things so taken, ought to be restored to them from whom they were taken, which we see frequently done. ¹ *Livy*, relating how the *Volsci* and *Æqui* were overcome by *L. Lucretius Tricipitinus*, says, *That the Spoil was exposed for three Days in the Field of Mars, that every one might have that Time to come and acknowledge his own, and freely take it away.* And the same Author in another Place, speaking of the *Volsci*, defeated by *Posthumius* the Dictator, says, ² *Part of the Spoil was restored to the Latins and Hernici, upon their owning of it, of another Part he made Portsale.* And again, ³ *Two Days were allowed to the Owners to come and claim their Goods.* And the same Author, speaking of the *Samnites's* Victory over the *Campanians*, tells us, ⁴ *It was a most joyful one to the Conquerors, for they had retaken 7400 Prisoners; a vast Booty for their Confederates; and the Owners were summoned by Proclamation, to own and take their Goods by a certain Day.* And a little further he gives us the like Account of the *Romans* ⁵. *The Samnites endeavouring to take Interamna, a Colony of the Romans, but not able to hold it, they plundered the Country, and carrying off a great Number of Men, Cattle, and other Things, they accidentally fell into the Hands of the Roman Consul, returning Conqueror from Luceria; nor did they lose only their Booty, but, being encumbered with their heavy Baggage, were themselves routed and slain. The Consul, by Proclamation, summoning the Owners to come to Interamna, to fetch their Goods, leaving his Army there, went to Rome, on the Account of chusing Officers.* The same Author also, in another Place, speaking of the Booty which *Cornelius Scipio* had taken at *Ilipa*, a City of *Portugal*, says thus, ⁶ *It was all exposed to View before the City, and Leave given to the Owners to take their own, the Rest was delivered to the Quæstor to be sold, and the Money arising from thence distributed to the Soldiers.* ⁷ *After the Battle of T. Gracchus at Beneventum, the whole Prey, except the Prisoners, and what Cattle were not owned within thirty Days, were given to the Soldiers:* As we read in the same *Livy*.

2. *Polybius* writes of *L. Æmilius*, when he had conquered the *Gauls*, ⁸ *He restored the Spoils to those that came for them.* ⁹ *Plutarch* and *Appian* relate, that *Scipio* did the same, when at the taking of *Carthage*, he found there many Things consecrated to the Gods, which the *Carthaginians* had brought thither from the Cities of *Sicily*, and elsewhere, (*viz.* restored them to their first Owners.) And so does *Cicero*, in his Oration against *Verres*, concerning the Jurisdiction of *Sicily*, ¹⁰ *The Carthaginians had formerly taken the City of Himera, that had been one of the stateliest and richest of Sicily; Scipio looking upon it as an Act worthy of the Roman People, when the War was ended by the taking of Carthage, took Care that their proper Goods should be restored to all the Sicilians.* And the same Author does largely speak of the same Act of *Scipio*, in his Oration against *Verres*, concerning Statues.

⁴ He is followed in this by *PET. ANT. DE PETRA*, *De Potestate Principis*, Cap. III. Quæst. IV. *BRUNINGUIS*, *De Homagiis*, Concluf. CCXLI. *GROTIUS*.

II. (1) *Et auget gloriam*, &c. Lib. III. Cap. X. Num. I.

² *Prædæ pars, sua cognoscentibus*, &c. (Lib. IV. Cap. XXIX. Num. 4.)

³ *Biduum ad recognoscendas res datum dominis.* [Lib. V. Cap. XVI. Num. 7. where he relates the Defeat of the *Tarquinius*.]

⁴ *Et quod lætissimum*, &c. *LIVY*, Lib. X. Cap. XX. Num. 15.

⁵ *Altero exercitu Samnites*, &c. *Idem. ibid.* Cap. XXXVI. Num. 16. & seq.

⁶ *Pugnatum haud procul Ilipa*, &c. *Idem. Lib. XXXV. Cap. I. Num. 11.*

⁷ *Præda omnis præterquam*, &c. *Idem. Lib. XXIV. Cap. XVI. Num. 5.*

⁸ Lib. II. (Cap. XXXI.) *GROTIUS*.

⁹ Also *DIODORUS SICULUS*, *Excerpt. Peiresc.* and *VALERIUS MAXIMUS*, B. I. Chap. I. Num.

⁶ Also the Humanity of the last *Scipio Africanus*, was eminently famous; for when he had taken *Carthage*, he sent about to all the free Cities of *Sicily*, that they should, by their Embassadors, fetch back all the Ornaments of their Temples, which the *Carthaginians* had taken away, and to take Care that they were set up again in their former Places. *GROTIUS*.

¹⁰ *Etenim ut simul P. Africani*, &c. Lib. II. Cap. XXXV.

Thus the *Rhodians* restored four Ships to the *Athenians*, which they had recovered from the *Macedonians*, that had formerly taken them from the *Athenians*. So *Phaneas* the *Ætolian* (as *Livy* ¹¹ says) thought it equitable, that all that had belonged to the *Ætolians* before the War, should be restored to them. Neither did *T. Quinctius* deny it, if the Demand had been only of Cities taken in War; and if the *Ætolians* had not broke the Conditions of the Alliance. Nay, even those Goods which had been consecrated at *Ephesus*, and which the Kings had afterwards made their own, the *Romans* ¹² restored to their former State.

III. Whether
any Thing may
be deducted.
^a B. ii. ch.
10. § 9.

III. But if such Things should come to one in Way of Trade, may he not charge him, from whom they had been taken, with as much as they cost him? He may, as we have already ^a said, in Equity, so far as the Recovery of the Possession of those desperate Things, ¹ might probably cost him, from whom they were taken. If then those Charges may be demanded of him, ² why may not also our Pains and Hazard be valued, as if a Person should recover another Man's Goods out of the Sea, by Diving? Apposite to this is the Story of *Abraham's* returning Conqueror of the five Kings to *Sodom*: *Moses* says, *He brought back all those Things*, (viz. *that they had taken away*), as related before, *Gen. xiv. 16.*

2. Neither can the Offer made by the King of *Sodom*, *Ver. 20, 21, 22, 23, 24.* to restore to him the Prisoners, and to keep the Rest himself, as the Reward of his Pains and Hazard, be otherwise applied. But *Abraham* ³ being a Man not only of a pious Mind,

¹¹ *Phaneas* & *pro societate belli*, &c. *LIVY*, *Lib. XXXIII. (Cap. XIII. Num. 9. & seq.)* Pompey restored *Paphlagonia* to *Attalus* and *Pylamenes*. *EUTROPIUS*, *Breviar. Lib. VI. Cap. XI.* By the Treaty of Alliance between the Pope, the Emperor *Charles V.* and the Republick of *Venice*, against *Solyman* it was agreed that each should recover what they had been dispossessed of, as we find in *PARUTA's History, Lib. VIII.* and, in Vertue of that Clause, the Island of *Cephalenia*, which had been taken by the *Spaniards*, was restored to the *Venetians*. There is also a Passage in *ANNA COMNENA* to the same Effect, in that Part of her History which treats of *GODOFROY*, *Lib. XI. Cap. VI. GROTIVS*,

¹² *STRABO*, *Geogr. Lib. XIV. p. 642. Edit. Paris.*

III. (1) But see what is said in the Place referred to in the Margin, *Note 3.* The Truth is, that it is proper to distinguish here, whether a Thing taken in an unjust War were honestly bought or not; that is to say, whether the Buyer did or did not know, that the Thing fell into the Seller's Hands, or the Hands of those from whom he had it by such a Title. If the Buyer knew that it did, he possesses it dishonestly, and, in consequence, ought to make a simple and absolute Restitution. If he did not know it, and there was no Reason to suspect it, he has all the Rights of an honest Possessor, and consequently he is not bound to restore, what he believed, and had Reason to believe, was lawfully acquired, without receiving all he had given for it of his own; according to the Principles which I have laid down in the Chapter here referred to, and in that of *PUFENDORF*, where the same Subject is treated. So that the Whole depends upon knowing, whether, in Case the Buyer was not ignorant that what he bought was taken in a War, he believed, or had Reason to suspect, that the War was unjust.

2 Our Author here proceeds imperceptibly to the Application of the Question he treats of, to the Things which the Enemy, from whom they were taken, had himself acquired by Arms in an unjust War. And here it is certain, that tho' in taking such Things from the Enemy, they are known to be the Property of another, that does not lessen our

Right to demand a Reimbursement from the antient Proprietor of what it cost us to get Possession of his Effects; that is to say, not only of the Expences of the Expedition, but also the Pains taken, and Dangers incurred, to which we were not obliged to expose ourselves, for the Recovery of another's Goods. But farther, if the Person to whom the Effects belonged, having Opportunity and Means to endeavour their Recovery, remained idle, he is deemed to abandon them, and, in Consequence, the other, who has taken them from the unjust Possessor, then acquires them fully and absolutely. See what I have said above, *Chap. VI. of this Book, § 1. Note 2.*

3 This is what the Rabbi *JACCHIADES* remarks, in his Commentary upon *DANIEL*, *Chap. V. ver. 17.* *SULPICIVS SEVERUS* says, that the Patriarch, after having given the tenth Part of the Booty to *Melchisedek*, restored the Rest to those from whom it had been taken. *Eidemque (Melchisedek) decimas prædæ dedit. Reliqua his quibus erepta erant, reddidit.* (*Hist. Sacra, Lib. I. Cap. VI. Num. 6.*) *St. AMBROSE*, speaking of the same Thing, says, that *Abraham* was rewarded by *GOD*, because he would receive no Repomence from Men. *Ideoquæ quoniam sibi mercedem, ab homine non quæsit, a DEO accepit.* *De Abrah. Patriarch. Lib. I. (Cap. III.)* With this Action of *Abraham* may be compared something like it done by *Pittacus*, one of the seven Sages. He refused half of the Lands which the *Mitylenians* offered him, after they had recovered them under his Conduct. He believed, as *VALERIUS MAXIMUS* says, that the Greatness of the Spoil, should he accept it, would lessen the Glory of his Exploits. *Atque etiam quum recuperati agri — deforme judicans, virtutis gloriam magnitudine prædæ minuire.* *Lib. VI. Cap. I. Num. 1. extern.* *PLUTARCH*, speaking of *Timoleon*, [who accepted a magnificent House and a fine Estate] observes, that it is not dishonourable indeed to receive in the like Case, but that it is more glorious to refuse such Offers, and argues the highest Degree of an eminent Virtue, which can deny itself those Things which it is lawful to desire. *In Vit. Timoleon.* (in fin. p. 277. B. Vol. I. *Edit. Wechel.*) See what we have said above, *B. II. Chap. XIV. § 6. and Chap. IV. of this Book, § 2. GROTIVS.*

The

Mind, but also of a heroick Spirit, would take nothing to himself; but of the Booty, (for, as we said before, that is what is meant⁴) as being his due, he gave the tenth unto GOD; he deducted the necessary Expences of that Expedition, and some Part he desired to be given to his Confederates.

IV. As Things (taken in an unjust War) are to be restored to their proper Owner, ^{IV. The People, or Part of them, to be restored, if unjustly possessed.} so a People, or Part of them, are to be returned to their lawful Sovereigns, or even to themselves, if they were free before this unjust Conquest. Thus was *Sutrium* retaken, and restored to its Allies in the Time of *Camillus*, as *Livy* informs us. The *Lacedæmonians* restored the *Æginetæ* and *Melii*² to their Cities. And the Cities of *Greece*, which had been oppressed by the *Macedonians*, were set at Liberty by *Flaminius*; who, in the Conference with ³ *Antiochus's* Embassadors, told them, it is equitable that all the Cities of *Asia*, which were of Greek Original, should be restored to their Liberty, which *Seleucus*, the Great-Grandfather of *Antiochus*, had taken by Force, and afterwards being lost, had been reconquered by this *Antiochus*: For, says he, *those Colonies were not sent into Æolia and Ionia to be subjected to the Kings of Asia, but to preserve a Nation so antient as that of Greece, and to propagate it throughout the World.*

V. It has been sometimes disputed, how long a Time is allowed, before this internal Obligation to Restitution may cease? But this Question, if it be between Subjects¹ of the same State, is best decided by their own Laws, provided those Laws give a true Right, that sets the Conscience at Rest, and not an external Right only; which may be collected by a prudent Searching into the Words and Meaning of those Laws. But if it be between Strangers each to other, it can be decided only by just Presumptions of a tacit Dereliction; of which we have spoken enough in ^a another Place to our Purpose. ^{V. In what Time the Obligation of Restitution ceaseth.}

VI. But if the Justice of the War be very doubtful, it will be best to follow the Advice of *Aratus* the ¹ *Sicyonian*; who in part persuaded the new Possessors² to accept of Money in lieu of them; and in part advised the first Owners rather to accept of the Value of their Lands, than run the Hazard of recovering them. ^{2 B. ii. ch. 4.} ^{VI. What is to be done in a dubious Case.}

The Author expresses himself here, in the Original of this Note, as if *Timoleon* had refused, as well as *Pittacus*, what was offered him: *Facta Pittaci & Timoleontis, &c.* whereas he did quite the contrary, as I have distinguished by the Words in a Parenthesis; for that Reason I have changed the Turn of Expression, which conveyed a false Idea.

⁴ Not that the whole Booty consisted in this, there were also, no Doubt, Things amongst it that belonged to the five Kings.

IV. (1) The banished *Saguntines* were re-established by the *Romans*, after six Years Absence. [See *Livy*, *Lib. XXVIII. Cap. XXXIX.*] The Emperor *Marcus Antoninus* restored those to Liberty, who had been made Slaves during the War with *Avidius Cassius*; and caused also their Effects to be returned to the antient Proprietors. [CAPITOLINUS, in *Marc. Anton. Cap. XXV.*] The King of *Castile*, and other Princes, restored *Calatrava* to the Knights of that Order, whom the *Moors* had deprived them of it, as *Mariana* relates, in his History of *Spain*, *Lib. XI. (Cap. XXV.)* See what has been said above, *Chap. X.* of this last Book, § 6. GROTIUS.

² It was *Lysander* who commanded their Army at that Time. *Hist. Græc. Lib. II. Cap. II. Num. 5. Edit. Oxon.*

³ *Si sibi Antiochus pulchrum esse, &c.* LIVY, *Lib. XXXIV. Cap. LVIII. Num. 10. & seq.*

V. (1) That is to say, when a Thing taken from

one Subject of a State, in an unjust War, on the Side of the Enemy who takes the Booty, is fallen into the Hands of another Subject of the same State.

VI. (1) *Cum quibus causis cognovit, &c.* CICERO, *De Offic. Lib. II. Cap. XXIII.* King *Ferdinand* did the same in *Spain*, as *Mariana* relates, *Lib. XXIX. Cap. XIV.* GROTIUS.

² This is the Conduct an Arbitrator, rather than a Judge, should observe, who, in this Case, is indispensibly obliged to leave Things in the State they are, supposing there be no civil Law to direct his Judgment and Award. But, as the Laws themselves do not always regulate Things, so as to satisfy the Consciences of those who follow their Direction, the principal Question here is to know, what each ought then to do of their own free Will, and without Regard to any other Rules than those of natural Equity. Now when it is supposed, as our Author does, that the Justice of the War is very doubtful, there being no more Reason to regard the Acts of Hostility, as just or unjust, on one Side than the other, Reason requires that they be considered indifferently as just on both Sides, with Regard to the Effects of the Acquisition of Things taken. The Possessor then, as in all other doubtful Cases, has the best Right, and, consequently, those who hold any Thing from him, with a Title lawful in other Respects, may consider themselves as having lawfully acquired it.

C H A P. XVII.

Of Neuters in War.

I. From Neuters nothing is to be taken but upon extream Necessity, and with restoring the full Value.
 2 B. ii. ch. 2.
 § 10.

I. IT may seem needless for us to treat of those that are not engaged in the War, when it is manifest that the Right of War cannot affect them; but because, upon Occasion of War, many Things are done against them on Pretence of Necessity, it may be proper here, briefly to repeat what we have already mentioned^a before, that the Necessity must be really extream, to give any Right to another's Goods. That it is requisite, that the Proprietor be not himself in the like Necessity. When real Necessity urges us to take, we should then take no more than what it requires. That is, if the bare keeping of it be enough, we ought to leave the Use of it to the Proprietor; and if the Use be necessary, we ought not to consume it; and if we cannot help consuming it, we ought to return the full Value of it.

II. Examples of Abstinence, and some Precepts.

II. 1. *Moses*, when he was obliged of Necessity to pass with the *Israelites* through the Country of the *Edomites*, he first offers to go through the Highway, and not to touch their Fields or Vineyards, and if they should want Water they would pay for it, *Numb. xx. 17.* The same did the Generals of the most renowned Probity amongst the *Greeks* and *Romans*. The *Greeks*, in¹ *Xenophon*, under *Clearchus*, promise the *Persians* to march without doing any Damage; and if they would sell them Provisions, they would not by Force take Meat or Drink from any one.

2. *Dercyllides*, in the same *Xenophon*,² led his Army through neutral Countries, without any Injury to the Confederates. *Livy*³ tells us of King *Perseus*, He returned into his own Kingdom, through *Pthiotis*, *Achaia*, and *Thessaly*, without any Damage to the Country. And *Plutarch*, of the Army under *Agis* the *Spartan*, They were a Sight to all the Cities of Greece, ⁴ marching through *Peloponnesus* inoffensively, civilly, and almost without any Noise. Thus *Velleius* says of *Sylla*,⁵ You would think he came into Italy, not as a revengeful General, but as a Peace-maker, he marched his Army so quietly through *Calabria* and *Apulia*, with such particular Care of the Fruits, the Fields, the Cities, and the Men, as far as *Campania*.⁶ And *Tully*, of *Pompey* the Great, Whose Legions so marched into Asia, as not only the Hands of so great an Army, but not even so much as their Feet, could be said to have done the least Damage to any one that was peaceable. And *Frontinus*,⁷ of *Domitian*, When he built Forts on the Frontiers of *Ubii*, he ordered the Fruits of those Places which he was to intrench, to be appraised and paid for; and the Fame of that particular Act of Justice, gained him the Credit of all Men. And *Lampridius*, of *Severus's* *Parthian Expedition*,⁸ He managed it with so much Discipline, and so great a Reverence to his own Person, that his Men seemed rather Senators than Soldiers: The Tribunes so ready, the Captains so modest, the Soldiers so friendly, that wheresoever they came, the Country People, for so many and extraordinary Benefits, honoured him as a God. The Panegyrist speaks⁹ of the *Goths*, *Huns*, and *Alani*, that

II. (1) *De Exped. Cyr.* Lib. II. Cap. III. § 13. Edit. Oxon.

2 *XENOPHON*, *Hist. Græc.* Lib. III. Cap. I. § 8.

3 *Triduum, non plus, &c.* *LIVY*, Lib. XLI. Cap. XXVII. Num. 6.

4 *PLUTARCH*, *Vit. Agid.* p. 801. D. The same Author relates the same of *Flaminius*, in the Life of that famous Roman General. *GROTIUS*.

5 *Putares Sullam venisse in Italiam, &c.* *VELLEIUS PATERCULUS*, Lib. II. Cap. XXV. Num. I.

6 *Cujus [Pompeii] legiones sic in Asiam, &c.* *Orat. pro Leg. Manil.* (Cap. XIII.) The same *Pompey* being informed, that his Soldiers commit-

ted Disorders in *Sicily*, during their March, ordered their Swords to be sealed up in their Scabbards, and punished those who were found to have broken the Seals. *PLUTARCH*, *Vit. Pomp.* (p. 624. A.) *GROTIUS*.

7 *Quum in finibus Ubiorum castella, &c.* *FRONTINUS*, *Stratagem.* Lib. II. Cap. XI. Num. 7.

8 *Quam [Parthicam expeditionem] tanta disciplina, &c.* *LAMPRIDIUS*, *Vit. Alex. Sever.* Cap. L.

9 *Nullus tumultus, nulla confusio, &c.* *LATIN. PACAT. Panegyr.* (Cap. XXXII. *Paneg. ult. E. XII.*) There are many Things in *CASSIODORUS* upon the Moderation of the *Goths*, in Regard to the

that served under *Theodosius*, No Noise, no Confusion, no Plundering was there, as from Barbarians; but if their Provisions happened to fall short, they bore it patiently, and proportioned every one's Allowance to their Numbers. And *Claudian* attributes the same to *Stilico*.

*Tanta quies, tantisque metus servator honesti
Te moderante fuit, nullis ut vinea furtis
Aut seges ereptâ fraudaret messe colonum.*

*You ruling us, so great was our Security
That all enjoy'd their own; the Vine her Tribute
Paid to the just Owner; the Husbandman
Received the fruitful Produce of his Fields.*

And ¹¹ *Suidas* to *Belisarius*.

3. This was brought about by those famous Warriors, by taking great ¹² Care to provide for the Subsistence of their Army, by paying their Troops well, and by observing a strict Discipline, whose chief Law ¹³ *Ammianus* says is, *That the Countries of those at Peace with us should not be wasted.* And in *Vopiscus*, ¹⁴ *Let no one dare to take away a Chicken of another Man's, let none touch a Sheep, let none pluck a Grape, let none tread down the Corn, and let none demand Oil, Salt, or Wood.* And so in *Cassiodore*, ¹⁵ *Let them live with the Provincials according to the Civil Law,*

the Subject in Question; for Instance, *Var. V. 10, 11, 13.* *Theodoric* their King prescribes it to them in these Words. *Illud tamen necessario commomentes, ut venientium nullus provenire possit excessus nec possessorum segetes aut prata vastetis — Quia ideo exercitiales gratanter subimus expensas, ut ab armatis custodiatur intacta civilitas.* Lib. V. Epist. XXVI. *Athalarick*, another King of the *Goths*, praises a Senator, whom he recommends, upon that Account. *Arma ejus nulla possessorum damna senferunt.* Lib. IX. Epist. XXV. *GROTIUS*.

¹⁰ *CLAUDIAN*, in *prim. Consulat. Stilich.* Lib. I. ver. 162. & seq.

¹¹ See *SUIDAS*, upon the Word *Belisarius*. *PROCOPIUS*, that famous Captain's Companion, and the Witness of his Actions often praises his Moderation. The Reader need only see the fine Speech he ascribes to him, addressed to his Soldiers upon that Head near *Sicily*, when he went into *Africa*, *Vandalic. Lib. I. (Cap. XII.)* and the Manner in which he says *Belisarius*, conducted himself in his march thro' that Country, *Ibid. (Cap. XVII.)* But I must add here another entire Passage, wherein the Historian gives his Hero the highest Praise on that account. "*Belisarius*, says he, took so much Care of the Country People, that they never suffered any Violence from the Armies he commanded. On the contrary their Passage enriched them all, contrary to all Appearance, because they sold their Provisions and Wares to the Soldiers at their own Price. When the Corn was ripe, the Cavalry were hindered from spoiling it, and as to the Fruits, he would not suffer a single Apple to be gathered from a Tree." *Gothic. Lib. III. (Cap. I.)* *NICETAS* praises the *Germans* for acting in the same Manner in their Expedition to the Holy Sepulchre. *Vit. Manuel Comnen. (Lib. I. Cap. IV.)* *NICEPHORUS GREGORIAS* relates also, that the good Discipline of the *Venetians*, and their Greatness of Soul, attended with Justice and Equity, was much admired upon this Account. Not one, says he, of their whole Army, would take any Thing without paying for it, *Lib. IX. (p. 188. Edit. Colon. 1616.) GROTIUS*.

¹² The Roman Generals, as *PLINY* observes,

took special Care, that Commerce should not be interrupted during the War: *Curve Romani Duces primam semper in bellis commerciorum habuere curam?* Hist. Natur. Lib. XXVI. Cap. IV. Care should be taken that the Soldier may have wherewithal to buy, in order to prevent his being forced to think of pillaging; as *CASSIODORUS* says very well: *Ha-beat, quod emat, ne cogatur cogitare, quod auferat.* Var. IV. 13. See the same Author, V. 10. and 13. *GROTIUS*.

¹³ He ascribes this Maxim to the Emperor *Julian*, who gives for the Reason of it, the Danger of the Soldiers committing Ravages, and thereby obliging the People, who suffer them, to break the Peace: *Adferens [Cæsar] pacatorum terras non debere caleari, ne, ut sæpe contigit, per incivilitatem militis occurrentia vastantis abrupte fœdera frangerentur.* Lib. XVIII. Cap. II. p. 205. Edit. *Valef. Gron.* The Author refers here in a little Note to another Place in *AMMIANUS MARCELLINUS, Lib. XXI.* He had probably in his Thoughts the Exhortation of the same Emperor to his Soldiers, in an Harangue, where he animates them to march against *Constantius*. He represents to them, to induce them not to plunder and use the Provincials ill, that this Moderation had contributed more to their past Glory, than the Victories they had obtained over their Enemies: *Illud sane obtestor & rogo, observate ne impetugliscentis ardoris in privatorum damna quisquam vestrum exsiliat sed cogitans* [I do not know whether the Copists should not have put *cogitans* for *cogitantes* in this Place: It is more natural to think, that the Emperor intended to refer this to the Soldiers, and to let them make the Reflection to themselves: The Fault might besides have easily crept in:] *Quod haud ita nos illustrarunt hostium innumeræ strages, ut indemnitas Provinciarum & salus, exemplis virtutum pervulgatæ.* Cap. V. p. 293, 294. Edit. *Valef. Gron.*

¹⁴ It is in a Letter writ by *Aurelian* before he was Emperor, to his Lieutenant General: *Nemo pullum alienum rapiat, ovem nemo contingat. Uvam nullus auferat, segetem nemo deterat: Oleum, sal, lignum, NEMO EXIGAT, &c.* *Vit. Aurelian, Cap. VII.*

¹⁵ *Ita tamen ut milites tibi commissi vivant cum Provincialis Jure Civili, nec, insolecat animus,*
8 L
qui

Law, neither let them grow Insolent, because they are armed; for the Shields of our Army ought to protect those who wear none. To which we may add that in the sixth Book of Xenophon's Expedition, ¹⁶ *We must not pretend to compel a State at Peace with us to give any Thing against their Will.*

4. From which Passages we may best understand that Advice of the great Prophet, even of him that was more than a Prophet, Luke iii. 14. *Offer Violence to no Man, ¹⁷accuse no Man falsely, and ¹⁸be content with your Wages.* To which agrees that of Aurelian in Vopiscus in the afore-quoted Place, ¹⁹ *Let him be content with his Allowance, let him live rather on the Spoil of the Enemy, than the Tears of the Provincials.* Neither may any one think that this is only finely spoken, but not to be practised. For neither would so holy a Man (as St. John) advise, or wise Law-Makers command what they believed not possible to be done. Lastly, ²⁰ What has been done we must necessarily own possible to be done. Therefore we have brought several Examples. To which we may add, that remarkable one ²¹ which Frontinus mentions out of Scaurus, that an Apple Tree full of Fruit standing within the Compass of the Ground where the Camp was pitched, was the next Day, after the Army was gone, found with its Fruit untouched.

5. Livy ²² relating how insolently the Roman Soldiers behaved in their Camp at Sucro, and that some of them in the Night-time pillaged the Neighbouring Country that was at Peace, adds this as the Reason, that all Things were done loosely and disorderly, without any regard to military Discipline. There is also another remarkable Place in the same Author, describing Philip's March through the Country of the Denthelatæ; They ²³ were indeed Allies (says he) but the Macedonians being in great Necessity plundered them, as if it had been the Enemy's Country; for robbing every where, they first laid waste great Houses, then some Towns, to the great Dishonour of the King, who heard his Confederates in vain calling upon the Gods and him for Assistance. Tacitus ²⁴ says Pelignus very much blasted his Reputation, for that he preyed more upon the Allies, than Enemies. And the same Author observes, ²⁵ that the Soldiers of Vitellius were scandalously slothful throughout all Italy, and only

qui se sentit armatum: Quia clypeus ille exercitus nostri quietem debet prestare Paganis. Var. VII. 4. Our Author had writ the last Words in this Manner: But in three Editions, which I have, I find *Romanis*, and I do not observe that the Editors or Commentators have noted any various Reading. The Opposition indeed is more just in following the Correction, which our Author seems to have intended. But the hard and incorrect Style of CASSIODORUS gives Reason to believe it not necessary.

¹⁶ *De Exped. Cyr.* Lib. VI. Cap. II. § 4. Edit. Oxon.

¹⁷ The Term of the Original (συνκοφαντείν) may be rendered *to plunder, to take by Force*, as it is used in the Greek Version, JOB xxxv. 9. *Psal.* cxix. 122. *Proverbs* xiv. 31. xxii. 16. xxviii. 3. *Ecclesiast.* iv. 1. and *Leviticus* xix. 11. The common Version translates the same Word by *defraudare*, LUKE xix. 8. GROTIUS.

¹⁸ St. AMBROSE says upon this Passage, that the Custom of paying Troops was established to prevent their pillaging: *Docens, idcirco stipendia constituta militiæ, ne dum sumtus quæritur, prædo grassetur.* Comment. in LUC. Lib. II. Cap. III. (p. 1647. Edit. Paris. 1569.) A Thought which St. AUSTIN has copied, *Serm.* XIX. De verbis Domin. secund. Matth. There are some fine Ordinances upon this Head in GREGORIUS TURONENSIS, Lib. II. Cap. XXXVII. in the *Capitularies* of CHARLES and his Successors, Lib. V. Tit. CLXXXIX. in the Councils of France, Vol. II. in the *Capitularies* of Lewis the Debonair II. 14. See also *Lex BAJOARIORUM*, Tit. II. 5. Frederick I. Emperor of Germany, decreed by a Law of Military Discipline, that if a Soldier should set the Farm or House of such as live in Peace on Fire, he should be branded in the Forehead, and turned out of the Army after having been well bastinadoed.

GUNTHER expresses this Regulation in his *Liguri-* nus thus:

Si quis pacificæ plebis villasve, domosve Ufferit, abrais signabitur ora capellis, Et pulsus castris post verbera multa recedet. (Lib. VII. p. 385. Edit. Reuber.) GROTIUS.

¹⁹ *Annonâ suâ contentus sit. De præda hostis, non de lachrymis Provincialium, habeat.* Vit. Aurel. Cap. VII.

²⁰ GUICCIARDIN Reasons in this Manner, *Hist.* Lib. XVI. GROTIUS.

²¹ *Universi quoque exercitus, &c. Strateg.* Lib. IV. Cap. III. Num. 13. See, in regard to Scaurus, who is himself the General and Writer here spoken of, GERARD. JOHN VOSSIUS, *De Historicis Latin.* Lib. I. Cap. IX. The Author refers here to what SPARTIAN relates, of the rigorous Manner in which Pescennius Niger punished the stealing of a Cock, Cap. X.

²² *Omnia libidine ac licentia militum, nihil institutio ac disciplina militiæ, aut imperio eorum qui præerant, gerebatur,* Lib. XXVIII. (Cap. XXIV. Num. 9.)

²³ *Socii erant: Sed propter inopiam, haud secus quam hostium fines Macedones populati sunt. Rapiendo enim passim, villas primùm, dein quosdam vicos etiam evastarunt; non sine magno pudore Regis, quum sociorum voces, nequicquam Deos Sociales nomenque suum implorantes, audiret,* Lib. XL. (Cap. XII. Num. 10, 11.)

²⁴ *Dum socios magis, quam hostes, prædatur.— Quod ubi turpi fama divulgatum, &c. Annal.* Lib. XII. (Cap. XLIX. Num. 2.)

²⁵ *Per omnia Italiæ municipia defides, tantum hospitibus metuendos, &c. Hist.* Lib. III. (Cap. II. Num. 2.)

dreadful to those that entertained them. And in *Cicero's* Oration against *Verres*, one of the Heads of the Accusation was this, ²⁶ *You have taken Care to have the peaceable Cities of our Allies and Friends plundered and wasted.*

6. And here I cannot omit the Opinion of some Divines, which I hold to be very right, that the King who does not give his Soldiers their just Pay, stands not only engaged to the Soldiers, but to his Subjects and Neighbours for the ²⁷ Damages consequent thereupon, which the Soldiers, compelled by pure Want and Necessity, have done them.

III. 1. On the other Side, it is the Duty ¹ of those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side, as we have said ^a before. But in a dubious Cause ^b to behave themselves alike to both Parties; as in suffering them to pass through their Country, in supplying them with Provisions, and not relieving the Besieged. The *Corcyreans* in *Thucydides* ² tell the *Athenians*, if they would really be Neuters, they should either forbid the *Corinthians* to raise Men in the Country of *Attica*, or suffer them to do so too. The *Romans* ³ objected against *Philip* King of the *Macedonians*, that he had doubly broke the Alliance, first that he had injured the Confederates of the *Romans*, and then that he had assisted their Enemies with Men and Money. *T. Quinctius* urges the same in a Conference ⁴ with *Nabis*. *You say, I have not directly violated my League of Friendship with you. How often would you have me convince you that you have? But to sum up all in a few Words, by what Means may Friendship be broken? Certainly by these two chiefly, if you treat our Allies as Enemies, or if you join our Enemies.*

2. *Agathias* tells us, he is an Enemy who does what pleases an Enemy; and *Procopius* ⁵ looks upon him to be in the Enemy's Army, who supplies them with Things that are properly useful in War. Thus said *Demosthenes* of old, ⁶ *He that invents, or prepares those Things, by which I may be taken, is mine Enemy, tho' he neither strikes me, nor throws a Dart at me.* *M. Acilius* ⁷ told the *Epirots*, who indeed had not assisted *Antiochus* with Soldiers, but were accused of having furnished him with Money, he could not tell whether he should account them Enemies or Neuters. And *L. Æmilius* ⁸ the Prætor complains of the *Teii*, that they had victualled the Enemy's Fleet, and promised them Wine, declaring, that unless they did the like to the *Roman* Fleet, he should hold them as Enemies. *Plutarch* mentions a Saying of *Augustus Cæsar*, ⁹ *That City has forfeited her Pretensions to Peace, that entertains the Enemy.*

3. It would also be very advantageous to make an Alliance with both Parties, so as with their full Consent we might sit still in Quiet, and might be permitted to do common Offices of Humanity promiscuously to them both. *Livy* says, ¹⁰ *It becomes those that are Friends to both Parties, to desire Peace, and not to engage on either Side.* *Archidamus* King of *Sparta*, observing the *Æleans* inclining to side with the *Arcadians*, writ a Letter to them; with only this in it: *It is good to be quiet.*

²⁶ Tu in iisdem locis Legatus Quæstorius, &c. In Verr. Lib. I. Cap. XXI. GROTIVS.

The Passages from Note 22. to this Place are not in the first Edition. They interrupt the Connexion of the Sense, and agree very little with what follows, and precedes them, as they are Examples of a Practice quite contrary to that of which the Author intends to shew both the Justice and Possibility. I am surprised that he has not quoted a Passage from *ONOSANDER* in this Chapter, who in giving Precepts to Generals of Armies does not forget this, that they forbid the Soldier to take or spoil any Thing in the Country of an Ally. *Strategic. Cap. VI. p. 14. Edit. Pigalt.*

²⁷ See above, B. II. Chap. XXI. § 2.

III. (1) See what is said upon *PUFENDORF*, *Law of Nature and Nations*, B. VIII. Chap. VI. § 7 Note 2.

² Lib. I. Cap. XXXV.

³ Dupliciter ab eo [Philippo] fœdus, &c. *LIVY*,

Lib. XXX. Cap. XLII. Num. 8.

⁴ Vos tamen, inquis, vestramque, Idem, *Lib. XXXIV. Cap. XXXII. Num. 14, 15.*

⁵ On the contrary, as the same Historian makes *Queen Amalasontha* say in a Letter to the Emperor *Justinian*, that not only joining a Prince with Arms in the Field, but to supply him publicly with all Necessaries of War, is being a Friend and Ally. *Gotthic. Lib. I. (Cap. III.) GROTIVS.*

⁶ Philipp. III. p. 46.

⁷ Militem tamen nullum Antiocho dederant [Epirotæ] pecunia juvissè eum infimulabantur—Iis, &c. *LIVY, Lib. XXXVI. Cap. XXXV. Num. 8, 9.*

⁸ Et juvissè eos [Tejos] commeatu, &c. Idem, *Lib. XXXVII. Cap. XXVIII. Num. 2.*

⁹ In Brut. p. 1011. D.

¹⁰ Pacem utrique parti, quod medios deceat amicos, optent; bello se non interponent. *LIVY, Lib. XXXV. (Cap. XLVIII. Num. 9. Καλὸν ἡσυχία. [Apud PLUTARCHUM Apophtheg. p. 219. A.]*

C H A P. XVIII.

Concerning Things privately done in a publick War.

I. Whether it be lawful to hurt a publick Enemy privately explained by the Law of Nature, of Nations and Civil Law.

I. I. **W**HAT we have said hitherto, does most belong either to those who command with an absolute Authority in War, or those who act by Vertue of the Orders they have received from the Sovereign. We are now to see, what may be privately done in War, whether we respect the Law of Nature, of Nations, or the Divine Law. Cicero¹ relates in his first Book of Offices, that the Son of *Cato* the Cenfor served in the Army under *Popilius* the General, and in a short Time that Legion was disbanded; yet the young Man out of a military Inclination still continuing in the Army, *Cato* writ to *Popilius*, if he designed to have him still in the Army, to give him a second Oath; adding the Reason, because the former being discharged he could not lawfully fight with the Enemy. He also records the very Words of *Cato* out of his Letter to his Son, in which he warns him from engaging in Fight, for it is not lawful, for one that is not a Soldier to fight an Enemy. *Plutarch* much commends² *Chryfantas* a Soldier of *Cyrus*, who drew back his Sword, that he had lifted up to kill his Enemy, upon his hearing the Trumpet sound a Retreat. And *Seneca* tells us,³ *He is a bad Soldier, who regards not the Signal of a Retreat.*

^a See Xenophon, *Cyr. Inst.*

^b Ch. 3. of this Book, § 10, 12.

2. But they are mistaken, who think this arises only from the external Right of Nations; for if you barely consider that, as it is lawful for any one to seize on his Enemy's Goods, (as we^b said before) so he may also kill his Enemy, for by that Right³ Enemies are accounted as if they were not real Persons. What *Cato* therefore adviseth, proceeds from the Roman military Discipline, which had a Law⁴ (as *Modestinus* observes) that he who disobeyed, should be put to Death, tho' he had had good Success; but he was understood not to have obeyed, who without the General's Command, fought the Enemy, as appears from the Example of *Manlius*. For if such a Thing were commonly permitted, the Soldier would abandon his Post of his own Head, or even Licentiousness might in Time proceed to such a Length, that the Whole Army or Part of it would rashly engage⁵ in dangerous Fights; which was by all Means to be avoided. Therefore *Salust* describing the Roman Discipline, says,⁶ *They were oftener punished in War, who contrary to Orders had fought the Enemy, or kept the Field after sounding a Retreat.* A certain *Spartan*, when just ready to kill his Enemy, stopt his Blow upon hearing the Retreat

I. (I) *POPILIUS Imperator tenebat, &c. De Offic. Lib. I. Cap. XI.*

² *Tam inutilis animi minister est, quam miles, qui signum receptui negligit. De Ira, Lib. I. Cap. IX.*

³ *Pro nullis habentur*, says our Author, applying here what the Roman Lawyers say of Slaves with regard to civil Rights: *Quod adinet ad jus civile, Servi pro nullis habentur. Digest, Lib. L. Tit. XVII. De diversis Reg. Jur. Leg. XXXII.* But this Fiction, which in some manner excludes Slaves from the Number of Men, in order to rank them amongst the Goods of Fortune, is only founded upon the arbitrary Decisions of a particular Legislator, which can have no Place in the present Question. It were better to give this for the Reason of it; that neutral People, from only continuing such, being bound to regard the Acts of Hostility on both Sides, as equally just; it suffices, with regard to them, that he is a Person of one of the Parties, who has killed or plundered his Enemy: They have then no Business to trouble themselves whether he, who has committed such an Act of Hostility, acted or not by the publick Authority. For tho' we were to suppose a Law of Nations merely arbitrary, such as our Author imagines there is, as this Right

would necessarily turn upon Things, of which the common Interest of Nations required the Observation; there would be nothing in this Case that can be referred to it, since it is of no import to Nations, whether private Persons do or do not, act against an Enemy of their own Head, and since the End of the War demands on the contrary, that all those of one Party may take all Occasions to hurt the other. So that the present Question can only regard the publick Right of every State. See what our Author observes at the End of this Chapter.

⁴ *In bello, qui rem a Duce prohibitam fecit, aut mandata non servavit capite punitur etiam si res bene cefferit. Digest, Lib. XLIX. Tit. XVI. De Re Militar. Leg. III. § 15.*

⁵ *Avidius Cassius* punished some Officers of his Army with Death, who had gone without his Orders with an handful of Men to surprize three Thousand, tho' they had put the latter to the Sword and returned laden with their Spoils. He gave as his Reason for so severe a Sentence, that there might have been some Ambuscade: *Dicens evenire potuisse, ut essent insidiae, &c. VULCATIUS GALLICAN. Cap. IV. GROTIUS.*

⁶ *Quod in bello sæpius vindicatum est in eos, &c. Bell. Catilinar. Cap. IX. Edit. Waff.*

founded, and gave this Reason, ⁷ *It is better to obey our Commanders, than to kill an Enemy.* And *Plutarch* ⁸ gives this Reason, why a Man dismissed from the Service, cannot kill an Enemy, because he is not obliged by the military Laws, which they that are to fight must observe. And *Epietetus* in *Arrian* ⁹ relating the Action of *Chrysantas*, just mentioned, says, *He thought it much better to obey the Orders of his General, than his own Will.*

3. But if we respect the Law of Nature and true Justice, ¹⁰ it seems lawful in a just War for any Man to do those Things, which may be beneficial to the innocent Party, provided it be within the just Measure of making War: Every one however has not a Right to appropriate to himself what he takes from the other Party, whose Cause we suppose bad; because nothing is due to him: Unless perhaps he may exact a just Punishment by the common Right of Men. Which last how it is restrained by the evangelical Law, may easily be understood from what we have ^c said before.

^c B. 2. Ch. 20. § 11.

4. An Order then may be either general or special; general, as when the Consul cried out in the Tumult among the Romans, ¹¹ *Let them that wish well to the Commonwealth, follow me.* Nay, this Right ¹² of killing is sometimes granted to every Subject, even beyond his own Defence, when the publick Safety requires it.

II. 1. They may have a special Order, not only who receive Pay, but also they who serve in War at their own Expences, and what is more, they who maintain Part of the War at their own Charges; as they who fit out Ships, and maintain them at their own private Cost; who to reimburse themselves (*instead of Pay*) are allowed to keep and appropriate to themselves what they take, as we have ^a said elsewhere; but how far this may be reconcilable to true Justice, and Charity, may very well admit of a Dispute.

II. *What may they do, that make War at their own private Charge, or fit out Ships, by internal Justice, in respect of the Enemy.*

2. Justice either respects the Enemy, or the State, with which we contract. We have already ^b said, that in a just War the Possession of all Things that can contribute to the Maintenance of the War, may for our own Security be taken away from an Enemy, but even this with a Condition of Restitution; but the Property of those Things can be only so far acquired, as amounts to the Value of what is due to the State, either at the beginning of the War, or in the Prosecution of it, whether the Things belong to the State at Enmity with us, or particular Persons, that may be of themselves innocent; but the Goods of the Guilty, by way of Punishment, may be taken away, and become the Property of the Captor's. Therefore the Goods of their Enemies shall be theirs, who maintain Part of the War at their own Charge; what respects the Enemy, so far, as that the reasonable Satisfaction on which I have mentioned, be allowed, to be adjudged by equal Arbitrators.

^a B. 3. Ch. 6. § 23, 24.
^b B. 3. C. 13.

III. And as to the State, the very same will be just, according to internal Justice, if there be an Equality in the Contract, that is, if our Charges and Hazard be equal to the uncertain Hope of the Booty. But if this Hope ^c does far exceed, the Overplus is to be restored to the State; just as if one should buy at a very low Price the cast of a Net, the Success of which, tho' uncertain, promises much, according to all Appearance.

III. *What in respect of their own State.*

⁷ PLUTARCH, *Lacon. Apoph.* p. 236.

⁸ *Quæst. Rom.* XXXIX. p. 274. A.

⁹ *Lib. II. Cap. VI.*

¹⁰ This indeed proves, that the Enemy is not wronged, when a private Act of Hostility is committed against him; but it does not follow from thence, that in Civil Society a private Person can act against the Enemy without the express or tacit Order of those, who are invested with the publick Authority. So that the Question, as we have said, relates to publick Right: And the Law of Nature, upon that Foot, far from leaving every one at Liberty to commit Acts of Hostility of his own Head, requires on the contrary, that in a Thing of so great Importance, and which relates to one of the principal Parts of Sovereignty, nothing should be done without the particular or general Permission of the Sovereign, or his Ministers; since that is a necessary Consequence of the Engagement of a Subject, considered as such.

¹¹ *Aut certè si esset tumultus, &c.* SERVIUS in *Æneid.* VIII. 1.

¹² Declarations of War sometimes not only license, but order, *The Subjects of an Enemy to be attacked wherever they are found.*

III. It has been said with Reason, that it is very difficult to make an exact Estimate in this Case; but I do not think it in the least necessary: There is great Reason to presume, that the Sovereign in having authorized Volunteers, Partisans, and those who fit out Vessels to make IncurSIONS upon the Enemy, and to keep the Booty for themselves, was also willing, that the Whole, however great it were, should be theirs; unless he had previously reserved a Part of it to himself. These Captures are generally not considerable enough with regard to the State, tho' they are so to the private Persons who take them, and may therefore be left entirely to them, without Prejudice to the Publick.

IV. *What the Law of Christian Charity requires of us.*

IV. But it is not enough that we do nothing against the Rules of rigorous Justice, properly so called ; we must also take Care that we offend not against Charity, especially Christian Charity. Now this may happen sometimes; when, for Instance, it appears, that such a plundering doth not so much hurt the State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable, that if we should use the like Extremity to our own private Debtors, it would be judged barbarously cruel. But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weakens the Enemy, ¹ the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian.

V. *How a private War may be mixt with a publick.*
^a B. 2. C. 1.

V. But it happens sometimes, that from the Occasion of a publick War, there arises a private one ; as if a Man should by Chance fall among his Enemies, and be thereby in Danger of losing his Life or his Goods, in which Case he ought to follow the Rules we have given ^a elsewhere concerning the just Defence of ones self. Private Persons are likewise often authoris'd by the State to act for their own particular Interest ; as when having suffered much by the Enemy they obtain Permission to refund themselves out of their Effects. And here we are to regulate ourselves by what has been said above ^b of the Right of Reprisals.

^b B. 3. C. 2.

VI. *What he stands obliged to, who without Command hurts an Enemy, explained with a Distinction.*

VI. Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy's Houses, lay waste their Fields, and commit such other Acts of Hostility, without any Command, and besides when there is no Necessity, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added, what they have omitted, if there be not a *just Cause* ; for if there be, he may perhaps be answerable for it to his own State, whose Orders he hath transgressed, but not to his Enemy, to whom he hath done no Wrong. Not unlike to this was the Answer ¹ which a certain *Carthaginian* made to the Romans, when they demanded *Hannibal* to be delivered up to them. *The Question is not whether Saguntum was besieged by private, or publick Authority, but whether the Fact were just or unjust ? For it is our Business to call our own Subject to an Account, whether he did it of his own Head or by our Order ? The only Point to be decided between you and us, is whether the Thing could be done without Prejudice to our Treaties.*

IV. (1) PLUTARCH blames *Craſſus* for this in his Life, p. 543. D. GROTIUS.

VI. (1) This Passage is quoted above, B. I. Chap. III. § 5 Num. 4.

C H A P. XIX.

Concerning Faith between Enemies.

I. *Faith is to be kept with all Sorts of Enemies.*

^a B. 3. Ch. 1.
§ 1.

I. I. **W**E have already ^a said, what, and how much may be lawfully done in War, is either considered simply in itself, or with regard to a foregoing Promise. The first Part being concluded, the other remains to be discussed, which is, concerning Faith (to be kept) between Enemies. It is a remarkable Saying of *Silius Italicus*, who had been a Roman Consul,

¹ —Optimus ille
Militiæ, cui postremum primumque tueri
Inter bella fidem—

The most excellent Warrior is he who has nothing so much at Heart, as the punctual Observance of his Word to an Enemy.

I. (1) *Punic*. Lib. XIV. (Ver. 169. & seq.) The Philosopher *Archelaus*, as APPIANUS ALEXANDRINUS relates, said, that Treaties solemnly

made and sworn, ought to be sacred and inviolable, even between Enemies. *Bell. Civil.* Lib. IV. (p. 628. Edit. H. Steph.) GROTIUS.

Xenophon ² in his Oration concerning *Agésilas*, says, *So great and noble a Thing it is for every Man, but especially for Generals to be strict Observers of their Faith, and to be so accounted.* And *Aristides* ³ in his fourth *Leuëtrica*. *It is in Treaties of Peace and other publick Conventions, that we chiefly know whether those that make them love Justice.* For as *Cicero* ⁴ well observed in his fifth Book of *Bounds*, *There is no Body, but approves and commends that Disposition of Mind, by which not only no Interest is sought, but on the contrary Faith is kept against Interest.*

2. It is the publick Faith, as it is in *Quintilian* the Father, ⁵ that procures a Truce between armed Enemies, and preserves the Rights of yielded Cities. And the same Author in another Place: ⁶ *Faith is the surest Bond of human Things, the Reputation of Faith is sacred among Enemies.* And so St. ⁷ *Ambrose*: *It is plain that Faith and Justice must be strictly observed in War.* And in St. *Augustine*, ⁸ *When our Faith is engaged, it must be kept even to our Enemy, tho' at that Time at War with him.* For their being Enemies, does not make them cease to be Men. And all Men arrived at the Years of Discretion are capable of a Right from a Promise. *Camillus* declares in *Livy*, ⁹ *That he had such a Society with the Falisci, as was established by Nature.*

3. From this Society founded on Reason and Speech, arises that Obligation from a Promise, which we now treat of. And we are not to imagine that, because it is permitted to tell a Falshood to an Enemy, or because, according to the Opinion of several, there is no Harm in it, as we have observed ^b elsewhere; we may extend ^b *B. 3. Ch. 1. § 17.* such a Permission to the very Words we use in treating with the Enemy. For the Obligation to speak Truth arises from a Cause, prior to War, and perhaps may be in some Measure annihilated by War, but a Promise of itself confers a new Right. *Aristotle* ¹⁰ perceived this Difference, when treating of Veracity, he said, *I do not speak of him, who says the Truth in the Conventions he makes, nor what relates to Justice or Injustice; for these Things belong to another Virtue.*

4. *Pausanias* ¹¹ said of *Philip* of *Macedon*, *No Body can justly call him a good General, who has always despised his most solemn Oaths, and has upon the slightest Pretence broke his Faith, the most of any Man.* And the like says *Valerius Maximus* of *Hannibal*. ¹² *A profest Enemy to the Romans, and all Italy, and a greater to Faith itself, glorying in Lies and Falshood, as if laudable Virtues; whence it came to pass, that whereas he might otherwise have left an illustrious Memory of himself, he now left it disputable, whether he ought to be considered as a great Man, or a notorious Villain.* In *Homer*, the *Trojans* pricked in Conscience condemn themselves.

¹³ Νῦν δ' ὅρκια πῖσά
Ψευδάμενοι μαχόμεθα τῷ ἑ νύ τι κάλλιον ἔστι.

² Cap. III. § 5. Edit. Oxon.

³ P. 184. C. Vol. II.

⁴ *Nemo est igitur, qui non hanc, &c. De finib. bon. & mal. Lib. V. Cap. XXII.*

⁵ *Ego publicam adpello fidem, quæ inter Piratas sacra est: Quæ inter armatos hostes inducias facit: Quæ deditarum civitatum jura conservat. Declam. CCXLVII. in fin. p. 505. Edit. Burman.*

⁶ *Fides supremum rerum humanarum vinculum est: Sacra laus fidei inter hostes. Declam. CCCXLIII. p. 721.*

⁷ *Liquet igitur, etiam in bello fidem & justitiam servari oportere. De Offic. Lib. II. Cap. XXIX.*

⁸ *Fides enim quando promittitur, etiam hosti servandum est, contra quem bellum geritur. Epist. CCV. Ad Bonifac.* This Father treats the same Subject at large in Letter CCXXV. *Grotius.*

To the Passage cited here St. *Austin* adds, that with much greater Reason we ought to keep our Promise made to a Friend: *Quanto magis amico pro quo pugnatur?* It is probable that he had in View the following Words of *Josephus*, the Jewish Historian: *Ὅς ἦγε πῖσις ἔχουσα καὶ πρὸς τὰς πολεμιωτάτας τόπον, τοῖς γε φίλοις ἀναγκασιότατη τετηρήθη, &c. Antiq. Jud. Lib. XV. Cap. VIII. p. 521.*

⁹ *Nobis cum Faliscis, quæ pacto fit humano, societas non est: Quam ingeneravit natura, utrisque est, eritque. Livy, Lib. V. Cap. XXVII. Num. 6. See what I have said upon PUFENDORF, Law of Nature and Nations, B. VIII. Chap. VII. § 2.*

¹⁰ *Ethic. Nicomach. Lib. IV. Cap. XIII. See what I have said upon the Preliminary Discourse, § 44. Note 4.*

¹¹ *In Arcadic. Cap. VII. p. 241. Edit. Wech.*

¹² *Nonne bellum adversus, &c. (Lib. IX. Cap. VI. Num. 2. Extern.)*

¹³ The Passage of *HOMER* cited here is not exactly repeated. The Author trusting without doubt to his Memory, has said, *καλλίον ἔστι* where he finishes the Sense, but in the Original there is:

—τῷ ἑ νύ τι κέρδιον ἡμῖν
"Ἐλπομαι ἐκτελέεσθαι, ἵνα μὴ ῥέξομεν ὤδε.

That is to say: *I believe our Affairs will not prosper, if we do not this, or if we do not restore Helena to the Greeks, with all her Riches.* In which the Sense is finer, and conveys another important Reflection to dissuade from Perfidy.

*Unjust Arms we bear,
Perjur'd as we are.*

II. *The Opinion refuted, that Faith is not to be kept with Pirates and Tyrants.*

^a R. Levi
Ben Gersou,
and R. Salomo,
ad Levit. xx.
10.

^b L. 36. Ecl.
3. L. 56. p.
686. Edit.
H. Steph.

III. *This Objection answered, that such deserve Punishment, and it is shewn that this is not considered, when we treat with them as such.*
^a B. 2. Ch.
11. § 7.

^b B. 2. Ch.
16. § 6.

II. 1. We have already said, that we may not allow of that of Cicero, ¹ *There is no Society with Tyrants, but rather the greatest Division*: And again, *A Pirate is not of the Number of those with whom we make War in form*; there ought to be no Faith nor Oath kept with him. Nor that of Seneca ² concerning a Tyrant, *Whatever Engagements I had with him, they are all void, because he has violated the Laws of human Society*. From which Fountain arose that Error of Michael of Ephesus, who says on the fifth of the *Nicomachia*, ³ *It is no Adultery to debauch the Wife of a Tyrant*. Which very Thing ^a some of the Jewish Doctors erroneously maintained concerning Strangers, whose Marriages they esteemed void.

2. ⁴ Yet Cn. Pompey finished most of the prattice War by Treaties, agreeing to save the Men's Lives, and allow them a Place where they might live without robbing. And sometimes Tyrants have restored Liberty on Condition of Impunity. Caesar in his third of the Civil War writes, that the Roman Generals compounded with the Robbers, and Fugitives, that were in the Pyrenean Mountains. Now who can say that such a Composition is not obligatory? ⁵ Indeed such Sort of People have not with others that particular Community, which the Law of Nations hath introduced between Enemies engaged in a solemn and compleat War. But yet, as Men, they are to enjoy the common Benefits of the Law of Nature, as Porphyry ⁶ rightly argues in his third Book of not eating living Creatures; now it is one of the most inviolable Laws of Nature, that we should perform what we promise. So Diodorus ^b relates, that Lucullus kept his Faith to Apollonius Captain of the Fugitives. Thus Dio writes, that Augustus paid to Crocota the Robber, who surrendered himself, the Price he had set upon his Head, because he would not break his Word.

III. 1. But let us see if we cannot produce something more plausible than what Cicero has said; and first, they who are notoriously wicked, and Members of no civil Society, may be punished by any Man, according to the Law of Nature, as we have ^a declared above. But they who may be punished, even with Death, both their Goods, and their Rights may be taken from them. As the same Cicero well observes, ¹ *It is not against Nature to strip him, if we can, whom it is lawful to kill*. But among his other Rights, is also a Right derived from Promise, and therefore this too may be taken away from him by way of Punishment. To this I answer, that the Reason would be good, if we had not treated with him as an Offender; but if we treat with him as such, it is to be understood, as if we in that Respect, remitted the Punishment, because, (as we have said ^b elsewhere) we are to explain the Sense of a Convention, so as that it may be reduced to nothing.

2. Nabis replied well in Livy, when Quintius Flaminius objected Tyranny to him. ² *Whatever Name is given, and whatsoever I am, just the same I was, when*

II. (1) See PUFENDORF upon this Subject, *Law of Nature and Nations*, B. III. Chap. VI. § 9. and II. and B. IV. Chap. II. § 8. The Passages of CICERO are quoted in B. II. Chap. XIII. § 15.

² *Quidquid erat, quo mihi cohereret, intercisa juris humani Societas abscidit*. De Benefic. Lib. VII. Cap. XIX.

³ SENECA the Father says also, *Non putavi adulterium, uxorem Tyranni polluere, sicut nec homicidium, Tyrannum occidere*. Excerpt. Controvers. Lib. IV. Cap. VII. The Lawyer JULIUS CLARUS believed, that Adultery might be committed with Impunity with a banished Woman. In § *Homicidium*, Num. 36. GROTIUS.

⁴ See his Life in PLUTARCH, p. 632, 633. Vol. I. Edit. Wechel.

⁵ Didius was blamed for his shameful Perfidiousness to the Celtiberians, an antient People of Spain, who lived by Rapine. GROTIUS.

Our Author had in his Thoughts what Titus Didius the Roman General acted in regard to the Celtiberians, settled near the City of Colenda, as APPIANUS ALEXANDRINUS relates it. De Bell. Hispan. p. 312. Edit. H. Steph. For the Rest, I find

no where else, not even in the antient Geographers, this City of Colenda: Neither does the learned CELLARIUS in his antient Geography mention it.

⁶ De abst. animal. Lib. III. p. 322. Edit. Ludg. 1620.

III. (1) The Passage is recited above, Chap. V. of this Book, § 1. Note 1.

² De nomine hoc [Tyranni] &c. LIVY, Lib. XXXIV. (Cap. XXXI. Num. 12, 13, 15.) In TERENCE a Merchant of Slaves says, "Tho' I am a Pimp, the common Bane of Youth, a perjured Wretch, a publick Nuisance, yet I never wronged you."

Leno sum, fateor, pernicies communis adolescentium,

Perjurus, pestis: Tamen tibi a me nulla est orta injuria.

Adelph. (Act II. Scen. I. Ver. 34.) See the Author, who has writ concerning the Treaty of Peace between the Princes and States of the Empire of Germany. GROTIUS.

you yourself (O T. Quintius) made a Treaty with me. And again, I had done these Things already, whatsoever they are, when you contracted an Alliance with me; to which he adds, If I had changed, I ought to give an account of my Inconstancy; but since you have changed, you ought to give an account of yours. Like to this there is a Place in the Oration of Pericles, recorded by Thucydides, We shall let those Cities remain free, which were so when we made an Alliance with them.

IV. That may likewise be objected, which I said^a before, that he who through Fear has forced a Promise from one, ought in Equity to release the Promiser, because he damnified him by Injustice, that is, by an Act both repugnant to the Nature of human Liberty, and to the Nature of the Act extorted, which should have been free. Tho' this (I confess) in some Cases holds true, yet it does not respect all Promises made to Robbers; for that the Promised be obliged to disengage the Promiser, it is required, that he have extorted the Promise by an unjust Fear. If any one then, to deliver his Friend out of the Hands of Robbers who have taken him, shall promise to pay a certain Sum of Money, he is bound to do it, ¹ because he cannot pretend to have been influenced by Fear, who came voluntarily to make this Contract.

V. Add to this, that he that is compelled by an unjust Fear to make a Promise, may be obliged to perform it, if he has confirmed it by an Oath; for thereby (as I have said^a before) the Man stands bound not only to a Man, ¹ but unto GOD, in regard to whom Fear can be no Exception. Yet it is true, that the Heir of the Promiser does not stand engaged by such a Bond alone; ² for those Things only pass to the Heir, which by the original Establishment of the Right of Property, enter into the Commerce of Life: But the Right acquired unto GOD by an Oath, cannot as such be included in these. Again, as we have likewise observed elsewhere, if a Man does happen to break his Faith to a Robber, whether sworn, or not sworn, he shall not upon that Account be liable to Punishment among other Nations; because in Detestation to Thieves and Robbers, all Nations by a general Consent are pleased to connive at any Thing (even tho' ill) done against them.

VI. What shall we say of the Wars¹ that Subjects make against their Kings, or such as have the supreme Authority? Tho' they may possibly have a Cause not in itself unjust, ² yet that they cannot have a Right to act by Force against their Prince, I have shewed^a elsewhere. But sometimes their Cause may be so very unjust, or their Resistance so criminal, that it may deserve a rigorous Punishment. Yet, if they be treated with as Deserters, or Rebels, ³ and a Promise made to them; a Punishment, tho' justly due, is not to be pleaded to prevent the Performance of that Promise, according to what we have now said. Faith is to be kept even with Slaves; and the Morality of Pagan Antiquity was so pure, as to own⁴ the Truth of that Maxim: It being generally believed, that the Lacedemonians suffered a Divine Vengeance⁴ for putting to Death some Tænarian Slaves, contrary to their Covenants. And Diodorus Siculus observes, that the Faith given to Slaves in the Temple⁵ of the Palician Gods, was never broken by any of their Masters: Neither will any Exception of Fear be allowed in this Case, if the Faith given be confirmed by an Oath.

IV. No Objection, that the Promise was extorted by Fear, if the Promiser was not himself affrighted.
^a B. 2. Ch. 11. § 7.

V. Or if there passed an Oath, tho' with Men, such a Violation is not punishable.
^a B. 2. Ch. 13. § 14, &c.

VI. The same applied to the Wars of a Sovereign against his Subjects.
^a B. 1. C. 4.

IV. (1) But see what I have said upon PUFENDORF, *Law of Nature and Nations*, B. III. Chap. VI. § 11. Note 11.

V. (1) But we have rejected this Principle, after PUFENDORF, in *J. II. Chap. XIII. § 14. & seq.*

² See what I have said after PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. II. § 17.

VI. (1) Compare this again with PUFENDORF, B. VIII. Chap. VIII. § 2.

² We have also shewn in the Notes upon B. I. Chap. IV. how far this Obligation of Non-Resistance extends to judge of it by Principles, that have nothing extravagant either on one Side or the other.

³ This Obligation is the more inviolable, as Sovereigns are every apt to treat as Rebellion and Disobedience a Resistance, by which the Subject only maintains his just Rights, and opposes enormous Vio-

lations of the Engagements of Sovereigns, either as such, or by Virtue of the fundamental Laws of the State. History furnishes but too many Instances of this Kind.

⁴ This was a terrible Earthquake, which happened at Lacedemon, and threw down the Whole City, five Houses only excepted, as ÆLIAN relates, *Var. Histor. Lib. VI. Cap. VII.*

In this Passage of ÆLIAN, it is very likely that instead of the Words, which our Author translates *Slaves of Tænarus*, τὰς ἐν Ταυνάρῃ δικέτας, the reading ought to be (and is) according to some Manuscripts, τὰς ἐν Ταυνάρῃ ἱκέτας, that is to say, *Suppliants*, as the late Mr. PERIZONIUS observes in his Note upon this Passage.

⁵ In this Temple Slaves, who were ill treated by their Masters, took Refuge, *Lib. XI. (Cap. LXXXVIII. p. 288. Edit. H. Steph.)*

As *M. Pomponius*, ⁶ the Tribune of the People, being bound by an Oath, tho' compelled by Fear, punctually performed what he had promised to *L. Manlius*.

VII. A special Difficulty concerning Promises made to Subjects in respect of the Sovereign Power handled.

VII. But a greater Difficulty than any yet mentioned may arise from the Legislative Power, and from that super-eminent Right over the Goods of the Subjects, with which the State is invested, and which the Sovereign exercises in its Name. For that Right, if it reach to all the Goods of the Subjects, why not then to that Right also derived from a Promise made in War? Which if granted, all such Covenants seem to be void, and so all Hopes of concluding a War, but by a compleat Victory, would be lost. But on the contrary we must observe, that this super-eminent Right is not to be promiscuously used, but only so far as the publick Good requires it in a civil Government, which, tho' monarchical and absolute, is not despotical. Now, this general Interest commonly requires, that such Agreements should be performed: Agreeable hereunto is what we have already ^a said of the Obligation of maintaining the present State of the Government. Add hereunto, where Necessity requires this eminent Right to be used, Satisfaction is to be made, as hereafter ^b shall be more fully explained.

^a B. 2. Ch. 4. § 8. n. 3.

^b In the following Chapter, § 7.

VIII. And it is shewn that such Promises may be confirmed by the Oath of the State.

^a See Manutius de Legibus.

VIII. 1. Moreover Agreements may be confirmed by Oath, ¹ not only by King, or Senate, but by the whole Body politick; as *Lycurgus* bound the *Lacedemonians*, and *Solon* the *Athenians* by Oath to observe their Laws: And lest by the Change of the Persons the Oath should lose its Force, ² to renew the same Oath every Year. In that Case, there would be no receding from the Engagement, not even for the publick Advantage. For a State has Power to part with its own Right, and the Terms of the Treaty may be so plain, as to admit of no Exception. *Valerius Maximus* thus speaks to the City of *Athens*; ³ *Read the Law which you have sworn to observe.* The *Romans* ^a called such Laws sacred, which they were obliged to keep by Oath, as *Cicero* ⁴ says in his Oration for *Balbus*.

2. There

6 He had sworn to the Son of *Manlius*, and not to himself, that he would desist from proceeding on the Accusation he had brought against the Father; and he declared in the Assembly of the People, that the Reason of his doing so, was because *Titus Manlius* had made him swear it, by threatening to kill him. *SENECA*, in relating this Fact, observes, that this young Man was the only Person, that found Means to restrain a Tribune of the People with Impunity: *Juravit Tribunus, nec sefellit; Et causam actionis remissæ concioni reddidit. Nulli alii licuit impunè Tribunalum in ordinem redigere.* De Benef. Lib. III. Cap. XXXVII. *GROTIUS*.

See also *CICERO* upon this Fact, *Offic. Lib. III. Cap. XXXI.*

VIII. (1) See my Observations upon *PUFENDORF*, *Law of Nature and Nations*, B. IV. Chap. II. § 17. Note 2. Edit. II.

2 See *PLUTARCH* upon this Head in the Lives of those two celebrated Legislators, p. 57. D. E. and p. 92. But there is no mention in that or any other Place, (that I know of) of renewing the Oath annually. On the contrary it seems, that such renewal was not thought necessary for continuing the Oath in all its Force, notwithstanding the Change of Persons. I find at least that *DIONYSIUS HALICARNASSENSIS*, a Greek Author, says expressly, that the Oath once taken by the Whole People was sufficient to make a Law irrevocable, even in regard to the Posterity of those, who had sworn to observe it. This is where he treats of *sacred Laws*, of which more will be said in the following Notes. *Antiq. Rom. Lib. VI. Cap. LXXXIX.*

3 *LEGE itaque Legem, quæ te jurejurando obstrictam tenet.* Lib. V. Cap. III. Num. 3. *Extern.*

4 *GRONOVIUS* criticises our Author in this Place. This is not *CICERO*'s Thought, says he. The Orator confines himself to proving, that nothing is sacred but what the People have declared so: *Sacro sanctum enim nihil potest esse, nisi quod per*

Populum Plebemve sanctum est. Orat. pro Balbo. Cap. XV. So that the Authority of the People was indeed necessary to the making a *sacred Law*: But every Law, to the Establishment of which the Interposition of the People was necessary, was not therefore *Sacred*, unless it implied, that whoever violated it, his Head should be forfeited to the Gods, so that any other Person might kill him with Impunity: For that is understood by *Caput sacrum sancire*, or *consecrare*. But this makes nothing against our Author. He never pretended, that the Reason, why a Law was called *Sacrata*, was only because it had been established by the Authority of the People. The Thought is too absurd to have entered into the Mind of *GROTIUS*, or for him to have ascribed to *CICERO*. He says expressly the contrary in his *Florum Eparsio ad Jus Justinian.* (p. 25, 26. Edit. Amstel.) *Erant autem Leges omnes sanctæ, quæ sanctionem haberent, at non omnes sacratæ.* After which he cites the Definition of these *sacred Laws* from *CICERO* himself, in the fourteenth Chapter of the same Oration: And he adds there *FESTUS* (on the Words *Sacrata Leges sunt*, &c.) as also the Scholiast upon the Words of *HORACE*, *Sanctarum inscitis Legum*, (Lib. II. Sat. I. Ver. 81.) Our Author therefore intended only to say, that the People, in instituting this Kind of Laws, bound themselves to observe them by the Sanctity of an Oath, *religione obligatur*: Words, to which the learned Critick ought to have attended, and which are taken from the Orator himself, upon whose Authority he founds his Opinion: *Qui, injussu suo, nullo pacto potest RELIGIONE OBLIGARI. — Quod PUBLICA RELIGIONE sanciri potuit, id abest.* He says a little above, *Quod quum magis fide illius Populi, justitiâ vestrà, vetustate denique ipsâ, quam aliquo PUBLICO VINCULO RELIGIONIS teneretur*, &c. Ibid. Cap. XV. So that it is not without Foundation, that our Author makes *CICERO* say, the People's Oath was necessary in these Sort of Laws: And we find in *DIONYSIUS HALICAR-*

2. There is in the third Book of *Livy* ⁵ a Passage agreeable to this, tho' of itself pretty obscure; where from the Opinion of several antient Lawyers, he declares, that the Tribunes of the People were sacred: But so were not the *Ædiles*, Judges, nor *Decemviri*, and yet to hurt any of these was contrary to the Laws. The Reason of the Difference is, because the *Ædiles* and the rest had no other Protection than that of the Law, that is, an Ordinance of the People, which could not be lawfully contravened, whilst it subsisted, but might be revoked by another posterior to it. Whereas the Inviolableness of the Tribunes was founded on the publick Religion, having been established by an Oath, which could not be revoked even by those who had sworn. *Dionysius Halicarnassensis* thus records it in his sixth Book: ⁶ *Brutus, calling an Assembly, proposed to the People, that the Tribunes might be rendred sacred and inviolable, not only by the Law, but also by a publick Oath, to which they all agreed.* Hence this Law was called *Sacred*. And therefore ⁷ that Fact of *Tiberius Gracchus*, in deposing *Octavius* from the Tribuneship, pretending that the Tribune's Power derived its Inviolableness from the People, but that this Privilege could not take Place in regard to the People themselves, was condemned by all good Men. Therefore (as I have said) both a State and a King may be bound by an Oath made to their own Subjects.

IX. But farther, a Promise ¹ made to a third Person, who has done nothing to extort it, shall be of full Force. But we shall not examine, wherein and how far that third Person may stand interested in it, being one of the Niceties ² of the Roman Law. For by Nature it is the Interest of all Men to consult the Advantage of others. Thus we read, ³ *That Philip having made Peace with the Romans, was denied the Power of treating the Macedonians ill, that in the War had revolted from him.*

IX. Or if a Promise be made to a third Person.

X. Moreover, as we have ^a already proved that mixt Governments sometimes exist, as a State may pass from one pure Form into another, so it may also by Covenant, or Agreement, pass into a mixt. So that they who before were Subjects, may become Sovereigns, or at least acquire a Part of the Sovereignty with the Right ^a of defending it by force of Arms.

X. How the publick State may be changed.

^a B 1. Ch. 3.

XI. 1. But a solemn War, that is, publick, and denounced on both Sides, among other particular Effects of external Right, has also this, that whatever Promises are made in that War, or for bringing it to a Conclusion, are so valid, that tho' they were occasioned by ¹ a Fear unjustly caused, yet they cannot be made void without the Consent of him to whom the Promise was made. Because as many other Things,

XI. That Fear in a solemn War by the Law of Nations is no just Exception.

HALICARNASSENSIS, (*ubi supra* VI. 89.) that the most Eminent were attended with it; besides the Imprecation against the Head of all those who should violate them. See also *FESTUS*, at the Word *Sacrosanctum*. Whether they were called *Sacratæ* for the one or the other of these Reasons, is a different Thing; and it does not appear clearly, that our Author intended to give the Etymology of that Word in this Place: At least *CICERO*, whom he cites, makes use of another Term, *Sacrosanctum*. It appears also by what *FESTUS* says at the Words *Sacratæ Leges*, that even the Antients disagreed concerning this Etymology. The Reader may see upon this Question of Criticism, the *Animadversiones* of the late Mr. *PERIZONIUS*, p. 418, 419. and the Remarks of the same learned Man upon the *Minerva* of *SANCTIUS*, p. 761, 762. of the last Edition.

⁵ *Et quum religione, &c.* Lib. III. (Cap. LV. Num. 7. & seq.)

The learned *GRONOVIVS* does not think our Author's Reason well founded for the Difference between the Tribunes of the People and the *Ædiles*, &c. The Truth is, says he, that no one could be considered as a sacred Person (*Sacrosanctus*) according to the Custom of the Romans, unless he was formally declared so by a Law, as the Tribunes had been, according to *LIVY*, Lib. II. Cap. XXXIII.

⁶ *Antiq. Rom.* Lib. VI. (Cap. LXXXIX.)

⁷ As reported at large by *PLUTARCH* in his Life.

IX. (1) See above, B. II. Chap. XXV. § 8. Num. 3. and a Dissertation of *OBRECHT*, *De Sponsore Pacis*, § 3. Diff. VII. p. 151, 152.

² See what the Author has said above, B. II. Chap. XI. § 18. Num. 1.

³ *Perseus* thought that the hardest Condition in the Treaty: *Una eum res, quum visio, &c.* *LIVY*, Lib. XXXIX. Cap. XXIII. Num. 6.

XI. (1) It is necessary in my Opinion to distinguish here, whether he who has compelled the other to treat by the Superiority of his Arms, had undertaken the War without Reason, or whether he could alledge some specious Pretext for it. If it was without any Cause, as *Alexander's* going to conquer remote Nations, who had never heard of him, and of Consequence could not have done any Thing against him, nor owe him any Thing; or even if the Cause alledged be evidently a frivolous Pretext in the Judgment of every Man of common Reason: I do not see wherefore the Conquered should be obliged to observe the Treaty of Peace, any more than a Man fallen into the Hands of Thieves should be held to carry exactly, or pay at their Demand, the Money he had promised them as a Ransom for his Life or Liberty; which our Author himself does not pretend; tho' building upon false Principles, which we have rejected more than once, he is for having such a Promise

^a See the Treatise De Composit. Pacis.

Things, tho' in themselves not wholly innocent, are yet by the Law of Nations reputed just, so is Fear, ^a which in such a War is occasioned on either Side; for if it were not allowed, such Wars, that are but too frequent, could be neither moderated, nor concluded, which yet are very necessary to be done for the good of Mankind. And this we may reasonably suppose to be that Right of War, which ² Cicero says, must be kept with the Enemy; who also tells us in another Place, ³ that an Enemy retained some Rights in War, that is, not only natural ones, but also some derived from the Consent of Nations.

2. Neither does it from hence follow, that he who has extorted such a Thing in an unjust War, may with a safe Conscience, keep what he has got, or compel the other Party to stand to his Covenants, whether sworn or not sworn. For internally, and in the very Nature of the Thing, it still continues unjust: Neither can this internal Injustice of the Act be taken away, but by a new and entirely free Consent of the Promiser.

XII. What is to be understood by such a Fear as is allowed by the Law of Nations.

XII. Further, whereas I have said that Fear is accounted just, which is caused in a solemn War, ¹ it is to be understood of such a Fear as the Law of Nations allows of. For Instance, if any Thing be extorted thro' the fear of Ravishment, or any other Terror, contrary to our Faith given, this ought to be adjudged by the Law of Nature, because the Law of Nations does not extend so far as to authorize any such Fear.

XIII. That Faith is to be kept even with the Perfidious. ^a B. 2. Ch. 13. § 16.

XIII. 1. That Faith is to be kept even with those that are perfidious, I have already said, ^a in treating of the Obligation of Promises in general; and it is likewise the Doctrine of ¹ St. Ambrose: Which doubtless extends to Enemies that are treacherous; such as the Carthaginians, with whom nevertheless the Romans inviolably kept their Faith. Valerius Maximus says on this Subject, ² The Senate regarded themselves, not those to whom they performed their Engagements. And likewise Salust, ³ In all the Punic Wars, tho' the Carthaginians in Time of Peace, and of Truce, were often guilty of most villanous Practices, yet they (the Romans) never returned the like to them, when they had an Opportunity.

2. Appian speaking of Servilius Galba, who put the Lusitanians to the Sword for breaking their Alliance, after having deceived them in his Turn by a new Treaty, observes, ⁴ He avenged one Treachery by another, and to the Scandal of the Romans, imitated the Barbarians. The same Galba was afterwards accused for it by Libo, a

a Promise to be valid in itself. But if the Conqueror had undertaken the War for some plausible Reason, tho' unjust at Bottom, when examined without Prejudice, in such Case the common Interest of Mankind undoubtedly requires, that some Difference be made between Promises extorted by Fear between private Persons, and those to which a Sovereign Prince or People is compelled by the bad Success of their Arms, tho' just. The Reason our Author uses in this Place is very good: And that without supposing a tacit Consent of Nations, which only renders the Engagement of the Conquered the stronger. For the Law of Nature itself which requires that Societies, as well as every Individual, should endeavour their Preservation, does by that alone make us regard not properly Acts of Hostility as just on the Side of the unjust Conqueror; but the Engagement of the Treaty of Peace as valid notwithstanding; so that the Conquered cannot dispence with observing it, upon the Pretext of the unjust Fear that occasioned it, which they might have done without the Consideration of the Advantage arising from thence to Mankind. This Interest of publick Tranquillity requires also, that even when a Treaty of Peace has been made, in Consequence of a War undertaken without Cause, or for one manifestly frivolous, the unjust Conqueror, who had no lawful Title, acquire it afterwards, in a reasonable length of Time, when the Conquered submit patiently to the Yoke, without being forced to it by the same Fear, which induced them to treat at first. See above, B. II. Chap. IV. § 12. & seq.

To what I have said may be added the Reason alledged by PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VIII. § 1.

² Est autem jus etiam bellicum, fidesque jurisjurandi sæpe cum hoste servanda. De Offic. Lib. III. Cap. XXIX.

³ The Passage has been already quoted above, Chap. XII. of this last Book, § 7. Note 8.

XII. (1) Thus a Promise extorted from an Ambassador made Prisoner is not valid, according to the Law of Nations. See MARIANA, *De Rebus Hispan.* Lib. XXX. GROTIUS.

The Spanish Historian speaks of Antony Acunia, Bishop of Zamora, whom John D'Albret the last King of Navarre had laid under an Arrest, and afterwards released upon his Promise to return, as soon as required. But that Prelate had not been received as Ambassador: And there were good Reasons not to receive him as such, as he had been present at the Battle of Ravenna between the Spaniards and French, which latter were the King of Navarre's Allies. See Chap. XII. and XIX. of the Book referred to in this Note. So that the Maxim, true in itself, is here misapplied. See what our Author says above, B. II. Chap. XVIII. § 5. and 6.

XIII. (1) Quanta autem Justitia sit, &c. Offic. I. 29.

² Se tunc Senatus non eos, &c. Lib. VI. Cap. VI. Num. 3.

³ Item bellis Punicis omnibus, &c. (Bell. Catilinæ. in Orat. Cæsar. Cap. L. Edit. Waff.)

⁴ De Bell. Hispan. p. 288. Edit. H. Steph.

Tribune

Tribune of the People ; which *Valerius Maximus* ⁵ relating, thus censures it: *Compassion, not Equity, pleaded in that Cause ; for the Absolution, which his own Innocency could not demand, was granted him in respect of his Children.* And *Cato* ⁶ writes in his *Originals*, he would certainly have suffered, if his Children and Tears had not interceded for him.

XIV. But we must also observe, that there are two Ways, whereby to avoid the Crime of Perfidiousness, and yet not perform the Promise ; namely, in Default of the Condition, or by Compensation. The Promiser is not properly discharged for Want of the Condition ; but the Event shews, that there had been no real Obligation, since he did not intend to engage himself but upon Condition. To which we may refer this, ¹ if the other do not perform what he was bound on his Part to do first. For all the Articles of one and the same Agreement seem to be included one in the other, in the Manner of a Condition, as if it had been thus expressed, I will do these Things thus, provided the other also do what he has promised. Therefore *Tullus*, ² in his Answer to the *Albans*, calls the Gods to witness, whether of the two Nations had scornfully sent back the Embassadors reclaiming their own, that all the Miseries of War might light upon them. *Ulpian* observes, ³ He shall not be held a Confederate, who has renounced his League, because some Condition, on which it was made, is not performed. For which Reason, when it is otherwise designed, this express Clause is usually added, if any Thing be done contrary to this or that Article, yet shall the rest be in full Force.

XIV. Not if the Condition ceases, which happens when the other Party refuses to stand to his Part of the Agreement.

XV. We have elsewhere ^a declared the Original of Compensation, that is, ¹ when we cannot otherwise recover what is our own, or what is justly due to us, we may take from him, who either keeps what is ours, or is indebted to us, the full Value thereof in any Thing else ; whence it follows, that we may much more keep what is actually in our Possession, whether corporeal or incorporeal. Whatever therefore we have promised, we need not perform, if it be of no greater Value than that of ours, which the other Part injuriously detains from us. ² *Seneca* says in his sixth Book of Benefits, *Thus the Creditor is often cast by the Debtor, when he has upon some other Account taken more than the Value of his Debt.* Nor does the Judge only sit between the Creditor and the Debtor, who may say to the Plaintiff, *You lent your Money. What then ? You now possess Land, which you never purchased, wherefore upon a just Valuation, depart you hence a Debtor, who came a Creditor.*

XV. Neither when there is a just Compensation opposed. ^a B. 2. Ch. 7. § 2.

XVI. It will be the same Case, if he with whom I deal owes me as much, or more, upon any other Contract, and I cannot otherwise recover it. Indeed in Courts of Justice, *Seneca* ¹ says, certain respective Actions of the Parties are not granted at the same Time ; but this is a pure Effect of the Disposition of the civil Laws, to which we are bound to conform. Each Law has its Rights apart, which it has been thought proper not to mingle with those of other Laws ; as the same ² Author observes. But the Law of Nations allows no such Distinctions, provided there be no other Hopes of recovering our own.

XVI. Tho' by another Contract.

XVII. The same may be said, where he that exacts a Promise, owes nothing in Consequence of an Agreement, but hath damnified the Promiser. ¹ As the same *Seneca* testifies, *The Farmer is not bound to his Landlord, tho' his Lease be not can-*

XVII. Or some Damage done.

⁵ *Misericordia ergo illam quæstionem, non æquitas, rexit : Quoniam quæ innocentie tribui nequiebat absolutio, respectui puerorum data est.* Lib. VIII. Cap. I. Num. 2.

⁶ *Quod item apud Catonem scriptum esse [in Originibus] video, nisi pueris & lachrymis usus esset, pœnas eum daturum fuisse.* De Orat. Lib. I. Cap. LIII. See also in *Brut.* Cap. XX.

XIV. (1) Compare PUFENDORF with this Place, *Law of Nature and Nations*, B. V. Chap. XI. § 9. and what our Author has already said, B. II. Chap. XV. § 15.

² *Nunciate, inquit, Regi vestro, Regem Romanum, &c.* (LIVY, Lib. I. Cap. XXII. Num. 7.)

³ *Digest.* Lib. XVII. Tit. II. pro Socio, Leg. XIV.

XV. (1) See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XI. § 5. & seqq. Our Author cites here in a Note the Passage of TERTUL-

LIAN, where he says, that no one ought to object to a Compensation of good or ill on both Sides : *Nulli compensatio invidiosa est, in qua aut gratia, aut injuria, communis est ratio.* *Scorpiac.* adv. Gnosticos, Cap. VI.

² *Sic Debitori suo Creditor, &c.* De Benefic. Lib. VI. Cap. IV.

XVI. (1) If a Man, says he, has entrusted me with a Deposit, and afterwards stole something from me, I ought to prosecute him for the Theft, tho' he may Claim the Deposit from me by another Action : *Separantur actiones, &c.* Ibid. Cap. V. See the *Receptæ Sententiæ* of the Civilian JULIUS PAULUS, Lib. II. Tit. XII. § 12. and the Notes of CUIJAS and Mr. SCHULTING upon him.

² *Quæ proposuisti, mi Liberalis, exempla, &c.* Ubi supra, Cap. VI.

XVII. (1) *Colonum suum non tenet, &c.* De Benefic. Lib. VI. Cap. IV.

celled, in Case he wilfully tramples down his Corn, or cuts down his Trees ; not because he has received what he agreed for, but because he has prevented his Tenant's receiving whereby he might pay him. Then he gives other Instances. ² You have driven away his Cattle, you have killed his Slave. ³ And again, It is lawful for me to compare the good that a Man has done me, with the Hurt he does me, and then declare, whether I am more indebted to him, or he to me.

XVIII. Or for
some Punish-
ment due.

XVIII. Lastly, whatsoever is also due by way of Punishment, may be balanced against the Thing promised. Which in the same Place of Seneca is at large explained. ¹ Thanks is due for a Kindness, and Revenge for an Injury. I neither owe him Thanks nor he Punishment to me, we are fully discharged one of another. And again, ² By comparing the Benefits and Wrongs which I have received, I shall find whether there does not remain something due to me.

XIX. How
these take Place
in War.

XIX. 1. But as amongst contending Parties at Law, if they have made any Agreement whilst the Suit is depending, none of them can compensate what he has promised, either by the Thing contended for, or the Costs and Damages of the Suit : So during the Continuance of the War, neither can that which first occasioned the War, nor the Damages allowed by the Law of Nations in War, be compensated. For the very Nature of the Engagement, which without that would be reduced to nothing, sheweth, that all the Disputes of War were set aside : Otherwise there could be no Agreement made so firm that might not be evaded. Whereto I may properly apply that Saying, ¹ of the same Seneca, whom I have cited so often, Our Ancestors would allow of no Excuses, that Men might be assured that Faith was strictly to be kept. For it were better not to admit of an Excuse, tho' just, from a few, than encourage every one to make them.

2. But what is it then that may be compensated by the Thing promised ? That which is due to us by any other Convention made during the War ; or on account of the Damage done us by Acts of Hostility in the Time of Truce ; or in Consequence of an Outrage committed on our Embassadors, or any other Action condemned by the Law of Nations.

3. But we must observe, that this Compensation be made between the same Persons, and that the Right of no third Person be injured ; yet so that the Subjects Goods must stand engaged for the Debts of their own State by the Law of Nations, as I have said ^a elsewhere.

^a B. 3. Ch. 3.
§ 2.

4. To which we may add, it is the Part of a generous Soul to keep firm to his Treaties, even after Injuries received ; on which Account that wise Indian, Jarchas, ² highly commended the King, who being injured by a confederated Neighbour, Would not break his Faith given, saying, That he had sworn so solemnly, that he durst not hurt the other, no not after great Provocation.

^b B. 2. Ch.
11, 13, 15,
16.

5. Now what Questions use to arise concerning Faith given to Enemies, may almost all of them be resolved, by the Rules we have established ^b above in treating of the Effect of Promises in general, and of the Oath that accompanies them in particular, of Alliances and publick Treaties, as also of the Right and Obligation of Kings, and the Interpretation of obscure or ambiguous Clauses. Yet that the Use of the Principles we have laid down may be better perceived, and to clear any Doubt that may arise hereafter, I shall not think much to point out some of those special Cases which are most remarkable, and most frequently occur.

² These Words are in the Passage which I have cited above, § 15. Note 2.

³ Beneficium nulli legi, &c. Ubi supr. Cap. VI. XVIII. (1) Dediti beneficium, &c. Ibid. Cap. V.

² Potius comparatione facta, &c. Cap. VI.

XIX. (1) Nullam excusationem receperunt, &c.

De Benefic. Lib. VII. Cap. XVI.

² The King commended by Jarchas was named Ganges, whose Ally is said to have carried his Infidelity so far, as to seize the Person of the Queen his Spouse. PHILOSTRAT. Vit. Apollon. Tyan. Lib. III. Cap. XX. Edit. Olear.

C H A P. XX.

Concerning the publick Faith whereby War is finished; of Treaties of Peace, Lots, set Combats, Arbitrations, Surrenders, Hostages, and Pledges.

I. **A**LL Agreements between Enemies depend upon Faith, either expressed or implied. Faith expressed, is either publick or private. Publick is either of the supreme or subordinate Powers. That of the supreme Powers, either puts an end to the War or is of Force during its Continuance. Among those Things that conclude a War, some are looked on as Principals, some as Accessories. The Principals are those very Things that finish the War, either by themselves as a Treaty of Peace, or by Consent that it be referred to another Thing, as the Decision of Lot, the Success of a Battle, the Judgment of an Arbitrator; whereof the first is purely casual, but in the two others the Chance is moderated by the Strength of the Mind or of the Body of the Combatants, and by the Power given to the Judge.

II. They who have Power to begin a War, have likewise Power to enter upon a Treaty to finish it; for every Man is the best Manager of his own Affairs; ^a whence it follows, that in a War on both Sides publick, it is wholly in their Power who enjoy the supreme Authority, which in a Government truly monarchical ¹ belongs to the King, unless there be any Thing that hinders him from exercising his Right.

III. ^a For if a Prince be not out of his Minority, (which in some Kingdoms is determined by Law, in others by probable Conjectures) or be not in his true Senses, he is not capable of making Peace. The same is to be said ¹ of a King that is a Prisoner, if his Kingdom had its first Rise ² from the Consent of the People; for it is not to be supposed, that the People would confer the Sovereignty upon one, with a Power even to exercise it at a Time when he is not Master of his own Person. Therefore in such a Case not the full Sovereignty, but the Exercise of it, and as it were the Guardianship is in the People, or him whom they shall delegate. But of those Things which are privately his own, whatsoever a King, tho' a Prisoner, shall Contract, will be valid, according to the Principles which we shall ^b establish concerning private Agreements. But what if a Prince be an Exile, ³ is it in his Power to make Peace? Yes ⁴ certainly, if it appear that he has no Dependence upon any Person. Otherwise his Condition would be little different from that of a Prisoner, for there are Prisoners at large. *Regulus* refused to declare his Opinion in the Senate, ⁵ alledging, that as long as he was bound by an Oath to his Enemies, he could not rightly be a Senator.

IV. In an Aristocracy, or Democracy, the Power of making Peace shall be in the major Part: In the one of the Sovereign Council, in the other of the People

II. (1) *In Statu vere regio*, says the Author. That is to say, if the King be absolute, and not obliged by the fundamental Laws of the Kingdom, to consult the People, or the Nobles of the State upon making War or Peace.

III. (1) See GUICCIARDIN, *Hist.* Lib. XVI. and Lib. XVIII. where he treats several Times of this Case. GROTIUS.

² So that, according to our Author, when the Kingdom is patrimonial, the King, tho' a Prisoner, can make Peace, in the same Manner as he may treat validly in regard to his private Estates, tho' he holds the Kingdom only by an usufructuary Title. Our Author supposes without doubt, that the King, who is a Prisoner, is not become a Slave by the Right of War, or that he, who has taken him, either expressly or tacitly has renounced his Right. The Question is otherwise useless, because Estates are acquired with the Person, according to what has been said above, *Chap.* VII. of this Book, § 4.

and *Chap.* VIII. § 1. Num. 3.

³ What LUCAN says may be applied here, that during the Time the Dictator *Camillus* was at *Veii*, *Rome* also was there, tho' the *Gauls* were Masters of the City:

—Tarpeja sede perusta
Gallorum facibus, Veiosque habitante Camillo
Illic Roma fuit.

Pharsal. (Lib. V. Ver. 27. & seq.)

See CHASSANÆUS, *De Gloria Mundi*, Part V. Consider. IX. GROTIUS.

⁴ Our Author supposes here again without doubt, that the King has been unjustly expelled his Dominions. Otherwise, as he would be equally incapable of making Peace, which is one of the most essential Parts of it.

⁵ *Sententiam ne diceret*, &c. CICERO, *De Offic.* Lib. III. Cap. XXVII.

who

^a B. 2. Ch.
5. § 17.

who have a Right to vote according to the Custom of the Country, as we have ^a said in another Place. Therefore Things thus agreed upon, shall be obligatory even upon those who dissented from them. As in *Livy*, ¹ *When it shall be once decreed, it must then be maintained as a good and profitable Alliance by all, even those who before were against it.* Also *Dionysius Halicarnassensis*, ² *It must be obeyed as just, whatsoever the Majority has decreed.* And *Appian*, *All are obliged to obey a Decree, and no Excuse to be admitted against it.* As also *Pliny*, ³ *What has pleased the most, must bind the rest.* But they may, if they please, make use of the Advantages of the Peace concluded against their Opinion.

V. How the
Sovereignty or
any Part there-
of, or the
Goods of a
Kingdom, may
be alienated to
obtain Peace.

V. 1. Now let us see what Things are subject to such an Agreement. Most Kings in our Days, holding their Kingdoms not as patrimonial, but as usufructuary, have no Power by any Treaty to alienate the Sovereignty in Whole, or in Part: Yea, and before they come to the Government, at what Time the People are their Superiors; ¹ such Acts may be a fundamental Law, for the future be rendered absolutely void and null; so that even as to Damages and Interest, they shall be no ways binding. For it is probable, that Nations thought fit to ordain that ² in that Case, the other Party should have no Action against the King for Damages and Interest, since, if that took Place, the Goods of the Subjects might be seized, as answerable for the King's Debt; and so the Precaution that might have been taken to hinder the Alienation of the Sovereignty, would become entirely useless.

2. But that the entire Sovereignty may be firmly alienated, the Consent of the Whole Body of the People is required; which may be done by their Representatives, whom they call the Orders or States. And that any Part of the Kingdom may be firmly alienated a twofold Consent is required, both of the Whole Body, and especially of that Part which is to be alienated, which cannot be divided from the Body to which it was united against its Will. But yet in Case of extreme Necessity, and otherwise unavoidable, that very Part may firmly convey the Government over themselves to another without the Consent of the People, ³ because it is probable that Power was reserved, when civil Societies were instituted.

3. But in patrimonial Kingdoms, nothing hinders, but that a King may alienate his Crown as he thinks fit. But it may happen to be so, that that King may not have Power to alienate any Part of his Dominion, as if he received it as his Propriety ⁴ upon Condition not to divide it. But as concerning those Things which are called the Goods of the Kingdom, they may become the King's Patrimony two Ways, either separably, or inseparably with the Kingdom; if this latter Way, they may be transferred, but not without the Kingdom; if the other, without it.

4. But those Kings, whose Kingdoms are not patrimonial, can scarcely be thought to have a Power to alienate the Goods of the Kingdom, unless it plainly appear by some fundamental Law or Custom, that has never been opposed, that such a Power was given them.

IV. (1) Which he makes *Aristenus*, Prætor of the *Achæans*, say: *Ubi semel decretum erit, omnibus id, etiam quibus ante displicuerit, pro bono atque utili fœdere defendendum.* Lib. XXXII. (Cap. XX. Num. 6.)

² *Antiq. Rom.* Lib. XI. (Cap. LVI.)

³ *Singulos enim, integrâ re, dissentire fas esse: Peractâ, quod pluribus placuisset, cunctis tenendum.* Lib. VI. Epist. XIII.

V. (1) But tho' the Act of Alienation has not been previously declared entirely null, it is however no less so. The Nullity follows necessarily, from the King's Power being limited in that Respect by the very Nature of his Kingdom; and much more, if in conferring the Sovereignty, it was expressly stipulated, that he should not alienate any Part of it. It is a different Question to know whether the Alienation remaining without Effect, the King, as for his own particular Part be not held to make the other contracting Party some Amends, admitting he can do so in a Manner not prejudicial to the Interests of his Subjects, or the State. See the following Note.

² It suffices to say, that the other Party may, and generally do know, that it is not in the King's

Power to treat: In which Case they can only blame themselves. The Reason alledged by our Author, may afterwards be put to account, but without its being necessary to found it upon a meer Supposition of a tacit Consent of Nations. For the rest, if we suppose that the Party, with whom the King has treated, could not know, that the Alienation was not in his Power; I see no Reason, why in such Case they may not have a Right to come upon the King's patrimonial Estate for Damages and Interest; in the same Manner as those, who have treated with a publick Minister, acting without Authority, may exact this Amends from him, according to the Principles laid down by our Author himself elsewhere, *B. II. Chap. XV. § 16. Num. 6.* But farther: In a doubt, or when the King has alienated some Part of his Kingdom, for very evident Reasons of Necessity or Utility, it may be presumed, that the People have given their Consent, according to what has been also advanced above, *B. II. Chap. VI. § 8. 11. and Chap. XIV. § 12.*

³ See what has been said above, *B. II. Chap. VI. § 6, 7.* with the Notes.

⁴ In which Case therefore he may indeed alienate the Whole Kingdom, but not a Part of it.

VI. We have elsewhere ^a said, how far the People and the Successors may be bound by the Promise of a King; namely, ¹ as far as the obligatory Power is comprehended in the Sovereignty; which should neither be drawn out to an Infinity, nor confined within too narrow Bounds; but we ought to consider as valid in that Respect whatever the Sovereign engages himself to do for apparent Reasons. It is a different Thing, if a King be the absolute Lord of his Subjects, and his Rule be rather despotical than civil, ² as having brought them into Bondage by Conquest, or have obtained the Property of their Goods, without being Master of their Persons, as *Pharaoh* when he had purchased all the Land of *Egypt*, or as those who receive ³ Strangers into their private Lands. For in this Case, besides a regal Right, there accrues another Right, which renders an Engagement valid, which a bare regal Power of itself could not do.

VI. *How far the People or Successors are obliged by a Peace made by the King.*
^a B. 2. C. 19. § 10; &c.

VII. 1. This also is often disputed, what Right Kings have to dispose of the Goods of private Men to procure a ^a Peace, who have no other Power over the Goods of their Subjects, than as they are Kings. I have already ^b said, that the State has an eminent Right of Property over the Goods of the Subjects, so that the State, or those that represent it, may make Use of them, and even destroy and alienate them, not only upon an extreme Necessity, which allows to private Persons a Sort of a Right over Men's Goods; but for the publick Benefit, which ought to be preferred to any private Man's Interest, according to the Intention, reasonably presumed, of those who first entered into civil Society.

VII. *The Goods of Subjects may by a Peace be granted away for the publick Good, but with Condition of repairing Losses.*
^a Gail. 2. Obs. 57.
^b B. 1. Ch. 6. B. 2. Ch. 14. § 7, 8.

2. To which we must add, that the State is obliged to repair the Damages, sustained by any Subject on that Account, out of the publick Stock; so that he himself who hath sustained the Loss, contribute, if it be necessary, according to his Quota, to the discharge of that publick Debt. Neither shall the State be released from this Obligation, tho' at present it be not able to satisfy it, but whenever the State shall be in a Capacity, this suspended Obligation shall resume its Force.

VIII. Neither can I here generally admit the Opinion of *Ferdinandus Vasquius*, that a State is not obliged to repair such Damages caused by War, because the Right of War permits such Damages. For this Right of War, (as we have ^a elsewhere explained it) partly Respects other Nations, and partly those ^b that are at War among themselves; but it does not extend to the Members of the same State, who since they are closely associated, it is equitable, that they should esteem each Man's Loss, sustained on Account of the Association, ¹ as common to all; yet this also may be constituted

VIII. *What of Things already lost in War.*
^a B. 3. ch. 6. § 3.
^b Ch. 10. § 5.

VI. (1) See REINKING. B. I. *Class.* III. *Cap.* V. *Num.* 30. and compare this with what has been said above, B. II. *Chap.* XIV. § 7. and 12. GROTIUS.

2 But see what we have said upon B. I. *Chap.* III. § II. *Num.* 1.

3 I add the Words, *upon this Condition*, which necessarily must be understood according to the Thought of our Author, who expresses himself clearly in another Place, where he has treated of the same Case: *Ut paterfamilias latifundia possidens, NEMINEM ALIA LEGE suas terras habitantem recipere velit, &c.* B. I. *Chap.* III. § 8. *Num.* 2. This gives me Occasion to defend him against a very four and ill-grounded Criticism of the late Mr. COCCEIUS, in a Work published some little Time after his Death, intitled, *Autonomia Juris Gentium, &c.* He says there, (*Cap.* XII. § 5.) Our Author supposes a Master of a Family, who, possessing a vast extent of Land, entertains a great Number of Servants and Workmen for the culture of them. This is not, adds he, a State, but a great Family; this Man is not a King, but a rich private Person: And GROTIUS confounds in this Manner the Head of a Family with an absolute Prince, which is *very absurd*. But is it not more absurd, to make so judicious a Man as GROTIUS say a Thing so contrary to the plain Sense of his Words, which import not a simple *Contract of Hire*, as it is supposed without Reason, but a Convention by which the

Head of a Family in Question grants Lands, upon Condition that the Inhabitants of them shall acknowledge him for the future as their absolute Sovereign? He afterwards maintains, that admitting such a Convention, the new King would have no Right to alienate his Kingdom, and founds his Reason upon this, that there neither is nor can be, as is pretended, any patrimonial Kingdom. This is not the proper Place to examine the Reasons he brings for this Doctrine, nor to shew their Weakness. Besides, I have already said, B. I. *Chap.* III. § 11. Note 4. what we ought to think upon this Head, to avoid vicious Extremes.

VIII. (1) There are some, who say, that War being deemed to be undertaken by the Consent of all the Citizens, every particular Person is also deemed to have exposed himself voluntarily to support all the Losses, which he may sustain in Consequence of the Acts of Hostility, especially in a War purely defensive; and therefore, that the State is not held to reimburse any one; unless it has received Advantage from what private Persons have lost, or unless the Damage was sustained by such Persons, in Consequence of the Hazards they run by Order of the Sovereign. For the Rest, it is so much the worse for those that have suffered, even tho' they have suffered more than others. But the Consequence is not just. This tacit Consent of the Citizens to the undertaking of a War, implies indeed a Will to suffer Loss, when they cannot do otherwise; but

constituted by the civil Law, that no Action may be brought against the State for Damages by War, ² in order to make every Man more ardent to defend his own.

IX. No Distinction here between Things got by the Law of Nations, and those by the civil Law.

IX. There are some that place a vast Difference between those Things which are the Subjects by the Law of Nations, ¹ and those which are theirs by the civil Law; that they may allow the Prince a larger Right over these, even of taking them away without Cause or Satisfaction; but not so over the other: But falsely. For the Right of Property, whatever be the Title of it, has always its proper Effects by the Law of Nature itself; so that it cannot be taken away, but for such Causes as are naturally ² inherent in the Property, or such as arise from some Fact of the Proprietor.

X. What is done by a King, is taken by Foreigners to be for a public Good.

X. But whether the publick Interest required that the Goods of the Subjects should be granted away by a Treaty, which a King ought not to do but for such a Reason, is a Question to be decided between the King, and the Subjects, as that of repairing Damages regards the State, and particular Persons. For to Strangers that contract with him the bare Fact of the Prince is sufficient, not only from the Presumption which the Dignity of his Person brings with it, but also from Law of Nations, which ¹ allows the Goods of Subjects to stand obliged by the Fact of the King.

XI. A general Rule for the interpreting Articles of Peace.

^a B. 2. ch. 16. § 11, 12.

XI. 1. But as to the true Understanding of the Articles of Peace, we must here observe, what has been said ^a before. The more favourable any Article is, the more largely it should be taken; and the less favourable it is, the more strictly it should be understood. If we consider the bare Law of Nature, there is nothing more favourable than what tends to this, that every one should enjoy his own. Which the *Greeks* express thus, ἕχαστον ἔχειν τὰ ἑαυτῶν. Wherefore where the Meaning of the Articles is ambiguous, it should be taken in this Sense, that he that has the Justice of the War on his Side, should obtain what he took up Arms for, and also recover his Costs and Damages, but not that he should get any Thing farther by way of Punishment, for that is odious.

2. But because in treating of a Peace it seldom happens, that either the one or the other of the Enemies owns he had been in the wrong; therefore in Articles of Peace, such an Interpretation should be admitted, as may according to the Justice of the War make the Balance ¹ even on both Sides; which is generally done two Ways. For either it is intended, that those Things whereof the Possession has been disturbed by War, should be put on their antient Foot, (which are the Words of *Menippus* in his Oration, wherein he treats of the several Sorts of Leagues) or as the *Greeks* say, ² ἕχοντες ἀ ἕχουσι, That Things should remain as they are.

XII. In doubtful Cases, it is believed that Things should remain as they are.

XII. 1. Of these two Senses, in a doubtful Case, the latter is more readily presumed, because what it includes is more easy to be done, and it brings no Alteration. Hence *Tryphoninus* observes, that after the Peace such Captives only are to return by Postliminy, as are expressly mentioned in the Treaty, as we have proved elsewhere ¹ by invincible Arguments, in following the Correction of *Faber*. So Fugitives also are not to be restored, unless stipulated. ² For by the Law of War we

not if there be any way to make them Amends, either fully, or in Proportion to what they have suffered more than their Fellow-Citizens, who were equally obliged to it. The one does not hinder the other.

2 There may be another considerable Reason for this, which is the Difficulty of estimating, and comparing together the Losses of every one. Besides, if private Persons are rich, and the Publick poor, as it sometimes happens, this sufficiently excuses the State from making any Amends.

IX. (1) Compare this with what has been said above, B. II. Chap. X. § 1. Num. 5. and Chap. XIV. § 8.

2 Our Author understands thereby the eminent Domain of the State, of which the lawful Use is founded upon the publick Utility, and consequently forms an Exception included in Property, as in every other Right of private Persons.

XI. (1) This is a natural Consequence of the Thing, or of the Intention of the contracting Parties reasonably presumed. For, as each believes

himself in the Right, each no doubt is for making his Condition as good as he can, and at least as advantageous as that of the other Party. So that the Distinction of *favourable* and *odious*, of which we have elsewhere shewn the Usefulness and Want of Solidity, is not more necessary in this Place.

2 See for Instance *THUCYDIDES* IV. 65. which I have already cited above, upon B. II. Chap. IV. § 8. Num. 3.

XII. (1) It is in Chap. IX. of this last Book, § 4. Num. 1. where the Law has been quoted. The Reader may see what I have said upon it, Note 3.

2 See the Law of the *Digest* quoted above at the End of Chap. I. of this Book. It is also sometimes agreed by Treaty of Peace, that such as would go over from one Party to the other, shall not be received. See the Articles of Peace concluded between the Emperor *Justinian* and *Chosroes* King of *Persia*, in the History of *MENANDER* the Pro-tector, (Cap. II.) *GROTIUS*.

receive Deserters, that is, by the Law of War we are allowed to entertain, and list among our own Troops such as quit their own Party. All Things by such an Agreement continue his, who is possessed of them.

2. But that Word *possessed* is taken not civilly, but naturally; for in War a Possession in Fact is sufficient, neither is any other required. Lands, I have already ^a said, are then possessed, when they are inclosed by some Fortifications; for such as are only encamped upon for a Time, are not here respected. *Demosthenes* ³ in his Oration for *Ctesiphon*, says, that *Philip* made haste to possess all the Places he could possibly, knowing well that at the concluding of the Peace, he should keep all that he had in his Possession. But incorporeal Things ⁴ cannot be possessed, but either ^b by the Things to which they adhere, (as the Services of Manors) or by the Persons whose they are. ⁵ It is not however necessary to be Master of the Person, in order to possess this Sort of Things, when the Question is concerning a Right, which can only be exercised in the Country, which was formerly the Enemies.

XIII. In that other Kind of Agreement, whereby the Possession of Things disturbed by War, is to be restored, we must observe, that the last Possession immediately before the War is here meant; yet so as those private Persons that were then unjustly ejected, ¹ may have recourse to Justice, either to obtain a provisional Decree, whereby they may be put again in Possession, or to claim their Estate.

XIV. But if a free People shall ¹ voluntarily submit themselves to either Party engaged in War, this Article of Restitution cannot reach them; because it only relates to those Things which were done by Force, Fear, or otherwise by a Treachery not allowable but in regard to an Enemy. Thus though the Peace were concluded among the Greeks, the Thebans yet ² retained *Plataea*, pretending That they were possessed of it, not by Force nor Treachery, but by the voluntary Surrender of the Inhabitants. And by the same Right was *Nisaea* ³ retained by the Athenians. *T. Quinctius* used the same Distinction against the *Aetolians*, replying, That was the Law of Cities taken by Force, but the Cities of Thessaly freely ⁴ submitted themselves unto the Roman Dominion.

XV. If there be no Clause whereby it is otherwise agreed upon, it is to be supposed in every Peace, that no Action shall be commenced for Damages done in War; which also is to be understood of those done between private Persons, ¹ these being also the Effects of War. For in a Doubt, those who treat of Peace, are

XIII. What if it should be agreed that Things should be restored to the same Condition that they were in before the War begun?

XIV. Then they who were before free, and have voluntarily submitted themselves, are not to be restored.

XV. Damages by War, if in doubt, are supposed to be forgiven.

³ *De Corona*, p. 316. B.

⁴ Consult PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VI. § 19.

⁵ This is our Author's Meaning, whose concise Expression has been very ill understood by the learned GRONOVIVS. Suppose, for Instance, that a Person has the Use and Profits, or the Fief of a Land, if the Enemy seizes this Land, tho' he does not take the Lord of the Fief or Tenant Prisoner, as neither the one nor the other can exercise his Right but in a conquered Country, their Liberty is of no manner of Service to them; the Right then passes over to the Enemy, without the Person to whom it adhered, and becomes real from personal as it was before. So that, after a Treaty of Peace, this Sort of Goods continue, as well as others, to the Party who retains the Lands, to which they adhere.

XIII. (1) The Possession, here intended, is rather the Possession of a Country in general, than that of private Persons. So that in regard to private Persons, Things ought to stand upon the same Foot, as if the Possession had never been interrupted by War. And this would take Place, tho' it were even supposed, that the private Person in question has been unjustly dispossessed, in what manner soever, by a Subject of the other State, with which Peace has been concluded. For as this Injustice is supposed to have happened before the War, he who has suffered it, may demand Reparation in the same Manner as he might have done at first.

XIV. (1) But, says ZIEGLER, admitting even that such a People has not submitted to the Dominion of either Party, unless by Force or Fear, I see

no Reason, why they can pretend to be reinstated in their first Condition, by Virtue of the Interpretation of that general Clause; especially if it is of no Importance to the other Party, whether that People be reinstated in the Possession of their Liberty or not. I answer for our Author, that he supposes here, as appears from the Examples which follow, a People who were the Ally of the contrary Party to that they have surrendered to, or who were concerned in some other Manner in the War: Otherwise the Question would be entirely impertinent. Now upon this Foot, such a People may well be included in the general Clause, according to which all Things are to be reinstated in their first Condition; if the State to whose Power they have submitted, have no other Title but an Act of Hostility; but not if they have submitted voluntarily: For the Clause in question regards only Acts of Hostility; and the Party, who has submitted voluntarily, has by that alone renounced all Benefit of a future Treaty of Peace.

² THUCYD. *Lib. V. (Cap. XVII. Edit. Oxon.)* The Historian had already said the same Thing of the same City in another Place, *Lib. III. (Cap. LII.)* GROTIUS.

³ THUCYD. *Ubi supra V. 17.*

⁴ *Quæ si maneret, captarum tamen urbium ea lex est. Thessaliæ civitates sua voluntate in ditionem nostram venerunt.* LIVY, *Lib. XXXIII. Cap. XIII. Num. 12.*

XV. (1) That is to say, Damages caused to private Persons of the other State at War, by lawful Acts of Hostility; and not those, which private Persons

are presumed with Reason to do it on such a Foot, that there be nothing which supposes the one or the other guilty of Injustice.

XVI. But not those before the War due to private Persons.

XVI. Yet those Debts, which were due to private Persons at the beginning of the War, ¹ are not to be accounted forgiven, for these are not acquired by the Right of War, but only forbidden to be demanded in Time of War; therefore the Impediment being removed, *i. e.* the War ended, they retain their full Force. But tho' it ought not to be easily presumed, that what was a Man's Right before the War is taken from him, for this Cause chiefly (as *Cicero* ² well observes) Civil Societies were first constituted, that every one might keep his own, yet this must be understood of that Right; which is derived from the Inequality of Things.

XVII. Punishments also before the War publicly due, if in doubt, are believed to be forgiven.

XVII. It is not so concerning the Right to Punishment; for this Right, as far as it concerns Kings, or People, is for this Reason presumed to be remitted; lest the Peace should not be compleat, if it left any old Grudges behind, which might in Time renew the War. Wherefore unknown Injuries are also comprehended in the general Terms, as the Action ¹ of the *Carthaginians* in drowning some *Roman* Merchants, was remitted by the *Romans*, before it was discovered to them, as *Appian* relates. *Dionysius* ² *Halicarnassensis* says, *Those are the best Reconciliations, which leave behind nothing of Resentment, or Ill-will.* And also *Isocrates*, ³ *After a Peace is concluded, it is base to remember former Injuries.*

XVIII. What of the Right of private Persons to exact Punishment.

XVIII. There is not the same Reason that private Men should be thought to remit the Right of demanding Punishment, because this may without War be judicially required; but since this Right is not ours in the same manner, as that, which arises from Inequality, and besides, Punishments having always something odious: The slightest Conjectures that may be drawn from the Terms of the Treaty, are sufficient to found a just Presumption, that this also is passed by.

XIX. That Right which before the War was publicly claimed, but disputed, is easily presumed to be forgiven.

XIX. But whereas we have said, that the Right, which we had before the War, should not easily be thought to be remitted, this indeed holds very true in the Right

Persons may have occasioned of their own Head, or under the Pretext of War against the Subjects of the Enemy, or those of the same State. The late Mr. COCCETIUS in a Dissertation, *De Postliminio in Pace*, Sect. I. has advanced contrary to the Opinion of our Author, and several others whom he quotes; that by simply making Peace, the Parties do not hold themselves reciprocally discharged from the Damages occasioned on both Sides, and that an express Clause of general Amnesty is necessary to that Effect. He founds his Opinion on what follows. I. A Treaty of Peace, says he, is nothing more in itself than a Transaction upon what occasioned the War, and consequently upon a publick Interest, in regard to which if there be any Thing given up that concludes nothing in respect to the Interest of particular Persons who have suffered Damage from the Enemy during the War. II. This Damage, adds he, ought naturally to fall only upon those, who had no just Cause for making War. Now in a Treaty of Peace, nothing is determined as to the Justice of the War, each continuing in his own Opinion as to that Point. III. From whence it arises, that the Right of *Postliminii* subsists even after such a Peace, according to *Law XII. of the Digest, Princ. De Captiv. & Postlim.* IV. It is to avoid this Inconvenience, that in Treaties of Peace, the Clauses, by which a general Amnesty is stipulated on both Sides, are so express and extensive. But this general Amnesty has a necessary Connection with the intent of a Peace, because the contrary might make Room for a new War. And the very Circumstance of not deciding upon the Justice of the Cause, proves, that the Damages, occasioned in Consequence of Acts of Hostilities, ought to be deemed by both Parties as justly sustained. The Law quoted is only a civil Law of the *Roman* People, upon a particular Case. See above, *Chap. IX.* of this Book, § 4. *Note 3.* and 11. Nor does the last Reason prove any Thing, since Things are often

expressed which could not fail of being understood, in which Case they are only recited for the Sake of greater Precaution.

XVI. (1) For Instance, if before the War, a Thing had been sold and delivered to some Merchant of the Enemy's Country, and that Merchant had not paid for the Goods. The Examples alleged by GRONOVIVS in this Place are entirely misapplied, because they suppose the Creditor and Debtor are both of the same State.

² *Hanc enim ob causam maxime, ut sua tenerent, Respublicæ Civitatesque constitutæ sunt.* De Offic. Lib. II. Cap. XXI.

XVII. (1) The Example is not well applied, says GRONOVIVS, here. For these Merchants were not thrown into the Sea before the Peace was concluded, but some time after the End of the first Punick War. So that, as soon as the Affair came to the Knowledge of the *Romans*, they were for avenging it as an Infringement of the Treaty, and declared War against the *Carthaginians*, who, to avoid it, gave them up *Sardinia*. But our learned Critick himself without Reason supposes, that the Question here relates to Things committed during the War, but unknown at the Time the Treaty of Peace was on Foot. There is no Difficulty in regard to Things of this Kind. For who can know all the Acts of Hostility, that have been committed during the Course of a War? So that by the Parties holding themselves reciprocally discharged from all the Mischief they have done each other during the War, they always understand, as well what they do not know, as what they do. The false Application of the Example therefore consists, only in the Crime of the *Carthaginians* not being committed before the War, but after the Peace made and concluded.

² *Antiq. Rom.* Lib. III. Cap. VI. l. p. 138. Edit. Oxon.

³ *Orat. Plataic.* p. 299. Edit. Henr. Steph.

of private Men. But as to the Right of Kings and Nations, a Remission may be more easily presumed, if the Terms of the Treaty, or probable Conjectures drawn from them, lead us to that Interpretation; but especially if the Right in question were not clear, but in dispute. For it is humane to believe that those who make Peace intend sincerely to stifle the Seeds of War. The same *Dionysius Halicarnassensis* well observes, *'We are not so much to endeavour to patch up a broken Friendship for the present, as to take Care to prevent our being involved again in the same War. For we are met here not to put off the Miseries of War, but entirely to take them away;* which last Words are almost taken *Verbatim* from *Isocrates*, in his Oration concerning Peace.

XX. Whatsoever is taken away after the Peace is absolutely concluded, is to be restored, for from that Time the Right of War immediately ceased.

XXI. But of those Articles which relate to the Restitution of Things taken in War, those in the first Place may be more largely interpreted, that are mutual, than ¹ those that concern only one Party. Next, those relating to Persons ² are more favourable than those that respect Things; and even among those that relate to Things, they that concern Lands ³ are more favourable, than those that respect Moveables; and also among these, they that are in ⁴ Possession of the State, more than those of private Persons. And again, among those in the Possession of private Men, they are ⁵ more favourable, that are possessed under a gainful, than those under a chargeable Title, as Things bought with Money, and those held in Dowry by Marriage.

XXII. To whom any Thing is granted by Articles of Peace, to whom are also all the Profits allowed ¹ from the Time of that Grant, but not before; as *Augustus Cæsar* well argued against *Sextus Pompeius*, who having *Peloponnesus* granted to him, would have also had all the Tributes that were in Arrears for some Years past, before the Time of that Grant.

XXIII. ¹ The Names of Countries are to be taken according to the present use, not so much of the common People, as of intelligent Persons, for such Affairs are commonly managed by Men of understanding.

XXIV. These

XX. Things taken after Peace to be restored.

XXI. Some Rules of Agreement whereby Things taken in War are to be restored.

XXII. Fruits, to be restored.

XXIII. Of the Names of Countries.

XIX. (1) *Antiq. Rom. Lib. III. Cap. IX.*

XXI. (1) It is, because then the Condition of the contracting Parties being unequal, there is great Reason to believe, that he, to whose Disadvantage the Inequality is, has pretended to engage himself as little as possible: And it was the other's Business, who was to have the Benefit of it, to have the Thing explained in as clear a Manner as possible.

² Each Party ought, and generally does, Interest itself more in the Restitution of Persons than Effects. Hence, in a doubt, they are supposed to have intended, that the Prisoners should be restored, for Instance, before all other Things, animate or inanimate, moveable or immoveable.

³ Lands are commonly of much greater Value than moveable Things: And War is more frequently made for them. Hence it is supposed with Reason, that the former were more immediately the Object of Consideration than the latter.

⁴ What the State has taken is also generally of much greater Value than what it has left to private Persons. Besides, it is more easy to be known.

⁵ It is plain, that the Restitution of this Sort of Things is more easily granted, since in restoring them, nothing is lost that might have been had without that.

XXII. (1) *ZIEGLER* has Reason to say, that if the Party, to whom a Thing is yielded up by the Treaty of Peace, had seized it before, during the War, he ought also to have the Revenues of it for the Whole Time it has been in his Possession, by the Right of War; tho' the Cession of it gives him a new Title. But the Thing is clear in itself, and our Author intended to speak only of the Case, in which there might be some Difficulty. When a Thing is yielded up, which we had in our Power, as we seem thereby to acknowledge, that

those to whom we make such Cession had a Right to it, it also seems first, that we ought to restore the Revenues, which have arisen to us from it, from the beginning of the War to the Conclusion of the Treaty of Peace. But when we only leave the Thing to those who have taken it, the Question is evidently superfluous; because the Possession, supported by the Right of War, secures the Revenue to the Possessor. Nevertheless, in the former Case, the Cession of itself, if rightly considered, has no retroactive Effect with regard to the Revenues. For till the Treaty of Peace, by which the Cession was made, the Right to the Thing yielded up was in Dispute; so that the Party who gives it up, acknowledges no Right in the other, but for the Time to come, and by Virtue of the Cession alone which he makes to him, by a Kind of Transaction. For the rest, that our Author intended to speak solely of this Case, appears from the Example which he alledges. For *Sextus Pompeius* was not in Possession of *Peloponnesus*. *APPIANUS ALEXANDRINUS*, whom our Author cites in the Margin, speaking before of the Conditions of the Treaty made between *Octavius* and *Mark Antony* on the one Side, and *Sextus Pompeius* on the other, distinguishes clearly *Sardinia*, *Sicily*, the Island of *Corfica*, and some others, which *Pompey* held at that Time from *Peloponnesus*, which he was to have besides, p. 713.

XXIII. (1) See *FRANCIS GUICCIARDIN* in the fifth Book of his History. *GROTIUS*

It will not be amiss to relate the Fact from this Historian in a few Words. *Lewis XII. King of France*, and *Ferdinand V. King of Spain*, had divided between themselves the Kingdom of *Naples*, after having expelled *Alphonso King of Aragon*. In this Partition *Terra-di labore* and *Abruzzo* were adjudged to the King of *France*; and *Pouilla* with *Calabria*

XIV. Of Reference to some former Agreements, and of the Obstruction here.

XXIV. These two Rules are of frequent use, viz. as often as Reference is had to some precedent Article, or antient Treaty, so often the Qualities or Conditions expressed in the preceding Article or antient Treaty are supposed to be repeated; and he shall be reputed to have fulfilled his Agreement, who was willing to have done it, ¹ if he had not been prevented by the other, who quarrels with him on that Head.

XXV. of Delay.

² See Albert. Argentin.

XXV. But whereas some affirm, that an Excuse is allowable for a short delay in the Performance, ¹ this holds not true, ² unless caused by an unforeseen Necessity. For it is no wonder, that some of our Canons seem ² favourable to such Excuses, when it is their Design to exhort Christians to such Things as are agreeable to mutual Charity. But in this Question of the interpreting Agreements, we do not enquire what is most commendable, nor what Piety or Religion demands, but what every one may be forced to do; in a Word what is merely of *external Right*, as we call it in Opposition to the Duty of Conscience.

XXVI. In a doubtful Case the Interpretation is to be given against him that gives the Conditions.

XXVI. But where the Meaning is doubtful, the Interpretation ought to be rather made against him ¹ who imposes the Conditions, as generally the more powerful. ² *The Power is in him that gives*, says *Hannibal*, not in him that desires Conditions of Peace: As the Interpretation ought to be against the ³ Seller. For he can only blame himself, for not fully explaining himself; but the other receiving Conditions in Words capable of divers Senses, has a Right to take them in the Sense most favourable to himself; agreeable to which is that of *Aristotle*, ⁴ *When Friendship is contracted on the account of Interest, the Profit of the Receiver ought to be the Measure (of what is due.)*

XXVII. Distinctions to be made between new Occasions of War, and breaking the Peace.

XXVII. It is also a daily Dispute, when a Peace may be said to be broken, which the *Greeks* call *παρεπινδνμα*; for it is not directly the same Thing, to give a new Occasion of War, and to break a Peace. But there is great a Difference ¹ between them, as well in regard to the Penalty which the Breaker incurs, as with respect to the Liberty of the injured Party to disengage his Word in the other Articles of the Treaty. A Peace then may be broke three Ways, either by doing what is contrary to all Peace, or against that which is expressly mentioned in that Peace, or against that which is to be understood from the Nature of every Peace.

to the King of *Spain*. A Dispute arose upon that about *Capitanata*, a small Country in the Kingdom of *Naples*. The *French* pretended, that this Country was Part of *Abruzzo*; and the *Spaniards* insisted, that it belonged to *Pouilla*. The first supported their Pretence by the antient Denomination, and the latter by the Custom of the present Times, established after the new Division which *Alphonso* had made of the Provinces. This gave Occasion to a great War between *France* and *Spain*.

XXIV. (1) Compare PUFENDORF with this Place, *Law of Nature and Nations*, B. V. Chap. XII. § 9.

XXV. (1) PUFENDORF gives good Reasons for this, *Law of Nature and Nations*, B. VIII. Chap. VIII. § 4.

² Our Author has in View what the DECRETALS lay down with respect to *Emphyteote*, to whom they grant a small Delay, in regard to the Estates of the Church, after two Years have expired without his having paid Rent. See *Lib. III. Tit. XVIII. De Locat. & conducto, Cap. ult.*

XXVI. (1) In this Case the strongest generally speaks first: But when Conditions are to be asked the weakest begins. Which *Sylla* told King *Mithridates*. PLUTARCH, in *Vit. Sull.* (p. 497. C.) GROTIUS.

² *Est quidem ejus, qui dat, non qui petit, conditionem dicere pacis, &c.* [LIVY, *Lib. XXX. Cap. XXX. Num. 24.*]

³ This is determined by the *Roman Law*: *Veteribus placet, pactionem obscuram, vel ambiguum, Venditori, & qui locavit, nocere: In quorum fuit potestate, legem apertius conscribere.* Digest, *Lib.*

II. *Tit. XIV. De Pactis, Leg. XXXIX.* It is indeed the Seller's Business to tell the Price of his Merchandize:

SA. *Indica, fac pretium. Do. Tua merx est, tua indicatio est.*

PLAUT. in *Perf.* (Act IV. Scen. IV. Ver. 37.) GROTIUS.

⁴ *Ethic. Nicom. Lib. VIII. Cap. XV.*

XXVII. (1) For when there is no Contravention to the Articles of the Treaty, tho' a new Occasion of War be given, the Penalty agreed on is not thereby incurred, which was to have taken Place on the Violation of any of the Articles: Nor is the Party offended discharged from his Engagements. However, as Mr. BUDDÆUS observes in his Dissertation *De Contraventionibus Fœderum*, (Cap. III. § 4.) when a new Occasion of War is given in this Manner, the Treaty of Peace is thereby broken indirectly; and with regard to the Effect, if Satisfaction for the Offence be refused. For then, the Offended having a Right to take Arms in order to do himself Justice, and to treat the Offender as an Enemy, against whom every Thing is lawful; he may also undoubtedly dispense with observing the Conditions of the Peace, tho' the Treaty has not been formally broken with regard to its Tenor. The same Author also very well observes, that this Distinction can scarce be of Use in these Days, because Treaties of Peace are conceived in such a Manner, that they include an Engagement to live in Amity for the future in all Respects; so that the least Occasion of War, how new soever it be, may be deemed an Infringement of the most important Article of the Treaty.

XXVIII. First, It may be done, when that is acted which is contrary to all Peace; as when we are invaded in a hostile Manner, when there is no new Cause of War, which if it may be alledged with any Plausibility, it were better to suppose it an Act of Injustice without Treachery than with it. It seems almost unnecessary to mention that of *Thucydides*, ' *Not they who repel Force by Force, but they who first offer the Violence, are the Breakers of the Peace.* This being granted, we must next see, who are the Invaded, and who by invading break the Peace.

XXIX. I find some are of Opinion, that if the Invaders be but their Allies, the Peace is broken. I do not deny but such a Contract may be made, not properly, that one Ally should be liable to Punishment for the Fact of another; but that the Continuance of the Peace may then be deemed to depend on a Condition, partly arbitrary, and ' partly casual. But it is scarce credible, that such a Peace should be made, unless it manifestly appear from the Treaty itself; for it is irregular, and inconsistent with the Design of those that make Peace. Therefore they that thus invade, without the Assistance of others, shall be adjudged the Breakers of the Peace, and it shall be lawful to make War on them, not on others; contrary to which, the *Thebans* formerly pleaded against the ' Associates of the *Lacedemonians*.

XXX. But if Subjects commit any Violence without publick Order, we must then see whether this Act of private Men can be said to be approved by the State; to which three Things are required. 1. The Knowledge of the Fact. 2. A Power to punish. And 3. A Neglect in the Person authorised to do it; as you may easily gather from what has been ^a said before. 1. The Knowledge may be proved, if the Fact be notorious, or has been complained of. 2. A Power is presumed, unless there be a Rebellion. 3. A Neglect may appear, if the Time be elapsed, which every State generally takes to punish Offenders. And such a Neglect is equivalent to a publick Decree. Neither can what *Agrippa* says in *Josephus* be otherwise understood, *That the King of Parthia should look upon the Peace as broken, if any of his Subjects took up Arms against the Romans.*

XXXI. Another Query is often made, whether it be all one, if Subjects take up Arms, not by themselves, but fight under others engaged in War. The *Cerites* in *Livy* clear themselves, by saying, their Subjects took up Arms without any publick Order. The same was the Defence of the ^a *Rhodians*. And indeed the best founded Opinion is, that such a Thing ought not to be deemed permitted, unless there are

XXVIII. (1) (*Lib. I. Cap. CXXIII.*) A Deputy from the *Armenians*, in his Speech to *Cosroez*, King of *Persia*, said amongst other Things, as *PROCOPIUS* informs us, that they who break the Peace are not always the first in taking up Arms, but those who lay Snares for their Allies, even in the Time of the Alliance. *Persic. Lib. II. (Cap. III.)* The same Historian makes the *Moors* speak thus in another Place: "Those who break the Treaty of Peace are not such, as having received manifest Injuries, and made open complaint thereof separate from the Offender: But they are those, who making Profession of their Willingness to observe the Alliance, commit Violence however against their Allies, and thereby render GOD their Enemy. They are not People, who in breaking with an Ally, only carry off their own Effects; but such as by taking away those of others, reduce the lawful Proprietors to the Necessity of exposing themselves to the Dangers of War." *Vandalic. Lib. II. Cap. XI.* *AMMIANUS MARCELLINUS* relates, that in the Time of *Valentinian*, the *Romans* gave way on Purpose before the *Persians*, that they might not be the first in committing Hostilities, and thereby give Reason to believe, that they had broke the Alliance; so that they did not come to Blows, till the last Extremity: *Operaque consultâ retrocedentes, &c. Lib. XXIX. init. GROTIUS.*

XXIX. (1) The Condition is partly arbitrary, (*potestativa*) as the Party, with whom the Peace is directly and immediately made, can contribute something in some Manner or other to hinder his

Allies from offending his antient Enemy. But it is casual, as he cannot absolutely hinder them from doing it, if they will not pay any regard to what he says or does for that End, and they are at the same Time in a Condition not to fear him. However as, from his having consented to the Rupture, in case his Allies should commit any Act of Hostility, he seems to have taken upon himself to hinder them from doing so; he has no Reason to complain, when that happens, even tho' he should have omitted nothing that depended on him. See further, upon the Division of Conditions into arbitrary, casual, and mixt, what *PUFENDORF* says in his Treatise, *Of the Law of Nature and Nations*, B. III. Chap. VIII. § 4.

2 That is to say, the *Platæans*. For when the *Lacedæmonians* had broke the Peace by seizing treacherously the Citadel *Cadmea*, the *Thebans* believed they had a Right to seize the City of *Platæa*, under Pretext, that having been the Ally of the *Lacedæmonians*, the act of the latter included also a Rupture with it. See *PAUSANIAS*, *Lib. IX. seu Bæotic. Cap. I.*

XXX. (1) It is in that Prince's Speech to the *Jews*, to exhort them to submit to the *Romans*: For in representing to them, that they had no Resource; he told them, that even tho' those of their Nation, who inhabited *Adiabene*, on the other Side of the *Euphrates*, should be willing to come to their Aid, the King of the *Parthians*, in whose Dominions they were, would not permit it. *De Bell. Jud. Lib. II. Cap. XXVIII. (XVI. in Latin.) p. 808. B.*

XXVIII. How a Peace may be broke by doing contrary to what is supposed to be in every Peace.

XXIX. What if we be invaded by Allies.

XXX. What if by Subjects, and how their Act may be judged approved. ^a B. 2. Ch. 21. § 2. & seq.

XXXI. What if Subjects serve under another Prince? ^a Gel. 1. 7. cap. 3.

apparent Reasons for believing that there was an Intention to permit it; as we see now that is sometimes practised, in Imitation of the old *Ætoli*ans, who accounted it lawful, ¹ *To plunder the Plunderer*. Which Custom *Polybius* says was so powerful, ² *That tho' they were not at War themselves, but only others, their Friends, or Allies, yet it was lawful for the Ætoli*ans, without any publick Order, to fight on both Sides, and to prey on either Party. And *Livy* gives the same account of them. *They suffer their Youth*, ³ *but without any publick Commission, to fight against their Allies, and often both Parties have Ætolian Auxiliaries at the same Time*. Thus the *Hetrurians* ⁴ of old denied to assist the *Veientes*, but yet did not hinder their Youth from going of their own free Will into the Service.

XXXII. *What if Subjects be injured, explained by a Distinction.*

XXXII. 1. Again, the Peace is said to be broken, not only when the whole Body of a State, but if any of the Subjects be forcibly invaded, unless upon Occasion of some new Cause of War. For Peace is made to the Intent that all the Subjects might live in Safety: The Treaty being an Act of the State for all the Members in general, and for each in particular. And if there be even a new Cause of War, it shall be lawful, tho' the Peace subsists, for every one to defend himself and his Goods, against those that attack him. For it is natural (as *Cassius* says) to repel Force by Force. Therefore this Right cannot easily be thought to be renounced amongst Equals. But it shall not be lawful to revenge ones self, or by Force to recover what has been taken away, unless Judgment be first denied us. For this may admit of some Delay, but that of none.

2. ¹ But if Subjects make it their constant Practice to commit Outrages contrary to the Law of Nature, so that there be Reason to believe they do it wholly against the Will of their Rulers, and no Court of Judicature can reach them, such as are Pirates; we may both recover our Losses from them, and avenge ourselves on them by Force of Arms, as if they were surrendered to us. But to assault others that are innocent on that Pretence, is directly against the Peace.

XXXIII. *What if Allies? With a Distinction.*
^a B. 2. Ch. 16. § 13.

XXXIII. 1. ¹ A forcible Invasion of our Allies also breaks the Peace, but it must be those ² that are comprehended in the Peace, as I have ^a already shewn in the Case of the *Saguntines*. This the *Corinthians* alledge in *Xenophon*, in his 6th Book of the *Greek History*, *We have all sworn to one another*. But tho' those Allies do not covenant for themselves, but others do it for them, it is still the same Thing, provided it fully appears that they have ratified it; but as long as it is not certainly known that they have done it, they are reputed as Enemies.

2. But the Case is different of the other Allies, who have neither been engaged in the War, nor comprehended in the Treaty of Peace; as also of ⁴ our Kinsmen and Relations, who are not under our Dependence; neither can an Assault upon them amount to the Breach of Peace. Yet it does not follow, (as we have ^b said before) that War may not be made on their account, but then it will be a new War and for a new Subject.

^b B. 2. Ch. 25. § 4.

XXXIV. *How a Peace may be broken by doing contrary to what is expressed in the Peace.*

XXXIV. The Peace is likewise broken, (as I have said already) by doing contrary to what is expressed in the Peace; where by doing is likewise comprehended, not doing what we ought to do, and when we should do it.

XXXI. (1) This might be expressed in *Latin* by the Words of *PLAUTUS*: *De præda prædam capio*. In *Trucul*. (*Act* II. *Scen*. VII. *Ver*. 15, 16.)

² He makes *Philip* King of *Macedon* say this, *Lib*. XVII. *Cap*. V.

³ [See the Passage cited above, *B*. II. *Chap*. XXV. § 9. *Note* 2.] The *Sabirian Huns* fought also sometimes on one Side and sometimes on the other, as *AGATHIAS* observes, *B*. IV. (*Cap*. III.)

⁴ *Sanguini tamen nominique & presentibus periculis conjanguineorum id dari, ut si qui juventutis sue voluntate ad id bellum eant, non impediunt*. *Lib*. V. (*Cap*. XVII.)

XXXII. (1) In this Manner *Augustus* passed Sentence in favour of *Herod* against *Syllæus*. See *JOSEPHUS*, *Antiq. Jud*. *Lib*. XVI. *Cap*. XVI. *GROTIUS*.

XXXIII. (1) See *THUANUS*, *Hist*. *Lib*. LXV. upon the Year 1578. There is also something upon this Head, in *FRANC. HARÆUS*, *Hist*. *Brabant*.

Vol. II. upon the Year 1556. *GROTIUS*.

² But see what I have said, upon the Passage cited in the Margin.

³ *Cap*. V. § 37. *Edit*. *Oxon*.

⁴ Our Author supposes reasonably, that those with whom we have this Kind of Ties, are not under our Dependence. For if the Injury is done, for Instance, to the Queen, or a Prince, the King's Son, not reigning himself elsewhere, it is the same as if offered to the King's Person. See *BODIN*, *De Republic*. *Lib*. V. *Cap*. VI. p. 951. *Edit*. *Francfort*. 1622. The *Roman Law* considers an Injury received by the Wife or the Children, as received by the Husband or Father, and gives an Action to the latter in his own Name. See the *Receptæ Sententiæ* of the Civilian *PAULUS*, *Lib*. V. *Tit*. IV. § 3. and *CUJAS* and *Mr. SCHULTING* upon him; as also the *JURISPRUDENTIA PAPIANEA* of *ANTHONY FAURE*, *Tit*. IX. *Princip*. II. *Illat*. XXII.

XXXV. Neither can I here admit of any Distinction between the Articles of Peace, as if some were of greater Concern than others : For whatever is inserted in the Articles, ought to be regarded as important enough to be observed. But Goodness, especially Christian Goodness, will more easily forgive small Faults, particularly if they be repented of ; as *Seneca* speaks,

¹ *Quem pœnitet peccâsse, pœne est Innocens.*

Who repents of his Crime, is almost innocent.

But to secure the Peace the better, it would be well done ² to add to the ^a Articles of less Concern, this Clause, That the Violation of any of them shall not be sufficient to break the Peace, but they shall be first put to Arbitration, before recourse is had to Arms, which *Thucydides* ³ records was stipulated in the *Peloponnesian* Treaty of Peace.

XXXVI. And I am clearly of Opinion, that it is on that Foot we are to explain the Intention of the two Parties, when a particular ¹ Penalty is expressly added to the Violation of certain Articles ; not that I am ignorant, that such an Agreement may be made, that it shall be in the injured Person's Choice, either to exact the Punishment, or make void the Accommodation. But the Nature of the Affair in question requires rather the other Interpretation, which I mentioned. This is also very plain, and what I have ^b said before, and proved by the Authority of History, that even in regard to Articles simply stipulated, he who fulfils not his Promise, when the other, who ought first to have executed his Engagements has failed therein, does not break the Peace ; since his Obligation was conditional.

XXXVII. But if an absolute Necessity occasion the Non-Performance of the Agreement, as if the Thing promised be lost, or taken away, or the doing of it be by some Means or other rendered impossible, the Peace shall not indeed be looked upon as broken ; for (as I have said already) Peace does not use to depend upon a casual Condition ; but the other Party shall have his Choice whether he had rather wait for the Performance of the Promise, if there be any Hopes of a possibility of its being done, though late, or receive the full Value of it, or be discharged from any mutual Engagements answerable to this Article, or thought equivalent to it.

XXXVIII. When there is even Treachery on one Side, it is certainly at the Choice of the innocent Party to let the Peace subsist ; as *Scipio* ^a did formerly after many perfidious Actions of the *Carthaginians*. Because no Man, by doing contrary to his Obligation, can thereby discharge himself from it. For though it be expressed, that by such a Fact the Peace shall be reputed as broken, yet this Clause is to be understood only in Favour of the Innocent, if he thinks fit to make use of it.

XXXIX. Lastly, We have said, that the Peace may be broken by doing what is contrary to the *Special Nature of the Peace concluded*.

XL. 1. Thus those Things that are done contrary to Friendship, do break that Peace which was contracted under the Condition of Friendship ; for what the Duty of Friendship alone may require from others, ought also here to be performed by the Right of Covenant. And to this (tho' not to every Peace, ¹ for there are some not on the same Account of Friendship, as *Pomponius* observes,) we may refer many of those Things, which Civilians advance concerning Injuries and Affronts done without force of Arms ; and especially that of ² *Tully*, *If any Thing be committed after a Reconciliation made, it shall not be accounted a Neglect, but an Offence, and not imputed to Imprudence, but Perfidiousness* ; but even here also we are not to judge of it invidiously.

XXXV. (1) *SENECA*, in *Agamemn.* Ver. 243.

² See a fine Example of it in the Treaty of Peace between the Emperor *Justinian*, and *Cosroez*, King of *Persia* ; as *MENANDER* the Protector informs us, (Cap. II.) *GROTIUS*.

³ *Lib. V. Cap. LXXIX.*

XXXVI. (1) As in the Treaty of Peace between the *Goths* and the ancient *Franks*. See *PROCOPIUS*, *Gothic.* Lib. I. Cap. XII. *GROTIUS*.

XL. (1) *Nam si cum gente aliquâ, neque amicitiam,*

neque hospitium, neque fœdus amicitiae causâ factum habemus, &c. Digest, Lib. XLIX. Tit. XV. De Captiv. & Postlim. Leg. V. § 2. *GROTIUS*.

See what has been said above, B. II. Chap. XV. § 5.

² *Post reditum in gratiam, si quid est commissum, id non neglectum sed violatum putatur, nec imprudentiæ, sed perfidiæ, assignari solet.* Fragm. Orat. pro *Aul. Gabin.* apud *Hieronym.* Apolog. adv. *Ruffin.*

XXXV. *Whether any Distinction is to be made between the Articles of Peace ?*

XXXVI. *What if some Penalty be added.*

^b B. 3. ch. 19. § 14.

XXXVII. *What if hindered by absolute Necessity ?*

XXXVIII. *The Peace shall stand firm, if the injured Person be willing to it.*

^a B. 3. ch. 19. § 13.

XXXIX. *How a Peace may be broken, by doing what is contrary to the Nature of every particular Peace.*

XL. *What comes under the Notion of Friendship.*

2. Therefore an Injury done to a Relation, or a Subject, of him with whom a Treaty of Peace has been concluded, shall not be deemed as done to himself, unless there was a manifest Design to affront and insult him thereby. Which natural Equity the *Roman Laws* observe, in Regard to Slaves³ that have been cruelly handled; and Adultery and Ravishment shall be imputed rather to Lust than Hatred: And the invading another Man's Property, shall be reputed rather a new Act of Covetousness than of Treachery.

3. But cruel Threatnings, without some new Cause given, are inconsistent with Friendship; and hereto I will refer the Building of strong Places on the Frontiers, not so much for Defence as Offence, and an unusual raising of Forces, if there be just and apparent Reasons to think that they are prepared against him with whom we have made Peace.

XLI. Whether to entertain Subjects and Exiles be contrary to Friendship.

^a B. 2. Ch.

5. § 24.

^b B. 2. Ch.

5. § 25.

^c Ubi supra, § 24. See Beza, l. 12.

^d B. 3. ch. 7. § 8.

^e B. ii. ch. 21. § 3, &c. XLII. How War may be ended by Lots.

XLI. 1. To¹ receive particular Persons as are willing to remove from one Prince's Territories into another's, is no Breach of Friendship; for this Liberty is not only natural, but has something favourable in it, (as we have said^a elsewhere). In the same Place I shall rank the Entertainment given to Exiles: For as I have^b before proved out of *Euripides*, the State has no Right over those whom they have banished. *Perseus* argues well in *Livy*,² To what Purpose is it to ordain one to be banished, if there were no Place allowed for his Refuge? And *Aristides*³ calls, To receive the Banished, a Right common to all Mankind.

2. But⁴ we have already^c proved, that it is not lawful to receive whole Towns, or any great Multitudes, who made a considerable Part of the State from whence they came: Nor those who are engaged by Oath, or otherwise, to continue in the Service, or under the Slavery of him whom they have quitted. But we have mentioned^d above, that the like hath been introduced among some People, by the Law of Nations, concerning those who have been made Slaves by the Chance of War; and also concerning the delivering up of such who are not banished, but fly from Justice, I have treated in^e another Place.

XLII. To decide a War by Lots is not always lawful, but only then, when we have a full Propriety¹ in the Thing disputed for: For the State is more strictly obliged

³ Si quis sic fecit injuriam, &c. Digest, Lib. XLVII. Tit. X. De injuriis & famosis Libellis, &c. Leg. XV. § 35. See the same Title of the Institutes, § 3.

XLI. (1) The famous Legislator *Solon* ordained, that no Strangers should be received into the Number of the Citizens of *Athens*, but such as were banished for ever by their Country, or who came to settle at *Athens* with their whole Families, in order to follow some Employment. *PLUTARCH*, in *Vit. Solon*. (p. 91. E.) King *Perseus*, as *APPIANUS ALEXANDRINUS* relates, said, to justify his giving Refuge to Exiles, that it was the common Right of all Men. Excerpt. Legat. Num. 25. (p. 367. Exc. Urfin.) This common Right is often confirmed, or rendered more strong by Treaties. See the Peace made with *Antiochus*, in *POLYBIUS*, Excerpt. Legat. XXXV. and that made between the Romans and Persians according to *MENANDER the Protector*, (Legat. Justin. Justinian. & Tiber. Cap. II.) as also what *SIMLER* says on the Articles of the Confederacy of the *Swiss Cantons*. The *Aradians*, whilst the *Kings of Syria* made War upon each other, obtained this Condition by a Treaty; that they should be permitted to give Refuge to all *Syrians* who came to take it in their Country; but that they should not expel, or deliver them up against their Will. *STRABO*, Geogr. Lib. XVI. (p. 754. Edit. Paris. Casaub.) *GROTIUS*.

² Et hercule quid adinet cuiquam exsilium patere, si nusquam exsili futurus locus est? Lib. XLII. Cap. XLI. Num. 7.

³ Orat. Leuctr. I. p. 105. C. Vol. II. Edit. P. Steph.

⁴ See what is said upon that Place.

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XLII. (1) *ZIEGLER*, and others after him, criticise our Author, without Reason, in this Place, from having taken his Thought wrong. They make him say, that the Method of Lots is only to be used, when the Parties have an absolute Propriety in the Thing disputed for. But had they duly considered the Sequel of the Discourse, they would have found, that *GROTIUS* never intended to say so. For he simply admits of a Recourse to Lots; when we are sensible of being too weak to resist, and he makes no Distinction there between the Things, of which the Sovereign has always full Power to dispose, as his peculiar Right, and those which appertain to the Subject, for the Defence of which he has undertaken the War. What misled the Interpreters, was the Expression of the Original, which is a little ambiguous: *Sortis aleæ subjici belli exitus licite non semper potest, sed tum demum quoties de re agitur, in quam plenum habemus dominium*. It seems at first Sight, that these Words, *sed tum demum*, &c. specify the Case excepted, in which the Method of Lots may be used: But here the *semper potest* is to be understood; for the Sense is, that it is only in Regard to Things of this Kind, that we always may, if we will, refer the Issue of a War to the Decision of Lots, even tho' we should do it in Circumstances, wherein it is not prudent to act in such a Manner; because every one may dispose of his own as he thinks fit. Whereas, when the Interest of the Subject is concerned, of which we are not absolute Masters, every other probable Means is to be tried, before we proceed to this, which is in its Nature entirely uncertain. This is our Author's Thought. It is however not amiss to observe upon this Occasion, how much it concerns an Author, especially

liged to defend the Lives, Chastity, and such like of the Subjects; and the King also is more strictly obliged to consult the Safety of the State, than to omit those Means which are most natural to his own and others Security. But yet, if he that is unjustly assaulted, shall, upon due Examination, find himself too weak to make any considerable Resistance, he may reasonably refer his Case to Chance, that by exposing himself to an uncertain, he may escape a certain Danger, which of the two Evils is the least.

XLIII. 1. Here follows a Question much controverted, *viz.* whether it may be lawful to decide a War by a Combat of one of each Side, ¹ as that of *Æneas* and *Turnus*, ² *Menelaus* and *Paris*; or between two of either Party, as that between the *Ætolians* and *Eleans*; or between three of a Side, as between the *Roman Horatii* and the *Alban Curiatii*; or between three hundred on each Side, as that between the ³ *Lacedemonians* and *Argives*.

XLIII. *How by a set Combat, and whether it be lawful.*

2. If we only respect the external Right of Nations, no Doubt but such Combats are lawful, for that ⁴ Right gives a Man Leave to destroy his Enemy how he can; and if the Opinion of the old *Greeks*, *Romans*, and other Nations, were right, that every Man had an absolute Power over his own Life, then those Combats are likewise reconcilable to internal Justice. But we ⁵ have several Times said, that this Opinion is repugnant to right Reason and GOD's Commands. We have ⁶ elsewhere proved ⁷ by Reason, and the Authority of Holy Scriptures, that he offends against Charity who kills a Man, for those Things which he can well spare. To which we shall add, that he who sets so small a Value upon his Life, which GOD hath given him as a great Blessing, sins against GOD and his own Soul. If the Thing disputed for be worthy of a War, as the Preservation of the Lives of many innocent Persons, we ought to endeavour it to the utmost of our Power; but to make use of a set Combat, purely as the Trial of a good Cause, or as an Instrument of Divine Judgment, ⁸ is vain and superstitious.

^a B. 2. c. 19. § 5. and c. 21. § 11. ^b B. 2. c. 1. § 12, &c.

3. There is but one Thing that can render such a Combat innocent and lawful, and that but on one Side, ⁹ when otherwise it is highly probable that he who prosecutes an unjust Cause should be the Conqueror, and thereby cause the Destruction of many innocent Persons; he cannot then be any Ways blamed, who undertakes a Combat on this Account, wherein he has most probable Hopes of Success. And this is also true, that many Things which are not rightly done, may be by others, tho' not really approved, yet permitted, in Order to prevent greater Mischiefs, that

especially when he writes in a concise Stile, to express his Sense with all possible Plainness and Perspicuity: Otherwise he gives Room for such as do not examine Things with sufficient Attention, that is to say, the greatest Part of his Readers, to take his Words in a quite different Meaning from his own, and to ascribe Things to the Writer, which never once entered his Thoughts.

XLIII. (1) See B. XII. of VIRGIL's *Æneid*, where that Combat is related at Length by the Poet, who, perhaps, invented it: For I know no other Authority for the Fact. There is nothing said of it in the little Treatise, *De Origine Gentis Romanæ*, ascribed to AURELIUS VICTOR: He only says that *Æneas* killed *Turnus*.

2 This is related in the third Book of the *Iliad*.

2 This Fact is in THESEUS, an antient Author, cited by STOBÆUS, *Serm.* VII. See the *Miscellanea Laconica* of MEURSIUS, *Lib.* IV. *Cap.* XIII.

4 See above, *Chap.* IV. of this third Book.

5 All these Reasons (says Mr. BUDDÆUS, *Jurispr. Histor. Specim.* § 23.) either prove nothing, or prove at the same Time, that it is never lawful to venture one's Life in a Combat of any Kind whatsoever. And this is what GRASWINCKEL has before asserted in his Defence of our Author against FELDEN, p. 259. See what I shall say presently, in *Note* 7.

6 This was a superstitious Custom of the antient *Germans*, who called this Kind of Combats *Judicia Dei*, or *Ordalia*. See FRANCIS HOTOMAN, *Obs.* III. as also the Dissertation of Mr. BUDDÆUS, cited in the foregoing Note, § 25. that of Mr. HERTIUS, *De Consultat. Legg. & Judiciis in Specialib. Rom. Germ. Imp. Rebuspubl.* § 21. Vol. II. *Opusc.* 459, 460. and one of Mr. SLICHER's, intitled, *De debita ac legitima Vindicatione Existimationis*, &c. Printed at Amsterdam in 1717. p. 37. & seq.

7 This Exception shews that the Thing is not bad in itself, and that all the Harm consists in exposing our own, or the Life of others, without Necessity to the Hazard of a single Combat, which would be unlawful, even tho' done without any Agreement. The Desire of terminating War, which has always such fatal Consequences, even to the victorious Party, is so laudable, that it may even excuse, if not intirely justify, those who engage, either themselves or others, imprudently in a Combat of this Nature. At least it seems to me, that in such Case, those who combat, not merely of their own Will, but by the Order of the State, are entirely innocent; for they are no more obliged to examine, whether the State acts prudently or not, than when they are sent upon an Assault, or to fight a pitched Battle.

could

could not otherwise be avoided ; as in many Places ⁸ Usurers and Prostitutes are tolerated.

^c See B. 2. ch. 23. § 10.

4. What therefore we have ^c said before, when we treated of the Means of preventing a War, if two Persons that dispute about a Kingdom, are willing to try it by single Combat, the People ⁹ may safely allow it, that a greater Calamity which threatens them may be prevented : We may say the same, when it is to conclude a War ; as *Cyrus* ¹⁰ challenged the *Assyrian* King. And *Metius*, in *Dionysius Halicarnassensis*, ¹¹ declares, that it is not unreasonable, if the Dispute be not concerning the Power and Dignity of the Nation, but of the Princes themselves, ¹² that they only should decide the Controversy by their own Swords. Thus we read, that the Emperor *Heraclius* fought a single Combat with *Chosroez*, Son to the King of *Persia*.

XLIV. *Whether the Fact of the King does here oblige the People.*

XLIV. They who thus refer their Cause to the Trial of a Combat, may indeed lose their own Right, if they have any, to the Kingdom disputed for ; but they cannot make over a Right to another, who has none of his own, to those Kingdoms which are not patrimonial. Therefore to make the Agreement valid, there is a Necessity to have the Consent ¹ of the People, and of Persons already born, that have any Right to the Succession. And even as to Fiefs ² that are not free, the Consent of the Lord, or Superior, is absolutely necessary.

XLV. *Who is to be judged the Conqueror.*

XLV. 1. Often in such Combats it is disputed ¹ which is the Conqueror. They cannot be reputed conquered, unless the whole Party on one Side be slain or put to flight. ² So in *Livy*, he that retreats within his own Borders, or into his own Towns, is to be esteemed vanquished.

2. Those three famous Historians, *Herodotus*, *Thucydides*, and *Polybius*, furnish us, each of them, with an Example of Disputes concerning Victory. The Case related by the first, respects only set Combats ; but he that rightly considers the Matter will find, that in all those Combats neither Party had a real Victory. For

⁸ But there is a great Difference between these Examples and the Case in Question. When Usurers and Courtisans are tolerated, that Toleration of itself implies no Approbation ; it is a simple Impunity, which the Law and Magistrates may, and ought often to grant, in Regard to several vicious Things. But set Combats are, by their Nature, such as could have no Effect, without being positively authorized by the State : So that if our Author's Reasons were good, the State never could, I do not say decree such Combats of their own meer Will, but even permit Champions to fight them, who should offer themselves for that Purpose ; because that Permission implies always an Approbation, and is adequate to an express Order.

⁹ See the foregoing Note.

¹⁰ As *Hyllus* long before challenged *Eurystheus*. See EURIPIDES in the *Heracleidæ*, ver. 804, & seqq.

¹¹ *Antiq. Rom.* Lib. III. Cap. XII. It appears by what follows, that the Question is not at all determined by our Author's Principles and Reasons. For the *Alban* General refuses the Combat of one to one, and chooses rather that three should fight with three ; because, says he, the Number *Three* includes, *a Beginning, a Middle, and an End.* Which is fine Morality.

¹² Thus the *Adrianopolitans* answered *Mahomet*, concerning himself and *Musa Zeleb*, as LEUNCLAVIUS relates, *Lib. XI.* In like Manner *Cunibert*, King of the *Lombards*, challenged King *Alachis*. PAUL. WARNAFRED. *Lib. V.* So *Pharnacus* challenged the General of the *Sauromatæ*, to try which of them should have the Fortrefs of *Cheriso*, that their Dispute might not expose a great Number of People to the Dangers of War. CONSTANTINE, *Porphyrogenet.* Cap. *De Castro Cherisonis.* See an Example of a single Combat for a Kingdom, in PONTANUS's History of *Denmark*,

(*Lib. V. p. 151. Edit. Amstel. 1631.* where the Champions were *Edmund Ironside* and *Canute*) and what Historians say of the Challenges which passed between the Emperor *Charles V.* and *Francis I.* King of *France.* GROTIUS.

XLIV. (1) Some Commentators say, that this Consent is not necessary, because the King of a Kingdom, not patrimonial, having a Right to make War and Peace, has also, by necessary Consequence, that of terminating War in such Manner as he shall judge most conducive to the Good of the Publick. But the Consequence is not just : For as the fundamental Laws, or rather the Nature of a Kingdom not patrimonial, deprive the King of the Power to alienate validly the Crown, by his sole Consent ; by that alone, I say, the Right of making Peace includes an Exception of the Case, in which the Alienation of the Kingdom would be concerned.

² *In feudis non liberis.* Our Author uses here the Distinction of *Fiefs free and not free*, in an improper Sense, as he has done elsewhere. See what I have said *B. I. Chap. III. § 23. Num. 2.*

XLV. (1) There is a Verse of ENNIUS which says, that to be really Victor, even when victorious, it is necessary the Vanquished should confess it.

Qui vicit, non est victor, nisi victu fatetur.

See SCALIGER upon FESTUS, at the Words *Herbam do.* GROTIUS.

The Passage of ENNIUS is in the Collection of HIERONYMUS COLUMNA, p. 133. *Edit. Amstel.* where the Note of that Commentator may be seen.

² *Pulsique quum in fines suos se recepissent* [Æqui] &c. *Lib. III. Cap. I. Num. 12. In oppida sua se recepere, uti sua popularique passi, &c. Ibid. Cap. II. Num. 10.*

the *Argives* were not put to flight by *Othryades*, but marched off in the Night, supposing themselves Conquerors, and with a Design to carry the News to their Countrymen. Neither did the *Corcyreans* defeat the *Corinthians*; but the latter, after having fought with Advantage, seeing a strong Fleet of the *Athenians* near, without hazarding an Engagement with them, retreated in good Order. Lastly, *Philip* the *Macedonian* had indeed taken a Ship of *Attalus*, forsaken by those of her own Party, but did not rout the whole Fleet: Therefore, (as *Polybius* observes) he rather behaved himself like a Conqueror, than really thought himself so.

3. But those Things, as gathering the Spoils, ³ giving Leave to bury the Dead, and offering Battle a second Time; which, both in the above-mentioned Authors and in *Livy*, you may find set down as Tokens of Victory, prove nothing of themselves, but as they may be attended with other Indications of the Enemy's Flight. And certainly, in a Doubt, the strongest Presumption is, that he who retreats runs away; but where there are no positive Proofs of Victory, the Case is just as it was before the Battle, and so they must either pursue the War, or come to a new Agreement.

XLVI. 1. *Proculus* ¹ tells us, that there are two Sorts of Arbitrations, one whereof he makes so absolute, that its Sentence must be obeyed, whether just or unjust; which, he says, takes Place when the Arbitration is founded on a Compromise. The other is, when the Judgment ² of the Arbitrator has Force only so far as is conformable to what an honest and equitable Person ought to pronounce. Of which we have an Example in the Decision of *Celsus*, ³ *If a Slave made free shall swear* (says he) *to do what Services his Patron shall require of him, the Demands of his Master shall be no farther obligatory than consists with Reason and Equity.* But this Interpretation of an Oath, tho' it may have been allowed by the *Roman* Laws, yet it is not agreeable to the plain Sense of the Words simply taken; but this holds very true, that the Word *Arbitrator* may be taken in both Senses, either as a Mediator only, such as were the ⁴ *Athenians*, between the *Rhodians* and *Demetrius*; or for an absolute Judge, whose Decree must be obeyed. And it is in this Sense that we here take it; as also we have ^a done before, when we treated of the Means to prevent a War.

XLVI. How War may be ended by Arbitration; and here Arbitration to be understood without Appeal.

^a B. 2. c. 23. § 8.

2. Tho' even against such Arbitrators, to whose Judgment both Parties have promised to stand, it may be provided by the Civil Law, as in some Places it is, to appeal from it, and exhibit Bills of Complaint; ⁵ yet this cannot be between Kings and Nations. For here can be no superior Power, which may either hinder or disannul the Obligation of a Promise, so that their Sentence must stand, whether just or unjust; to which we may rightly apply that of *Pliny*, ⁶ *Every Man makes him the supreme Judge of his own Cause, whom he has chosen Umpire.* For it is one Thing to speak of the Duty of an Arbitrator, and another of the Obligation of those who have engaged by Promise to stand to their Arbitration.

³ PLUTARCH says, this Permission, demanded by the *Thebans* after a Battle, assured the Victory to *Agefilas*. In *Vit. Agefil.* (p. 606. B.) The same Historian observes elsewhere, that those who had obtained Permission to bury their Dead, were deemed, according to the received Custom, to have renounced the Victory, and could not erect a Trophy. In *Vit. Nicias*, (p. 527. A. B.) GROTIUS.

XLVI. (1) *Arbitrorum enim genera sunt duo, &c.* Digest. Lib. XVII. Tit. II. *Pro socio*, Leg. LXXXVI.

² These Arbitrators, according to the Ideas of *Roman* Law, are generally chosen by the Parties, to judge and determine something relating to the Engagements of a Contract; whereas the former are taken to terminate a Quarrel.

³ *Si Libertus ita juraverit, &c.* Digest. Lib. XXXVIII. Tit. I. *De operis Libertorum*, Leg. XXX. See CUYAS, upon Law XLIII. of the Title of the Digest. *De verborum obligationibus*, Vol. I. Opp. Edit. Fabrott. p. 1224. & seq.

⁴ See PLUTARCH, in the Life of *Demetrius*, p. 899. A.

⁵ See MARIANA, *Hist. Hisp.* Lib. XXIX. 15. BEMBO, *Lib. IV.* [Fol. 62. where he treats of an Arbitration between the *Florentines* and *Venetians*, in which the latter had made choice of *Hercules*, Duke of *Ferrara*, for their Arbitrator.] There are many Examples of Treaties of Peace concluded by the Means of Arbitrators in CROMER's *Hist. Polon.* Lib. X. XVI. XVIII. XXI. XXIV. XXVII. XXVIII. There are also some in PONTANUS's *History of Denmark*, Lib. II. See also those we have cited above, B. II. Chap. XXIII. § 8. GROTIUS.

⁶ *Adeo summum quisque causæ suæ judicem facit, quemcumque elegit, &c.* Hist. Nat. Præfat.

Our Author undoubtedly supposes that there is neither Fraud nor Collusion on the Side of an Arbitrator. See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XIII. § 4. with which Place it is necessary to compare this whole Subject.

XLVII. Arbitrators in doubtful Cases bound to the Equity.

XLVII. We must consider, in the Duty of an Arbitrator, whether he be chosen under the Notion of a Judge, properly so called, or whether a more extensive Power be given him, which, according to *Seneca*, is in some Manner essential to every Arbitration. ¹ *A good Cause*, says he, *had better be referred to a Judge than an Arbitrator, because the Judge has a constant Rule and Orders to proceed by, which he must not transgress; but the other having full Liberty to judge according to his Conscience, may retrench or add something, and pronounce Sentence, not according to the rigorous Laws of Justice, but as Humanity and Piety shall direct.* And *Aristotle* ² reckons it, *The Duty of an honest Man, rather to go to an Arbitrator than a Judge; giving this Reason for it, For an Arbitrator respects that which is equitable, the Judge that which is legal; and for that Purpose the Use of Arbitrators was invented that Equity may prevail.* For Equity, in this Place, does not properly signify, as elsewhere, that Part of Justice which restrains the Generality of the Terms of a Law, according to the Intent of the Law-maker, (for even this is the Judge's Charge) but every Thing which is better done than not done, tho' not according to the strict Rules of Justice, properly so called. But such Arbitrators, as they are frequent among private Persons, that are Subjects to the same State; and are particularly recommended to Christians, by the Apostle *St. Paul*, *1 Cor. vi.* so, in doubtful Cases, so large a Power is not supposed to be granted them. For when there is any Obscurity, we are to follow ³ that Side which gives the least Extent to the Things in Question. But especially this is to be observed between sovereign Princes, who having no common Judge are presumed to tie up the Arbitrator to those strict Rules which Judges are generally confined to.

XLVIII. Arbitrators ought not to judge of Possessions.

XLVIII. But this is to be observed, that Arbitrators chosen by a People, or sovereign Power, ¹ are to give Sentence of the principal Matter, but not of the Possession, ² for Judgments of Possessions belong to the Civil Law: By the Law of Nations, the Right of Possession follows Property; therefore till the Cause is tried, no Innovation is to be made, both to avoid Prejudice, as also because the Recovery of those Things is difficult. *Livy*, in his History of the Arbitration between the *Carthaginians* and *Masinissa*, says, ³ *The Deputies did not change the Right of Possession.*

XLIX. How far the Force of a pure Surrender extends.

XLIX. ¹ There is another Way of submitting to the Judgment of one in Order to terminate the War, which is to give the Enemy a full Power to dispose of us; whereby ² we surrender at Discretion, and become subject to him to whom we surrender. The *Greeks* call it *ὑποπέπειν τὰ κατ' αὐτὸν*. Thus the *Ætolians* were asked, in *Livy*, whether they would submit themselves to the Discretion of the *Romans*. This was the Advice of *L. Cornelius Lentulus*, as related by *Appian*, about the End of the second *Punic War*, concerning the Affairs of the *Carthaginians*. ² *Let the Carthaginians, says he, surrender at Discretion, as the Conquered use to do, and as others have done formerly; then we shall see what we have to do; they will then take kindly of us whatever we grant them, since they cannot consider it as the Effect of a Treaty concluded with them. Now this makes a great Difference: For whilst we enter into Treaties with them, they will always have some Pretence to break them, alledging, that they had been wronged in some Part of them. For since many Things are capable of a double Interpretation, there will always remain Room for a*

XLVII. (1) *Ideo melior videtur conditio causæ bonæ, si ad Judicem, quam si ad Arbitrum mittitur, &c.* De Benefic. Lib. III. Cap. VII. But the Ambiguity of the Latin Word *Arbiter* misled our Author in this Place. Arbitrators, properly so called, are not meant here, but real Judges, who in Affairs *bonæ fidei*, as the Roman Law expresses it, were to determine according to the Maxims of Equity, and not according to the Rigour of the Law, as I have observed elsewhere. See Mr. *Noodt's* Treatise, *De Jurisd. & Imp.* Lib. I. Cap. XIII.

² *Rhetoric.* Lib. I. Cap. XIII. in fin.

³ *Semper in obscuris, quod minimum est, sequimur.* Digest. Lib. L. Tit. XVII. De divers. Reg. Jur. Leg. IX.

XLVIII. (1) This the Duke of Savoy said, in the Dispute which he had concerning the Marquisate of Saluzzes. See *DE SERRES*, [or rather the Continuator of his Work] in the Reign of *Henry IV.* GROTIUS.

² But see what I have said in the Chapter of PUFENDORF, cited § 6.

³ *Eodem anno inter Populum Carthaginiensem, &c.* Lib. XL. Cap. XVII. Num. 1, 6.

XLIX. (1) Which the *Latins* called *Permittere de se arbitrium*, as appears by the Demand which the Roman Senate made to the *Ætolians*, *Interrogati ab uno Senatore, permitterentne arbitrium de se Populo Romano, &c.* *LIVY*, Lib. XXXVII. (Cap. XLIX. Num. 4.) GROTIUS.

² *De Punic. Bell.* (p. 34. Edit. H. Steph.)

Dispute: Whereas, if they surrender, and we disarm them, and become Masters of their Persons, they will then see that they have nothing properly their own; they will humble themselves, and whatsoever they shall receive from us, they will look upon as of meer Grace and Favour.

2. But here we must also distinguish, what the Vanquished ought to suffer, and what the Conqueror may do, either in Strictness, or without transgressing some Duty, or without exacting what is unworthy of him. The Conquered having yielded himself, must suffer any Thing at the Will of his Conqueror, as being now in Subjection; and if we respect the ³ external Right of War, they have nothing but what may be taken from them, their very Lives and personal Liberty, much more their Goods, whether publick, or belonging to private Persons. Livy tells us in another Place, ⁴ that *The Ætolians having surrendered at Discretion, were afraid lest they should be ill-used in their Persons.* We have cited ^a in another Place, *When all Things are surrendered to the Conqueror, it depends on him to take away or to leave what he pleases.* To this agrees that of Livy, ⁵ *It was the antient Custom of the Romans, when they would not make any Treaty, either of Peace or Friendship with a People, to punish them by Arms, till they had surrendered themselves with all their Right, divine and human, given Hostages, delivered up their Arms, and received Garrisons into their Towns.* And even sometimes those that yielded themselves might be killed, as we have shewn in ^b another Place.

^a Ch. 8. of this Book, § 4.

L. 1. But the Conqueror, that he may do nothing unjustly, ought first to take Care that no Man be killed, unless for some capital Crime; so also, that no Man's Goods be taken away, unless by Way of just Punishment. ¹ And even by keeping within these Bounds, as far as his own Security will permit it, it is honourable (to a Conqueror) to shew Clemency and Liberality, and sometimes even necessary, by the Rules of Virtue, according as Circumstances shall require.

^b B. 3. c. 11. § 16.
L. *The Duty of the Conqueror, with Respect to those who thus surrender.*

2. Admirable are the Conclusions of those Wars which are finished with a general Pardon, as I have ^a said in another Place. Thus pleaded Nicolaus the Syracusan, in Diodorus, ² *They surrendered themselves up, with their Arms, trusting to the Mercy of the Conquerors; it would then be an eternal Shame, that they should be deceived in their Opinion of our Clemency.* And again, *What Grecian ever condemned them to barbarous Punishment, who yielded to the Mercy of the Conqueror?* And thus Octavius Cæsar, in Appian, speaks to L. Antonius, coming to surrender himself, ³ *If you had come purely to treat with me, you should have found me a Conqueror highly incensed at your Actions; but now you come to surrender yourself, your Friends, and your Army to our Discretion, you have disarmed my Anger, and taken from me the Power which you would have been forced to give me, if we had made an Agreement together; for upon considering what you ought to suffer, and I to grant, I shall prefer my Honour to Revenge.*

^a B. 3. c. 15. § 16.

3. We often meet in Roman Histories ⁴ with these Expressions, *Tradere se in fidem*, To yield themselves to the Faith. *Tradere in fidem & clementiam*, To yield to

³ In Reality it is not merely as being become the Conqueror's Subject, that the Conquered may be treated in this Manner. Our Author is far from believing, that the latter, who in extreme Necessity, for Instance, render themselves Subjects to any one, who was not their Enemy, and give him the most absolute Power over them (which in Latin is expressed by *dedere se*. (See above, B. II. Chap. V. § 31.) that the latter, I say, consent, that he should dispose at his Pleasure of their Estates and personal Liberty, and still less of their Lives. I observe this, because some Writers have falsely imagined that our Author has confounded these different Manners of submitting to a Person with each other.

⁴ *Et permisso libero arbitrio, ne in corpora sua serviretur, metuebant.* Lib. XXXVII. (Cap. VII. Num. 1.)

⁵ *Mos vetustus erat Romanis, &c.* Idem, (Lib. XXVIII. Cap. XXXIV. Num. 7.) GROTIUS.

Our Author cites this Passage from the seventh Book of the Roman Historian, which was occasioned by his having taken it from the *Semestria* of PETER DU FAUR, Lib. I. Cap. VII. p. m. 43. where we find this false Citation, with another from another Book of LIVY.

L. (1) See a remarkable Example of this in MARIANA'S History of Ferdinand, King of Leon, Lib. XI. Cap. XV. and compare this Place with what we have said in the eleventh Chapter of this last Book, § 14, 15. GROTIUS.

² Lib. XIII. Cap. XXI. and XXIII. p. 342, 343. Edit. H. Steph.

³ *De Bell. Civil.* Lib. V. p. 697. Edit. H. Steph.

⁴ For Instance in LIVY: *Legationes finitimas ab Eleunte, & Dardano, & Rheteo, TRADENTES IN FIDEM civitates suas benigne audivit.* Lib. XXXVII. (Cap. IX. Num. 7.) Paullo, *ut se suaque omnia in FIDEM ET CLEMENTIAM Populi Romani PERMITTERET,*

to the Faith and Clemency. So in the thirty-seventh Book of *Livy*, *He gave a gracious Audience to the neighbouring Embassadors, that came to surrender their States to the Faith of the Romans.* And in the forty-fourth Book, *Paulus earnestly desiring that he might be allowed to surrender himself, and all he had, unto the Faith and Clemency of the People of Rome.* But it must be understood, that by these Words is meant an absolute Surrender: ⁵ And that the Word *Fides* in these Places signifies nothing but the Probity of the Conqueror, to which the Conquered yields himself.

4. There ⁶ is a remarkable Story in *Polybius* and *Livy*, of *Phaneas*, an *Ætolian* Embassador, who, in his Speech to the Consul *Manius*, said these submissive Words, that *The Ætolians did freely surrender themselves, and all they had, to the Faith of the People of Rome.* Which when he had affirmed again to the Consul, who asked whether that was really the Design of the *Ætolians*; the Consul demanded that the chief Authors of the War should be immediately delivered up to him. *Phaneas* presently replied, ⁷ We surrender ourselves up to your Faith, not unto Slavery: And added, that it was not the Custom of the *Greeks* to exact such a Thing as he commanded the *Ætolians* to do. The Consul answered, he valued not what the Custom of the *Grecians* was; that, according to the Custom of the *Romans*, he had an absolute Power over those who had surrendered themselves by publick Deliberation; and presently ordered the Embassadors to be laid in Irons, ⁸ *Do ye, having surrendered yourselves to our Faith, pretend to teach us what in Duty and Honour we should do?* as *Polybius* has it. From which Words it is plain, what he to whose Faith any People have surrendered themselves, may do with Impunity, and without violating the Law of Nations. However, the *Roman* Consul did not make Use of this Power, but dismissed the Embassadors, and permitted the *Ætolians* to have a new Consultation in their Assembly. ⁹ Thus the People of *Rome* are said to have answered the *Falisci*: That they had been informed the *Falisci* had yielded themselves, not to the Power, but the Faith, of the *Romans*. And of the *Campanians*, we read, ¹⁰ that they had submitted absolutely, and not by any Agreement.

5. But concerning his Duty to whom the Surrender is made, that of *Seneca* ¹¹ is very applicable, *Clemency has an unlimited Power to judge: It is not tied down by the Forms of Law, but pronounces according to Equity: It may both absolve and condemn, as it thinks fit.* Neither does it signify much how the Person surrendering expresses himself, whether he yield to the Wisdom, Moderation, or Mercy of the Conqueror, for they are all but Compliments, the Reality of the Matter is, the Conqueror becomes absolute Master to do what he pleases.

LI. Of a conditional Surrender.

LI. But yet there are also conditional Surrenders, which are made either in Favour of private Persons, as when ¹ the saving their Lives, their personal Liberty, or

MITTERET, contendente. Lib. XLV. Cap. IV. in fin. GROTIUS.

To which may be added, this Passage of another *Roman* Historian, from whence it appears, that Persons surrendered in this Manner without Conditions: *Mittuntur ad Imperatorem legati, qui Jugurtham imperata facturum, ac SINE ULLA PACTIONE sese regnumque suum IN ILLIUS FIDEM tradere.* SALLUST, *De Bell. Jug.* Cap. LXVI. Edit. Waff.

5 It is the same Thing, according to *POLYBIUS*, as to surrender to the Conqueror's Discretion. *Excerpt. Legat. XIII.* The *Greeks* express this thus, *Ἐἰς δίκην σφᾶς αὐτοὺς παραδιδόναι*, as in *THUCYDIDES*, Lib. III. (Cap. LXVII.) *DIODORUS SICULUS* says, *καὶ αὐτῶν παραπέμειν ἐξουσίαν.* Lib. XIV. GROTIUS.

The last Passage is, *τὴν πᾶσαν καὶ αὐτῶν παραπέμειν ἐξουσίαν.* Biblioth. Histor. Lib. XIV. Cap. CXII. p. 453. Edit. H. Steph.

6 *Ubi supra*, (p. 1116. Edit. Amstel.) *LIVY* expresses it thus, *Ita ad extremum finivit, ut diceret, Ætolos se suaque omnia fidei Populi Romani permittere.* Lib. XXXVI. (Cap. XXVIII. Num. 1.) GROTIUS.

7 *Non in servitutem inquit, &c.* *LIVY*, *ubi supra*, Num. 4, 5, 6.

8 *Ubi supra.*

9 *Adversus quam [civitatem] scire cupiens, &c.* *VALERIUS MAXIMUS*, Lib. VI. Cap. V. Num. 1.

10 *CAMPANORUM aliam conditionem esse, qui non foedere, sed per deditionem, in fidem venissent.* *LIVY*, Lib. VIII. (Cap. II. Num. 13.)

This Example relates to a different Manner of speaking, of which our Author has himself treated above, B. I. Chap. III. § 21. Num. 3.

11 *Clementia liberum arbitrium habet; non sub formula, sed ex æquo & bono, judicat. & absolvere illi licet, & quanti vult, taxare litem.* De Clement. Lib. II. Cap. VII. This alludes again to the Difference there was, according to the *Roman* Law, between *Judex* and *Arbiter*, of which I have spoke in Note 1. upon § 47.

LI. (1) Thus the Inhabitants of the City of *Phocæa*, when they surrendered their City to *L. Æmilius Regillus*, stipulated, that no Hurt should be done to them. *Tum portas aperuerunt, pacti, ne quid hostile poterentur.* *LIVY*, Lib. XXXVII. Cap. XXXII. Num. 10.

some of their Goods ² be expressly stipulated; or in Favour of the whole Body of People, whence may result a mixt Government, of which we ³ have treated in ^a B. 1. c. 37 § 17. another Place.

LII. To publick Treaties are sometimes joined Hostages and Pledges, which are a Sort of Accessory. Hostages (we have ^a said) are either such as freely give ¹ themselves, or are given by him that hath the sovereign Power. For he that is possessed of the supreme civil Power, has a Right both over the ² Actions and the Goods of the Subjects; but the Prince, or State, shall be obliged to make Satisfaction to him or his Friends, for any Losses which he may thereby suffer. And if it be indifferent to the State, which, of several Persons, goes as Hostage, it is best to decide that by Lots; but the Lord of a Fief has not this Right over his Vassal, unless he be also his ³ Subject; for the Homage and Obedience that he owes him, does not reach so far.

LIII. We have already said, that a Hostage may be put to Death by the external Right of Nations, but not by the internal, unless he himself be guilty of a capital Crime. Neither can they become ¹ Slaves; but they may even by the Right of Nations enjoy, and leave their Goods to their Heirs. Tho' it is provided by the Roman Law, that their Goods ² should be confiscated to the Publick.

LIV. The Query is, whether a Hostage may lawfully Escape? And certainly he may not; if at first, or since, he hath engaged his Word (in Order to have a little more Liberty) that he would not; otherwise, it does not seem to be the Intent of the State that sent him, ¹ to oblige their Subject from making his Escape, but to allow

² The Roman Prætor, spoken of in the foregoing Note, restored to the Phœceans their City, Lands, and Liberty to live according to their own Laws. *Urbem, agrosque, & suas leges iis restituit.* LIVY, *ibid.* Num. 14. It is true, the Historian does not say this was by Way of Composition; but nothing hinders its being stipulated upon surrendering. Mr. THOMASIVS, in his Dissertation *De Spasione Romanorum Numantina*, § 12. maintains, that there is no Example of a Composition, by which the Conqueror left those who surrendered any Part of their Civil Liberty. He adds some other Remarks against our Author, which I shall not examine; tho' he does not seem to have sufficiently comprehended his Principles. See above § 49. Note 3.

LII. (1) There are also Hostages, neither given by the Sovereign nor themselves, but taken by the Enemy. In this Manner *Joash* made the Children of *Amasiah* Hostages, *2 Kings* xiv. 14. *Alexander the Great* took thirty thousand, as *QUINTUS CURTIUS* relates, *Lib. VIII. Cap. V. Num. 1.* and *Hannibal*, four thousand, as we find in *LIVY, Lib. XXI. Cap. XXI.* at the End. There are many other Instances of it in antient History: And nothing is more common in these Days than to take Hostages by Force, for the Security of Contributions. There is a great Difference, with Regard to the Effects of Right, between Hostages of this Kind, and those which are given by the State. For the former, unless they have engaged by Promise to remain in the Hands of the Enemy, may not only escape, (as our Author admits the other to do also, tho' without sufficient Reason, as we shall see below) but the State may receive them, as well as any other Prisoners that make their Escape. This is what the late Mr. BATTIER, Professor of Law, and Syndick at *Basil*, has very well observed, in a small Dissertation *De Obsidibus, & eorum jure*, § 12. See below, § 53. Note 1.

² And, in Consequence, the State may engage the corporal Liberty of Subjects, which is all that the Engagement of Hostages includes of itself. See *PUFENDORF, Law of Nature and Nations, B. VIII. Chap. II. § 6.*

³ Or unless it has been expressly stipulated in the Act of Investiture. See *CUJAS, in Feud. Lib. II. Cap. VII.* and *ALBERICUS GENTILIS, De Jure Belli, Lib. II. Cap. XIX. p. 397.*

LIII. (1) Hostages are demanded and given for the Security of the Execution of some Engagement: Now in this Case it suffices, that the Hostages are retained, in such Manner as shall be judged proper, till the Performance of the Things agreed on; it is not at all necessary, that the Hostages become Slaves. But it is not the same in Regard to those which are taken after a City has been reduced to surrender; for they ought to be considered as Prisoners, who, according to the received Custom of old, became Slaves. The Hostages also, who have been given voluntarily, if those who gave them break the Conventions, and renew the War, fall into the same Condition; because, from thenceforth they become Enemies again. This Mr. BATTIER observes also, in the Dissertation cited before, (§ 19.)

² *DIVUS COMMODUS* rescriptit, *Obsidum bona, sunt Captivorum, omnimodo in fiscum esse cogenda.* Digest, *Lib. XLIX. Tit. XIV. De Jure Fisci, Leg. XXXI.* But the Hostages might make Wills, if the Roman People or Emperor permitted them; or if they had acquired the *jus togæ*, that is to say, the Freedom of the City of Rome. See the following Law of the Title here cited, and *CUJAS* upon *Law XI. of the Title Qui testamenta facere possunt*, p. 1068. col. 2. Vol. I. *Opp. Edit. Fabricii*, as also the Treatise of the late Baron SPANHEIM intitled *Orbis Romanus* II. 7. p. 239, 240.

LIV. (1) But says Mr. BUDDÆUS, (in his Dissertation intitled, *Jurisprud. Hist. Specimen*, § 56.) either the State did intend that the Hostage should continue in the Hands of him to whom he was given, or that the State had not Power to oblige the Hostage to remain. The first is manifestly false; for otherwise the Hostage could be no Security, and the Convention would be illusive. Nor is the other more true; for if the State, by Vertue of its *eminent Domain*, can expose even the Lives of the Citizens, why may it not engage their Liberty? Mr. BATTIER, in the Dissertation which I have

allow the Enemy to secure him as he pleased: And thus may the Fact of *Clelia* be defended. But tho' she had not offended in doing it, yet the State could not ² receive and detain their Hostage; whereupon *Porfenna* declared, ³ *If they did not send back his Hostage, he would take it as a Breach of the Treaty.* Then ⁴ *The Romans immediately restored her, according to Covenant, as a Pledge of the Peace.*

LV. Whether a Hostage may be lawfully detained upon any other Account.

LV. The Obligation of Hostages has something odious in it, both because it is contrary to Liberty, and because it arises from the Fact of another: So that we are here to explain the Sense of the Terms in a Manner that restrains, as much as possible, such an Engagement. And therefore, they who are delivered Hostages on one Account, cannot be detained on another: Which must be taken thus, provided any other Promise in Question was made, without an Engagement at the same Time to give Hostages; but if we have already broke our Faith in any other Case, or a just Debt be contracted, then the Hostage may be retained, yet not as a Hostage, but by the Law of Nations, ^a whereby Subjects may be retained Prisoners for their Sovereign's Debts, καὶ ἀνδροληψίαν, by way of Arrest, or Reprisal. Which however may easily be prevented, by inserting an express Clause, that the Hostages shall be ¹ restored, when that shall be performed for which they were given.

^a See B. 3. c. 2.

LVI. Upon the Death of the Principal, the Hostage to be free.

LVI. He that is delivered as a Hostage only, to release either a Prisoner or another Hostage, if this die the other is released; for by his Death all Right of Pledge dies with him, as *Ulpian* has said, in the Case of a ransomed Prisoner: Wherefore as in *Ulpian's* ¹ Case, the Ransom ceases to be due by the Death of the Person, in whose Room it had been substituted, so in this Case, the Person substituted cannot be here detained. Therefore the Demand of *Demetrius* to the Roman Senate to be dismissed, was not unreasonable, *As being a Hostage for Antiochus, he being dead, he ceased to be so,* says ² *Appian*; and *Justin* out of *Trogus*, ³ *Demetrius being a Hostage at Rome, as soon as ever he heard of the Death of his Brother Antiochus, went directly to the Senate, and told them he came thither as a Hostage for his Brother, being alive, but now he was dead he could not tell whose Hostage he was.*

LVII. The King dying, whether the Hostage may be retained.

^a B. 2. c. 16. § 16.

LVIII. Hostages may be principally obliged, and one of them is not bound for the Fact of another.

LVII. But if the King who made the Covenant die, shall his Hostage still be detained? That depends upon what we have ^a already said, whether the Treaty were personal or real. For Accessories cannot justify us in receding from the general Rule in the Interpretation of Principal Acts, whose Nature they themselves also ought to follow.

LVIII. By the Way we must add this, that Hostages sometimes are not a bare Accessory of the Obligation, but really the ¹ principal Party; as when by Agreement,

cited more than once, (§ 18.) declares also, and with Reason, against our Author's Opinion; who does not agree himself with what he advances, that the State ought to give up fugitive Hostages, as Mr. VANDER MEULEN observes on this Place.

² See what PLUTARCH says upon it, in the Life of *Publicola*. VIRGIL speaking of the Action of *Clelia*, says, that, having broken her Chains, she saved herself by Swimming,

Et fluvium vinclis innaret Clœlia ruptis.

(*Æneid*, VIII. 651.) which the Commentator SERVIVS explains of the Engagement of the Treaty. *Sed vincla pro custodiis accipimus, aut certe pro fœderibus, &c.* GROTIUS.

³ *Quemadmodum, si non dedatur obses, pro rupto se fœdus habiturum, &c.* LIVY, Lib. II. Cap. XIII. Num. 8.

⁴ *Et Romani pignus pacis ex fœdere restituerunt, &c.* Ibid. Num. 9.

LV. (1) That is to say, even tho' there be some other Reason for which they might be retained without that Clause. This is evidently our Author's Thought. So that ZIEGLER, and others after him, are in the Wrong to suppose the contrary; since they object to him, that an express Convention would not have more Force than a tacit one, by which the Party that receives Hosta-

ges, always engages to restore them, as soon as that is performed, for the Security of which they were given.

LVI. (1) See the Law cited above, Chap. IX. of this Book, § 10. Note 7.

² *De Bell. Syr.* p. 117. Edit. H. Steph.

³ *Patruus ejus Demetrius, qui obses Romæ erat, cognita morte Antiochi fratris, Senatum adiit, Obsidemque se, vivo fratre, venisse; quo mortuo, cujus obses sit, se ignorare. Lib. XXXIV: Cap. III. Num. 6.* Our Author observed here, that it was better to read, for the Connection of the Discourse, *Obsidem inquiens se, &c.* But BERNEGGER rejects this Correction, in his Note on this Place, without saying who is the Inventor of it. SCHEFFER however approves it. It is better, in my Opinion, to read *Obsidem se*, leaving out the *que*, which is not in some Manuscripts, as the latter of those Commentators acknowledges, that the Passage may be read without Inconvenience, by an Ellipsis, frequent in the antient Abridger we speak of.

LVIII. (1) That is to say, they ought themselves to execute, in default of him for whom they are given as Hostages, what he had engaged to do; so that the Obligation of the former does not cease by the Death of the latter: And, at Bottom it is the same Thing as if they had entered into the Engagement themselves, and in their own Name. For,

ment, a Person having engaged himself for the Fact of another, and being bound for Damages and Interest, in Case what he promises is not executed, gives Hostages in his stead: And this seems to have been the Meaning of the Treaty concluded near the *Furcæ Caudinæ*, as we have ^a remarked elsewhere. But the Opinion of ^a B. 2. c. 15. those who maintain, that ² Hostages may stand engaged for the Fact of one another; § 16. even without a mutual Consent, is not only severe but unjust.

LIX. Pledges have some Things common with Hostages, and some peculiar to themselves. What they have in common is, they may be detained for another ¹ Debt at present due, unless Faith be given to the contrary. The Peculiar is, that what Contract soever is made concerning these, is not so strictly taken as that concerning Hostages. For this Act is not in itself so odious, because it is natural that Things ² should be kept, not Men.

LX. We have said ^a elsewhere, that no Time can prejudice the Right of Redemption, if that be performed for which the Things were first deposited. For that Act which has an antient and manifest Cause, cannot easily be believed to proceed from a new one; therefore tho' the Debtor has left the Pledge for a very long Time in the Hands of the Creditor, it is presumed he has done it, by supposing that the antient Contract still subsisted, and not because he renounced his Right; Unless some evident Conjectures necessarily require another Interpretation. ¹ As if when a Man was ready to have redeemed it, but met with some Impediment, and afterwards kept Silence so long as to give Reason to suppose that he had voluntarily abandoned it.

LIX. *What Obligation lies upon Pledges.*

LX. *The Right of Redemption, how lost.*
^a B. 2. c. 4. § 15.

For, as to the Rest, our Author does by no Means pretend, that their Obligation may not be in itself subsidiary; as ZIEGLER supposes, and others after him, who, without Reason, often criticise this great Man, for Want of understanding his Thoughts.

² ALBERICUS GENTILIS, whom our Author cites in the Margin, does not say this. He supposes, on the contrary, (*p.* 396. *Edit. Hanov.* 1612.) that there has been a Consent of the Hostages themselves. ZIEGLER has before observed this Mistake.

LIX. (1) With this Difference however, that in such Case the Pledge is retained as a Pledge; but the Hostage not as an Hostage, but as a Subject responsible in that Quality for the Act of his Sovereign; as our Author has explained it above, § 55. *Num.* 2.

² One is more easily induced to leave Things than Persons in the Hands of another. This suffices as a Foundation for the Restriction.

LX. (1) See what I have said, *B. II. Chap. IV.* upon § 15. or last.

C H A P. XXI.

Of Faith during War, of Truces, of Safe-Conduct, and the Redemption of Prisoners.

I. 1. **T**HERE are some Things that use to be granted mutually by sovereign Princes, in Time of War, which ¹ *Virgil* and ² *Tacitus* call *Belli Commercium*, *The Commerce of Wars*. ³ *Homer*, *Συνημόςσιναι*. Such as Truce, Safe-Conducts, Ransom of Prisoners. A Truce is an Agreement, by which, during the War, for a Time we forbear all Acts of Hostility. I say, during the War: For as *Cicero* ⁴ says, in his eighth *Philippick*, there is no Middle between War and Peace. And War is a certain State, which (like Habits) may subsist, even tho' its Actions be for a While suspended. *Aristotle* says, ⁵ *A Man may be virtuous, tho' asleep, and tho' he lead an inactive Life*. And again, *The* ⁶ *Distance of Place doth not dis-*

I. *What a Truce is, and whether it be a Time of Peace or War.*

I. (1) ——— *BELLI COMMERCIA Turnus*
sustinet ista prior ———

(*Æneid* X. 532.)

² *Neque enim capere, aut venumdare, aliudve quod BELLI COMMERCIIUM, sed cædes, patibula, &c.* *Annal. Lib. XIV. Cap. XXXIII. Num.* 5. See also *Histor. Lib. III. Cap. LXXXI. Num.* 4.

³ *Iliad. Lib. XXII. ver.* 261.

⁴ *Etenim cum inter Bellum & Pacem medium nihil sit, &c.* *Philip. VIII. Cap. I.*

⁵ (*Ethic. Nicomach. Lib. I. Cap. III.*)

⁶ *Ibid. Lib. VIII. Cap. VI.*

solve Friendship, it only interrupts the present Exercise of it. And ⁷ Andronicus Rhodius, There may be a Habit, tho' at present it may not operate. So ⁸ Eustratius, An Habit, in Respect to an Ability simply taken, is called an Act, but in Respect to Action itself, is called Power; as Geometry is in a Geometrician when he is asleep. And in Horace, Lib. 1. Sat. 3.

Ut, quamvis tacet Hermogenes, cantor tamen, atque
Optimus est modulator, & Alfenus vaser, omni
Abjecto instrumento Artis; clausaque tabernâ
Sutor erat ———

Why, as Hermogenes, * tho' he holds his Tongue,
Is skill'd in Musick, and can set a Song;
And shuffling Alfen, tho' he lost his Awl,
And thrèw away his Last, and shut his Stall,
And broke his Threàds, yet was a Cobler still. Creech.

2. So then, as Gellius says, ⁹ A Truce cannot be called a Peace, for the War continues, tho' Fighting ceases. And in the Panegyrick of Latinus Pacatus, ¹⁰ Truce suspends the Effects of War. Which I here mention, that we may understand ¹¹ that whatever is agreed upon to be of Force during a War, has also the same Force during a Truce; unless it fully appear, that it was not so much the general State of War, as the Exercise ¹² of it, was had Regard to. On the contrary, if any Thing be agreed on concerning Peace, it is of no Force in Time of Truce. Tho' Virgil calls a Truce ¹³ *Pacem Sequestram*, A provisional Peace; and Servius, ¹⁴ A temporary Peace; and so does the Scholiast on Thucydides, ¹⁵ A temporary Peace bringing forth War. Varro, ¹⁶ *Pacem Castrorum*, The Peace of Camps for a few Days. All which are not Definitions, but certain Descriptions, and those figurative: Such also was that of Varro, ¹⁷ when he calls it *Bellorum ferias*, War's Holy-Day: He might as well have called it *Belli Somnum*, War's Sleep. So Statius ¹⁸ called the Days wherein there was no Pleading, Peace. And Aristotle ¹⁹ called Sleep *The Chain of the Senses*; and so you may call Truce, *The Fetters of War*.

3. But in M. Varro's Exposition (which also ²⁰ Donatus follows) ²¹ Gellius finds just Fault with this, that he added, *A few Days*, shewing that it is sometimes granted for a few Hours, I may also add, for twenty, thirty, forty, nay a hundred Years, of which we have Examples in Livy ²²; which may also confute that De-

⁷ Paraph. Lib. I. Cap. XIV. p. 47. Edit. Heinsf.

⁸ Ad VI. Ethic. Nicom. (Cap. I.)

* SENECA maintains, that an eloquent Man is such, tho' he holds his Tongue, and an Artist an Artist, tho' he has not the Instruments necessary for the Exercise of his Trade: *Artifex est etiam, cui ad exercendam artem instrumenta non suppetant* ——— *Quomodo est disertus, etiam qui tacet.* De Benefic. Lib. IV. Cap. XXI.

⁹ Nam neque pax est Induciæ: Bellum enim manet, pugna cessat, &c. Noët. Attic. Lib. I. Cap. XXV.

¹⁰ Quum induciæ bella suspendèrant, &c. Cap. IX. Num. 5. Edit. Cellar.

¹¹ For Instance, to pay so much for the Ransom of Prisoners, during the War, &c. that Commerce should be free during the War, between Merchants, &c.

¹² If, for Instance, certain Contributions during the War be agreed on, as those Contributions are only granted to prevent Acts of Hostility; they ought to cease during the Truce, because at that Time Acts of Hostility are no longer lawful.

¹³ ——— *Et pace sequestrâ*
Per Silvas Teucris, mixtique impune Latini
Erravere jugis ———
Æneid, Lib. XI. ver. 133. & seq.

¹⁴ PACEM ergo SEQUESTRAM inducias dicit: id est, pacem temporalem, & mediam inter bellum præteritum & futurum.

¹⁵ In Lib. I. Cap. XL. p. 25. Note 3. Edit. Oxon. It is a maritime Term applied here. See the Dissertation of a learned German Civilian named JOHN STRAUCHIUS, *De Induciis*, (§ 2.) which is the fifth and last of a Collection printed at Brunswick, in 1662.

¹⁶ INDUCIÆ, inquit, sunt pax castrensis, paucorum dierum. Apud GELLIUS, ubi supra, I. 25.

¹⁷ Item alio in loco: INDUCIÆ, inquit, sunt belli feriæ. Idem, ibid.

¹⁸ Et PACEM piger annus habet, messesque reversa
Dimisere forum ———

Silvar. Lib. IV. Silv. IV. ver. 40.

¹⁹ Lib. De Somn. & Vigil. Cap. I. in fin.

²⁰ INDUCIÆ sunt pax in paucos dies, vel quod in diem dentur, vel quod in dies otium præbeant. In Eunuch. TERENCE. Act. I. Scen. I. ver. 15.

²¹ Neque paucorum tantum, &c. Noët. Attic. I. 25.

²² See Lib. I. Cap. XV. and Lib. VII. Cap. XX. and compare PUFENDORF with this Place, *Law of Nature and Nations*, B. VIII. Chap. VII. § 3, 4.

(or first Day) of *March*. In the former Case the Time must be ¹ reckoned according to its just Measure, that is, conformably to its natural Measure: For that Account which is made by Days civil, arises from the Laws and Customs of Nations. In the other Case it is generally asked, whether the Day, the Month, or the Year, on which the Truce is to expire, is meant to be excluded or included.

2. It is certain, that as in natural Things there are two Sorts of Bounds, the one within the Thing, as the Skin is the Bound of the Body; the other without the Thing, as a River is the Bound of the Land: So, according to either of these two Ways, may those Bounds that depend on the Will be conceived; but it seems more natural, ² that the Bound should be taken, which is part of the Thing, *That is called the Bound of any Thing which is the extrem Part of it*, says *Aristotle*. ³ Neither is this against ⁴ common Use. *Spurina* forewarned *Cæsar* of a Danger that should not exceed the ⁵ Ides (or the 15th) of *March*. Being asked upon the very Day about it, he said, it was indeed *come*, but not yet *past*. Wherefore much more should this Interpretation of Truces be thus understood, where the lengthening of the Time has in it something favourable, *viz.* the sparing of human Blood.

3. But yet that Day, from whence a certain Space of Time is to commence, is not to be reckoned in that Space, because ⁶ the Preposition *from* does not signify Conjunction but Separation.

V. *When it begins to bind.*

V. This I shall add by the Way, that Truces, and such like Agreements, do immediately oblige both Parties consenting, from the Time they are concluded; but the Subjects on both Sides then begin to be bound, when the Truce receives the Form of Law, that is, when it has been solemnly notified, ¹ which being done, it immediately begins to have a Power to bind the Subjects. But that Power, if the Publication be made only in one Place, shall not at that Instant extend itself throughout the whole Dominion; but upon a convenient Time allowed, to give Notice in every Place. And if any Thing in the mean Time be done by the Subjects contrary to the Truce, they shall not be punishable for it. ² The contracting Parties,

IV. (1) That is to say, from the Moment the Truce is concluded, to the same Moment of the last Day; and not with Regard to the Beginning or End of the Civil Day, which begins and ends at different Times, according to the Places and Customs of different Nations. Thus, by the *Roman* Law, an Infant is held to be a Year old, when it attains to the Beginning of the three hundred and sixty-fifth Day: Whereas, according to the natural Calculation, the Year is not compleat till that Moment of the Day in which the Child came into the World. *Anniculus, non statim ut natus est, sed trecentesimo sexagesimo quinto die dicitur, incipiente planè, non exaëto die: Quia annum civiliter, non ad momenta temporum, sed ad dies, numeramus.* Digest, Lib. L. Tit. XVI. De verborum signific. Leg. CXXXIV.

² Thus decides *BALDUS*, De Statutis, in verb. Usque *BARTOLUS* in L. Patronus, D. De Legat. III. & in L. Nuptæ 12. D. De Senatorib. *ARCHIDIACONUS*, in C. Ecclesiæ XIII. Qu. 1. *HERON. DE MONTE*, Lib. De Finibus, Cap. XXIII. *GROTIUS*.

³ *Metaphys.* Lib. V. Cap. XVII.

⁴ Si quis sic dixerit, ut intra diem mortis ejus aliquid fiat; ipse quoque dies, quo quis mortuus est, numeratur. Digest, Lib. L. Tit. XVI. De verb. signific. Leg. CXXXIII.

⁵ Introiit Curiam, sprete religione, Spurrinamque irrident, & ut falsum arguens, quod sine ullâ noxâ Idus Martiæ adessent. Quamquam is, venisse quidem eas, diceret, sed non præteruisse. *SUETONIUS*, in Cæs. (Cap. LXXXI. in fin.) *DION CASSIUS* expresses the Soothsayer's Words thus, Πᾶσις ἐδὲ πᾶσις ἐλεγγυθεν. (Lib. XLIV.) And AP-

PIANUS ALEXANDRINUS, Πάρεσιν αἱ Ἐίδει, ἅλλ' ἐπαρρηλύθασιν. (De Bell. Civ. Lib. II. p. 522. Edit. H. Steph.) *GROTIUS*.

⁶ But see *PUFENDORF*, in the Chapter already cited more than once, § 8. What our Author says here is so much the worse founded, as it does not agree with what he had said just before himself; that in Regard to a Truce, the Prolongation of Time has something favourable in it. *STRAUCHIUS*, in the Dissertation I have cited before, Cap. V. § 2. had long ago declared himself against our Author, upon this Head.

V. (1) They cannot know it certainly before that: And the Case is the same as when the War began. It frequently happens that there is Reason to believe, from the Preparations making, and the Rumours or Advices to be relied on, that a War is resolved: However, till the Declaration of it be published in Form, no one ought to attack the Enemy, as may be done afterwards. So that nothing is more frivolous, than the Objections which some Commentators make in this Place against our Author's Opinion.

² It is true they are not in fault, as it is supposed, that the Truce could not be notified sooner to such as are at a remote Distance. But as each Party stands engaged for himself and Subjects, who, from the Moment the Truce is concluded, should all be held to discontinue Acts of Hostility, if it were possible for them to be apprized of the Treaty, which ought immediately to be notified to them; each ought also to be deemed as engaged to disapprove, and hold for null, all Acts of Hostility committed in remote Places, and, in Consequence, to make all possible Amends to such as have suffered

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Parties, however, are not the less bound to repair ³ those Damages.

VI. 1. What may be lawfully done, and what not, in the Time of Truce, may be understood from the Definition of it. All ¹ Acts of Hostility are unlawful, either against Persons or Things; that is, whatsoever is then done by Force of Arms against the Enemy. For all such Acts, during the Time of the Truce, is against the Law of Nations, as *L. Æmilius*, in *Livy*, ² tells his Soldiers.

VI. What may be lawfully done during a Truce.

2. Nay, whatsoever Things of the Enemy shall by Accident fall into our Hands, tho' they had been formerly ours, are to be restored; because, in Regard to external Right, by which we are here to regulate ourselves, the Property of them has passed to the Enemy. And therefore, as *Paulus* ³ the Lawyer observes, the Right of Postliminy, during a Truce, does not subsist; because Postliminy supposes an antecedent Right of taking by Force; which ceases during a Truce.

3. To come and go, to have free egress and regress, but without any Train or Attendance that may give Umbrage, is also permitted, as ⁴ *Servius* observes on those Words of *Virgil*,

Mixtique impune Latini.

Latians, no longer Foes, mixed in the Woods.

Where he also tells us, that the City of *Rome* being besieged by *Tarquin*, and a Truce agreed upon between *Porfenna* and the *Romans*, whilst the *Circean Games* were celebrated in the City, the Enemy's Captains were allowed to come into the City, and contend in the Races, and that proving Victors they were crowned.

VII. To retreat back with an Army, which we find in *Livy* that *Philip* did, is not a Breach of Truce; nor to repair a Wall, nor to levy Soldiers, ^a unless it be particularly excepted in the Agreement.

VII. Whether to retire back, to repair Breaches, or the like.

^a See an Example in *Paruta*, l. 3.

VIII. 1. It is undoubtedly a Violation of the Truce, to seize on any Place possessed by the Enemy, by corrupting the Garrison. For such an Acquisition cannot be lawful, unless authorised by the Right of War. The same may be said of the Reception of Subjects who would revolt to the Enemy. We have an Example in *Livy's* forty-second Book, ¹ when *The People of Coronæa and Haliartus*, from a natural Inclination to Monarchy, sent *Embassadors* into *Macedon*, to desire a Garrison that might defend them against the insupportable Pride of the *Thebans*; the King told them he could not send them any, having lately made a Truce with the *Romans*. In the fourth Book of *Thucydides*, we read that *Brusidas* received the City *Menea*, revolting from the *Athenians* to the *Lacedemonians* in Time of Truce; but at the same Time an Excuse is added, which is, that he had in his Turn somewhat to charge the *Athenians* with.

VIII. A Distinction concerning seizing of Places.

2. It is indeed lawful to take Possession of Places deserted, that is, really deserted, *viz.* with a Design not to possess them again; but not, if they be left un-garrisoned, whether the Garrisons were withdrawn before or after the Truce. For the Property remaining renders the other's Possession unjust; which shews how groundless the Cavil of *Belisarius* was, who, under that Pretence, seized, during the Truce, some ^a Places from whence the *Goths* had withdrawn their Garrisons.

^a Port, Centelles, and Albe.

ed by them. It suffices, that they are not responsible for the Impossibility they have been under to prevent them, and that it cannot reasonably be considered as an Infringement of the Truce.

3 This the *Athenians* pretended, in Relation to *Scione*, which had surrendered two Days after the Conclusion of a Truce. See *THUCYDIDES*, *Lib. IV.* (Cap. CXXII.) So what the *Spaniards* did in *Italy*, according to *MARIANA*, XXVIII. 7. is not to be justified. *GROTIUS*.

VI. (1) The Truce is here supposed to be general. But sometimes a Truce is made for certain Places only, for Instance, by Sea, and not by Land: Or in Regard to certain Acts of Hostility, as the ravaging of the Country, &c. See *PUFENDORF*, in the Chapter cited above, § 3. Our Author observed, in a small Note upon § 10. that Examples of Truces may be found in *PROCOPIUS*

and *MENANDER the Protector*, in which certain Places were excepted.

2 *Nunc fraudem hostium incusans, qui, pace petita, induciis datis, per ipsum induciarum tempus, contra jus gentium, ad castra oppugnanda venissent.* *Lib. XL. Cap. XXVII. Num. 9.*

3 See the Law cited above, § 1. Note 23.

4 *Denique obsessa urbe, &c.* In *Æneid*, XI. 134. But here the Safety of Egress and Regress is rather meant, than the Care not to do any Thing in going out and coming in, that may give Umbrage to the other Party. For the Rest, the Reader may see the *Paræmiæ Juris Germanici* of the late Mr. *HERTIUS*, II. 14, 15. wherein he explains in what Manner safe Conduct is abused.

VIII. (1) *Coronæi & Haliartii, &c.* *Lib. XLII. Cap. XLVI. Num. 9, 10.*

IX. 1. The

IX. Whether
he may return
that is forcibly
retained during
the Truce?

^a B. 3. c. 9.
§ 4.

IX. 1. The Query is, Whether he who being detained by some unforeseen and inevitable Accident, is found among the Enemies at the expiring of the Truce, has a Right to return? If we barely respect the external Right of Nations, his Case I do not doubt, is the same ¹ as his who coming in Time of Peace, upon the sudden breaking out of a War (not having Time to withdraw) is unhappily found among his Enemies, who, we have ^a already declared, is to continue a Prisoner till the End of the War. Neither is it against internal Justice, as the Goods and Actions of the Enemies stand obliged for the Debt of their State, and may be taken by Way of Payment. Neither has he any more Cause to complain than many other innocent Persons, on whom the Calamities of War accidentally fall.

2. It signifies nothing to alledge here what is said of the Excuse of an unforeseen Tempest, ² which has driven a Vessel into some Place where it is subject to Confiscation. Nor that in *Cicero's* second Book of Invention, concerning a Man of War, by a Storm driven into Harbour, which the Quæstor would have sold by the Law. For those Examples relate to a Punishment which the insuperable Accident secures from; but here we do not properly discourse of Punishment; but of the Use of a Right that for a certain Time lay suspended, yet it would be far more humane, far more honourable, to release such-a-one.

X. Of the special
Agreements
of Truces, and
what Queries
usually arise
from thence.

X. There are also some Things unlawful during a Truce, from the special Nature of the Agreement. As suppose a Truce were granted only for the Burying of the Dead, ¹ nothing ought to be changed; so if a Truce be made, that the Besieged should not, ² within such a Time, be assaulted, then it would be unlawful to receive fresh Supplies of Men or Provisions. For since such a Truce is granted to oblige one Party, the other ought not to be prejudiced by it. And sometimes it is agreed in the Truce, that they shall not have Liberty to pass and repass; ³ sometimes Protection is granted to Persons, not to Things; wherefore, if in Defence of our Goods we wound any Person, it is not Breach of the Truce. For since it is lawful to defend our Goods, personal Safety is to be referred ⁴ to that which is

IX. (1) But see what I have said against PUFENDORF, who is of the same Opinion, § 10. of the Chapter already cited several Times. Our Author, and STRAUCHIUS, who follows him, (*Cap. ult. § ult. Diss. De Induciis.*) have here departed without Reason from ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIII.

2 *Tamen eum, qui ante Idus Martias profectus ex portu, & relatus tempestate in Insulam deductus esset, si inde exisset non videri contra legem fecisse.* Digest, Lib. XXXIX. Tit. IV. *De Publicanis*, & *Væctigalibus*, & *Commisissis*, Leg. XV. *Si propter necessitatem adversæ tempestatis expositum onus fuerit, non debere hoc commissio vindicari, Divi Fratres rescripserunt.* Ibid. Leg. XVI. § 8.

X. (1) They cannot, for Instance, retire during that Time, into a more secure Post, nor intrench themselves. PUFENDORF, in the Chapter to which I have referred several Times, is of a different Opinion, § 9. He maintains, after STRAUCHIUS, (*Diss. De Induc. Cap. V. § 4.*) that these Sort of Things, which tend solely to put one's self into a State of Defence, have nothing unlawful in them, because no one is deemed to renounce his Right to defend himself. And, adds he, it is the Fault of him who grants such Truce, if it gives the Enemy Opportunity to render himself stronger. But these Reasons, upon close Examination, prove nothing: And the late Mr. BATTIER, whom I have quoted before, has declared, with Reason, for GROTIUS, in a small Academical Dissertation, intitled, *De Induciis Bellicis*, printed in 1697. The Party, says he, that hath granted a short Truce for the Interment of the Dead, hath granted it for that Purpose only, and there is all the Reason in the World to believe, that he would not have permitted any Thing further, had it been demanded of him. And

besides the Reason alledged by our Author, if, in the Time granted by the Truce for the Interment of the Dead, the Enemy endeavours to intrench himself, and we prevent him by Force, I do not see that he can have any Room to complain. Now how could one and the same Convention give one Party a Right to do a Thing, and the other to prevent it? I add, that the Right of defending one's self, which PUFENDORF speaks of, and which no one, he says, is supposed to renounce, regards only the Case wherein one is actually attacked, and not the Measures which may be taken to prevent a remote and uncertain Danger. Now the Question here relates to the latter. For the Rest, the Examples of *Tissaphernes*, from CORNELIUS NEPOS, in *Agefil. Cap. II.* and of XENOPHON, *Orat. de laud. Agefil. Cap. I. § 10, 11. Edit. Oxon.* are very apposite. But as to that of *Philip*, alledged by Mr. BATTIER, and others, after ALBERICUS GENTILIS, *Lib. II. Cap. XIII. p. 313.* it is not applicable here, but to the Case our Author speaks of in § 7. where he also alleges precisely the same Fact. He who first cited it repeats it wrong: *Se recepit*, says he, *in loca tutiora*, which LIVY does not say, but only that *Philip* decamped without Noise. *Silenti agmine abiit*, Lib. XXXI. Cap. XXXVIII. at the End.

2 As the *Neapolitani* obtained from *Totilas*, in PROCOPIUS.

3 See the *Decretals*, Tit. *De Judæis*, Cap. XI.

4 By reserving a Right to pillage, when the Security of Persons on both Sides is agreed on; the Right of defending against Pillage is also reserved: And hence the Security of Persons is not general; but only for such as go and come without Intent to take any Thing from the Enemy, with whom such limited Truce is made.

principal in the Treaty, not unto that which may be deduced from it by consequence.

XI. If the Faith of Truce be broken on one Side, the other may undoubtedly proceed to Acts of Hostility, without any Declaration; for every Article of the Agreement implies a Condition, as I have said a little ^a before. We may find indeed some Examples in History, where some have bore it ought to the End of the Truce. But we read also that War was made upon the *Hetrurians*, and others, for Breach of Truce. From which Diversity of Examples we may infer it to be lawful for the injured Person to have Recourse to Arms; but whether he will or not is left to his own Choice.

XI. A Truce broken on one Side, the other may renew the War.

^a B. 3. c. 19. § 14. and c. 20. § 35.

XII. This is certain, that if the Punishment agreed on, be demanded, and be inflicted on the Transgressor, then the other Party ¹ has no Right to make War; therefore Punishment is inflicted, that other Things may continue safe. So, on the contrary, if the War be renewed, the Offender ² is acquitted from Punishment, since the other had his Choice.

XII. What if a Punishment be added.

XIII. The Actions of private Persons do not break a Truce, unless the State has some Share in them, either by an Order or an Approbation, which is also implied, if the Offender be neither punished nor delivered up, nor Restitution made.

XIII. When private Acts break the Truce.

XIV. A Right to pass and repass beyond Truth, is a Kind of Privilege; therefore what we have already said concerning Privileges, must be observed in the interpreting of it. But this is a Privilege not hurtful to any third Person, nor very burthensome to him that granted it, therefore not to be taken in the strictest Sense of the Words, but with some Allowance, within the Propriety of the Terms. And more especially, if it were not granted upon Request, but freely offered. But still the more, if besides a private Advantage, ¹ a publick one is intended. Therefore we are to reject a strict Interpretation, tho' the Words may bear it, unless it would otherwise create an Absurdity, or that very probable Conjectures of the Intent of the Person may induce us to it. But, on the contrary, an Extension even beyond the proper Signification of the Words shall take Place, to prevent such an Absurdity, or from very reasonable Conjectures.

XIV. Free Passage without a Truce, how to be interpreted?

XV. Hence we gather, that a safe Pass granted to Soldiers, extends not only to inferior Officers, but also chief Commanders; because the Propriety of the Word will allow ¹ that Signification, though there is also another ² more strict. So under the Name of Clergy ³ are comprehended Bishops. So the Mari-

XV. Who may come under the Name of Soldiers.

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XII. (1) In this Case, the Party against whom Hostilities are committed, notwithstanding the Truce, may also, besides the Penalty stipulated by it, exact Amends for what he has otherwise suffered by the Infraction of the Treaty. Mr. BATTIER makes this Remark in the Dissertation cited before, § 10. or last.

² See PUFENDORF, *Law of Nature and Nations*, § 11. of the Chapter which answers to this.

XIV. (1) If, for Instance, to treat of Peace be the Matter in Question, and the Passport has been given for that End.

XV. (1) Thus, in the *Roman Law*, concerning privileged Wills, the Word *Miles*, in Opposition to that of *Paganus*, generally signifies all those who are actually upon a military Expedition, whether they command or obey, are Officers or common Soldiers.

² According to which those who obey are called *Milites*, or *Troops*, in Opposition to *Officers*, *Generals* or *Subalterns*. This is a known Thing, and ALBERICUS GENTILIS proves it by Authorities, in his *De Jure Bell.* Lib. II. Cap. XIV. p. 321. where he decides in a different Manner from our Author, both upon this and the following Example.

³ The Word κληρικοί, from whence the Latin *Clerici*, and our Words *Clerk*, and *Clergy*, are derived, included at first, that is to say, from the Beginning of the third Century, when this Custom was introduced, all publick Ministers of Religion,

of whatsoever Order they were; in Opposition to *Laicks*, (Λαϊκοί) or simple Believers. See Mr. BOEHMER's Dissertation, *De differentia inter Ordinem Ecclesiasticum & Plebem, seu inter Clericos & Laicos*, which is the sixth of his *Dissertationes JURIS ECCLESIASTICI antiqui ad PLINIUM SECUNDUM, & TERTULLIANUM*, and the ninth Dissertation of the same Collection, § 2. as also the fifth Chapter of his *Origines præcipuarum materiarum juris Ecclesiastici*, published with his SCHILTERUS illustratus. To which may be added, the fifth Chapter of the first Book of Mr. BINGHAM's *Antiquities of the Christian Church*, from which the learned and judicious Author of the *Bibliotheca Anglicana* has given us several curious Extracts. But in Process of Time the Term *Clerk* or *Clergy* was confined to Ecclesiasticks of an inferior Class; so that *Bishops* were not comprehended under that Name. Examples of this are very common; and to this relates a Passage of the *DECRETALS*, cited by our Author in the Margin, but which is improperly placed in the Margin of the preceding Paragraph, in all the Editions of the Original, without excepting mine, (Mr. BARBEYRAC's) where the Printers have forgot to put it in its right Place, as I had marked it in their Copy. CLERICI sane, si contra istam formam quemquam elegerint; & eligendi tunc potestate privatos, & ab Ecclesiasticis beneficiis triennio noverint se suspensos.—EPISCOPUS autem, si contra hanc fecerit, aut consenserit fieri, in conferendis prædictis Officiis & Beneficiis potestatem amittat, &c.

ners ⁴ in a Fleet may be called Soldiers; and all in general, who have taken the military Oath.

XVI. *To go, to come, to depart, how to be here understood.*

XVI. 1. Leave given to go ¹ implies also one to return; not that the Word *go* includes it of itself, but because otherwise this Absurdity would follow, that a Favour would be intirely usefess. If one promises *to let us go away in Safety*, we are to understand a Permission to depart, without having any Thing to fear, till we shall be got into a Place of Security. ² It was therefore Treachery in *Alexander*, to cause them to be murdered in their Return home, to whom he had given Leave to depart.

2. But he that has Leave given him to go away, has not also to come back again; so neither has he that is allowed to come, a Liberty to fend; nor on the contrary; for they are distinct Things, neither will Reason ³ warrant us to go beyond the Words; but yet, tho' an Error cannot give any Right, it may excuse from Punishment, if any were stipulated. He also that has Leave to come, shall come but once, and not again, unless the Time allowed ⁴ in the Pass gives Room to conjecture otherwise.

XVII. *How far a safe Conduct extends to Persons.*

XVII. The Son must not follow the Father, nor the Wife her Husband; tho' when the Question is about the Right of Dwelling in a Country, the one follows the other: For we used to ¹ dwell, not to travel, with our Families. But a Servant or two, tho' not particularly expressed, shall be presumed to be allowed, to him who cannot decently travel without them. For he that grants any Thing, is supposed to grant the necessary Consequents, which Necessity is here to be morally understood.

XVIII. *How far unto Goods.*

XVIII. Goods likewise shall be comprehended, not all, but what are necessary for Travellers.

XIX. *Who may come under the Name of Attendants, and who under the Name of a Nation.*

XIX. Under the Name of Attendants we must not understand those whose Character is more odious than that of the Person himself, whose Safety is provided for: Such as are Pirates, Robbers, Fugitives, and Deserters. The expressing the Name of their Country ¹ in the Passport, plainly shews that the Permission does not extend to others, who are not of that Country.

XX. *Whether a Passport be valid upon the Death of the Granter?*

XX. Licence to pass freely being derived from the Authority with which he who gives it is invested, in a dubious Case, does not cease by the Death ¹ of the Granter,

Ec. Lib. I. Tit. IV. De Electione & Electi potestate, Cap. VII. § 3. In the CODEX THEODOSIANUS the Bishops are called Primi Clerici, Lib. XVI. Tit. VIII. De Judæis, Caliculis, Ec. Leg. XIII. See the learned JAMES GODOFROY, p. 228. Vol. VI. and p. 31, 32. of the same Volume.

⁴ *In classibus omnes Remiges & Nautæ milites sunt; & jure militari eos testari posse, nulla dubitatio est. Digest, Lib. XXXVII. Tit. XIII. De bonorum possessione ex testamento militis, Leg. I. § 1.*

XVI. (1) There may be however some Cases in which the one does not imply the other. Let us suppose, for Instance, that a safe Conduct is granted to some Person of the Enemy's Party to go, not into some other Place of their own People's, but into a third or neutral Country; to Rome, for Example, or into France, when he cannot go thither without passing through the Dominions of him who grants the Passport: In that Case, if he would return by the same Rout, a new Passport is necessary; the Advantage of the first being expired. This the late Mr. HERTIUS, after others, very well observes, in his Dissertation *De Literis Commeatus pro pace*, § 13. p. 327, 328. Vol. I. *Opusc. & Commentat.*

2 This was a Blot, says PLUTARCH, that tarnished the Lustre of that Conqueror's military Actions, who, on other Occasions, made War with Justice, and in a Manner worthy of a King. (*In Vit. Alexandr. p. 698. C. Vol. I. Edit. Weeb.*) LEUNCLAVIUS relates a like Treachery of Bajazet to the People of the City of Widin in Servia. *Hist. Turc. Lib. VI. GROTIUS.*

³ Mr. HERTIUS maintains, however, in the Dissertation which I have cited a little above, (§ 15. p. 330.) that when a Passport is given in Order to treat of Peace, as that may be done, either in Person or by another, the Party may either go himself or send another in his Place.

⁴ If, for Instance, it be expressed, that he may come during six Months, and if he can go and come several Times during that Term.

XVII. (1) *Quum precario quis rogat, ut ipsi in eo fundo morari liceat: Supervacuum est adjici, ipsi suisque. Nam per ipsum suis quoque permissum uti videtur. Digest, Lib. XLIII. Tit. XXVI. De Precario, Leg. XXI. seu penult.*

XIX. (1) When, for Instance, it is expressed with his French or German Attendants. Our Author insinuates, that if it be only said, with his Attendants, or Followers, it does not signify of what Nation they are. By which he tacitly rejects the Opinion of ALBERICUS GENTILIS, who, in his Treatise *De Jure Belli*, Lib. II. Cap. XIV. p. 325. inclines to believe, that when the Nation is not expressed, it is supposed the Attendants or Train ought to be of his Nation to whom the Passport is given.

XX. (1) It may, however, be revoked, in my Opinion, if the Successor deem it proper for good Reasons; but in such Case it is necessary, that the Person to whom the safe Conduct has been granted, should have Notice given him to retire, and the necessary Time allowed him for removing into a Place of Safety.

according

according to what we have said ^a before, concerning the Grants of Kings, and other sovereign Princes. ^a B. 2. C. 14. § 12.

XXI. It is often disputed, what is meant by this Expression in a Pass, *during my Pleasure*. And the best founded Opinion is, that it shall last till the Donor shall declare his ¹ Will to be otherwise, for that is presumed to continue, in a doubtful Case, which is sufficient to produce some Effect of Right: But not if he that granted it be disabled to will, which ² may happen by Death: For the Moment the Person ceases to be, that Presumption of a Continuance of his Will falls of itself, as Accidents vanish as soon as the Substance is destroyed.

XXII. But a safe Pass is a Security to him who has it, even beyond the Territory of the Granter, because it is granted by Way of Protection against the Right of War, which of itself is not confined to any particular Prince's Dominion, as we have said ^a in another Place.

XXIII. The Redemption of Prisoners is a Thing very favourable, especially amongst Christians, to whom the divine Law particularly recommends this Kind of Mercy. ¹ *The Redemption of Prisoners is a great and signal Part of Justice*, says *Lactantius*. To redeem Prisoners, especially from a barbarous Enemy, is called by *St. Ambrose* ², the most noble and highest Liberality. The same Author defends his own and the Churches Fact, in selling even the consecrated Vessels to redeem Prisoners. *The greatest Ornaments of Sacraments*, says he, *is* ³ *the redeeming of Captives*: And many other Things to the same Purpose.

XXIV. 1. I dare not then approve, without Restriction, those Laws which forbid the ransoming of Prisoners, as we may read ¹ of among the *Romans*. No

XXI. What if it be given only during the Pleasure of the Granter?

XXII. Whether Security be allowed beyond the Territory of the Donor?

^a B. 3. ch. 4. § 8.

XXIII. The Redemption of Prisoners favourable.

XXIV. Whether such a Redemption can be forbidden by any Law, explained.

XXI. (1) The Clause, *during Pleasure*, implies in itself a Continuation of safe Conduct, till it be expressly revoked, and the Change of Will thus signified, which otherwise is deemed always to subsist, whatever Time may be elapsed. This is also the Decision of *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. XIV. *in fin.* where he adds another Example of the Exception, which our Author makes here after him; that is, when he who has given the safe Conduct is no longer in the Employment, by Vertue of which he was empowered to grant such Security. And indeed his Authority concluding at that Time, he is no more in a Condition to continue his good Will, than if he were dead.

2 Thus when a Person has given a Lodging in his House to another, *during his own Pleasure*, and happens to die, the Heirs may turn the other out of the House; as it is determined in a Law, explained according to the Correction of a great Man, Mr. ANTHONY FAURE, (*Conject. Jur. Civ.* Lib. II. Cap. XIX. *LUCIUS TITIVS epistolam talem misit: Ille illi salutem. Hospitio illo, quamdiu voluero* [so this learned Civilian reads it, for *volueris*] *utaris, superioribus diætiis omnibus gratuito: Idque te ex voluntate mea facere, hac epistola tibi notum facio. Quæro, an hæredes ejus habitationem prohibere possunt? Respondit, secundum ea quæ proponerentur Hæredes ejus posse mutare voluntatem.* Digest. Lib. XXXIX. Tit. V. *De Donationibus*, Leg. XXXII. This is very clearly expressed in another Law: *Locatio, precariæve rogatio, ita facta, quoad is, qui eam locasset, dedissetve, vellet, morte ejus, qui locavit, tollitur.* Lib. XIX. Tit. II. *Locati conducti*, Leg. IV. See Cardinal TUSCHUS, *Præf. Conclus.* 751. lit. p. REINKING, Lib. II. *Class.* II. Cap. VIII. Num. 30. GROTIUS.

XXIII. (1) *Captivorum redemptio, magnum atque præclarum justitiæ munus est.* Inst. Divin. Lib. VI. Cap. XII. Num. 15. Edit. Cellar.

2 *Præcipua est igitur liberalitas, redimere captivos, & maxime ab hoste barbaro, &c.* De Offic. Lib. II. Cap. XV.

3 *Ornatus sacramentorum, redemptio captivorum est.* Ibid. Cap. XXVIII. St. AUSTIN imitated this Action, as POSSIDIUS relates, who says, that some worldly Persons did not approve it. (*De Vita Augustin.* Cap. XXIV.) Another Bishop of Africa, named *Deo-gratias*, did the same Thing, as VICTOR UTICENSIS informs us, Lib. I. HINCMAR, in his Life of St. Remigius relates, that a consecrated Vessel, which had been that Prelate's, was given to ransom Prisoners taken by the Normans. MARK ADAM, in his Ecclesiastical History of Bremen, relates a like Action of Rembert, Archbishop of that City. The sixth, or rather eighth, General Council approved such a Use of consecrated Vessels; and the Decree thereupon has been inserted in the Canon Law, Cause XII. Quest. II. Can. XIII. GROTIUS.

XXIV. (1) The learned BOECLER, in his Dissertation, intitled, *Miles Captivus*, (Vol. I. p. 981.) criticises our Author upon this Place. There are, says he, no other Roman Laws, that prohibit the ransoming of Prisoners, but those of the military Discipline, the Violation of which was punished in that Manner. There is not one that forbids entirely the ransoming of Prisoners: But when the Roman Soldiers were taken by the Enemy, it was examined, whether they had observed the Laws of military Discipline, and in Consequence, whether they deserved to be ransomed. It is true the Side of Rigour generally prevailed, as that which was thought most advantageous to the Republic; from the Persuasion, that many had fallen into the Enemy's Hands, only in Consequence of some Fault contrary to their Engagements. This is all the Passage cited by GROTIUS proves; and T. Manlius Torquatus, in opposing the ransoming of Prisoners, speaks only of an antient Custom. *Ut morem traditum a patribus, necessario ad rem militarem exemplo, servaretis.* LIVY, XXII. 60. Num. 7. Whether the Laws themselves of the Roman military Discipline were not too rigorous, is a different Question.

State so negligent of Captives as ours, ² said one in the Roman Senate. And *Livy* says, that in the most antient Times *Rome* had no Compassion for those who were fallen into the Hands of the Enemy. The Ode ³ of *Horace* is well known on this Subject, where he calls the redeeming of Prisoners a shameful Condition, and an Example of dangerous Consequence, a Loss added to the Cowardice of the redeemed Prisoner. But what *Aristotle* condemns in the *Spartan* Government, is generally blamed in the *Roman*; namely, that every Thing in it related too much to warlike Affairs, as if the Safety of their State consisted only in them. But if we would consider it according to Humanity, it were better sometimes to renounce all the Pretensions for which War is undertaken, than to leave so many Men, either our Kindred or Countrymen, unto intollerable Slavery.

2. Such a Law then cannot be esteemed just, unless there appear a Necessity for that Severity, purely to prevent greater, or more numerous Calamities, which are otherwise morally unavoidable. For in such a Necessity, as the Prisoners themselves, by the Law of Charity, should patiently bear their hard Fortune, they may be laid under an Obligation to it, and others prohibited to do any Thing to draw them from it, according to what we have ^a said in another Place, that a Citizen may be delivered up for the Good of the Publick.

^a B. 2. Cb. 25. § 3.

XXV. *The Right in a Prisoner may be transferred.*

XXV. Prisoners taken in War are not made Slaves, by our Laws or Customs. Yet I doubt not, but that Right of demanding a Ransom from one so taken, may be transferred by the Captor to another, for Nature allows even incorporeal Things to be alienated.

XXVI. *The Ransom of one may be due to more than one.*

XXVI. And the same Person may be indebted for his Ransom to several Men; as if discharged by one, before he paid his Ransom, he be taken by another; for these are distinct Debts, from distinct Causes.

XXVII. *Whether the Ransom agreed upon may be made void, if the Estate of the Person be then unknown.*

XXVII. An Agreement made for a Ransom cannot be made void, because the Prisoner is found to be much richer than he was thought to be; because by the ¹ external Right of Nations, which is now the Matter in Question, no Man may be compelled to give a greater Price than what he first agreed for, if there was no Cheat in that Contract; as may be easily understood from what I have said ^a already concerning Agreements.

^a B. 2. Cb. 12. § 26.

XXVIII. *What Goods of a Prisoner belong to the Captor.*

XXVIII. From what has been said already, that Prisoners are not now made Slaves, it follows, that we do not acquire all their Goods in general, as was done formerly, in Consequence of the Right of Property, which one had over their Persons, as we have said ^a in another Place. The Captor then has Right to nothing but what he actually takes; wherefore, if the Prisoner can hide any Thing from him, it is none of the Captor's, because he is not possessed of it. As *Paulus* the Lawyer decides, against *Brutus* and *Manilius*, ¹ he that seizes upon a Field, cannot be said to possess the Treasure that is buried there, because he knows not of it; for no Man can possess what he knows not of; whence it follows, that what is so concealed may help to pay for his Ransom, ² he having still kept the Property of it.

^a B. 3. Cb. 7. § 4.

XXIX. I. There

² *Nemo nostrum ignorat, nulli umquam civitati viiores fuisse captivos, quam nostræ, &c.* *Livy*, Lib. XXII. (Cap. LIX. Num. 2.) See another Passage of the same Author, [quoted above, Chap. IX. of this Book, § 4. Num. 2.]

3 *Differentis conditionibus
Fœdis, & exemplo trahenti
Perniciem veniens in ævum.*
* * * * *
————— *Flagitio additis*
Damnum. ———

(Lib. III. Od. V. ver. 13. & seq. 26, 27. GROTIUS.

4 The Emperor *Maurice* seriously repented an Inhumanity of the same Kind, which he had committed. See *ZONARAS*, in his Life. GROTIUS.

XXVII. (1) It suffices to say, that the Circumstance of the Prisoner's having more or less Riches, has no Relation to the Engagement. So that if his Ransom was to be settled by his Worth, that Condition should have been put in the Contract.

XXVIII. (1) *Cæterum quod BRUTUS & MANILIUS, &c. Digest, XLI. Tit. II. De adquir. vel amitt. possess. Leg. III. § 3.* See *CUJAS* upon this Point, *Recit. in Paulum, ad Edictum*, Vol. V. Opp. p. 748.

2 When Prisoners of War became Slaves, as, according to the received Custom, the Master acquired a Right of Property both over their Persons and Estates; it was not necessary, that he should actually take Possession of all they might have, or even have Knowledge of it, provided he could seize it, when discovered: The Intention of appropriating to himself all the Goods known or unknown of his Prisoner, was evident, and a natural Consequence

XXIX. 1. There is also another Query, whether a Ransom agreed upon, and not paid before the Prisoner's Death, is to be recovered from the Heir; the Answer is easy in my Opinion: If he died in Prison there is nothing due, for the Agreement was made upon Condition that he should be set at Liberty; but he that is dead cannot be so. On the contrary, if he die, being set at Liberty, it shall be due; because he had already gained that for which the Ransom was promised.

XXIX. *Whether the Heir be chargeable with the Prisoner's Ransom.*

2. I freely own, that the Contract may be so made, that the Ransom shall be simply due from the very Moment of the Contract, and the Captive shall still be detained, not as a Prisoner of War, but as one engaged for himself. So, on the contrary, the Covenant may be so made, that the Money of the Ransom shall be only then due, if the Prisoner be alive, and at Liberty, upon a Day prefixed. But such Sort of Clauses not being very natural, are not presumed, without evident Proofs.

XXX. Here is one Query more, whether he is obliged to return to Prison, who was released on Condition of releasing another, if that other die before the Releasement. I have proved ^a elsewhere, that in regard to gratuitous Promises, the Promiser has performed his Word, if he has omitted nothing to engage a third Person to do such or such a Thing; but a Promise being made upon a valuable Consideration, the Promiser stands obliged to the full Value, that he promised. So in this very Case, he that is released, is not obliged to return into Custody; for that was not stipulated in the Agreement: And Liberty is a Cause too favourable for presuming a tacit Convention. But neither ought the Prisoner to enjoy Liberty for nothing; but shall ¹ pay the Value of what he could not perform. For this is more agreeable to the Simplicity of natural Right, than what the Expositors of the Roman Laws have delivered unto us concerning an Action *Præscriptis verbis* (in prefixed Terms) or a personal Action, ² *Ob causam datam, causâ non secutâ* (for a Thing given and a Thing not following.)

XXX. *Whether he that is released to free another ought to return, the other being dead.*
^a B. 2. c. 2. § 22. and c. 15. § 16. B. 3. c. 20. § 58.

C H A P.

quence of the Thing; as when a Person acquires an Estate in Land, where there may be many Things which have a natural Dependence upon it. But the Case is different amongst us, with whom the Custom of Slavery is abolished. Whatever desire we may have to take and appropriate all that belongs to a Man we have made Prisoner of War, we have no other Right over his Person, than to detain it till a Ransom be paid, or Peace concluded. So that we may search, rifle, and appropriate all we can find, that belonged to him; but if we have neglected to make the necessary Search, or the Prisoner, who is under no Obligation to declare all he has, has found Means to conceal something from us; there is then no Acquisition of that Thing; neither is it acquired as a natural Dependence of some other Thing, as the Prisoner does not belong to him, who took him. So that the Example of the Treasure, unknown to the Master of the Land, is very proper here. And further: Let us suppose that before any Agreement concerning Ransom, the Person, in whose Possession the Prisoner is, discovers some Effects belonging to the Prisoner in the Hands of a third Person, but which this third Person has found either amongst the Booty made in plundering, or in the Hands of another Prisoner, whom he has taken himself: Will any Body say, that these Effects may be reclaimed by the former, upon Pretence that they belonged to his Prisoner? So that ZIEGLER's Criticism is no better founded here, than almost every where else. I must say the same of the late Mr. HERTIUS's Thought, who in his Dissertation *De Lytro*, (Sect. II. § 30. p. 287. Vol. I. Opusc. & Comm.) tho' he falls in with that Commentator in regard to the pretended Acquisition of Effects unknown, approves however our Author's Decision, and makes it extend even to Prisoners of War, who actually become Slaves. His Reason is, that he who treats with his Prisoner, does thereby declare, that he is contented with the Ransom he re-

quires of him: Whence he is deemed from thenceforth to have lost Possession of the Effects, which he had acquired with the Person; and much more, of those which he had acquired without acquiring at the same Time a Right of Property over the Person. But he who treats for Ransom with his Prisoner, intends certainly to gain something: He would gain nothing, if the Prisoner only gave him what he has already. Thus if we suppose, that even the concealed Effects belonged to him, it is evident he must have treated only under this Condition, that there shall be nothing of that Kind in what is given him for the Ransom: So that the Condition not being performed, the Agreement falls to the Ground of course. For this Reason, the Decree of *Scanderbeg*, which PUFENDORF also repeats, B. VIII. Chap. VII. § 12. is rather a favourable Decree, passed in Consideration of the unhappy Condition to which Persons are reduced by Slavery, than a Sentence founded upon the Rigour of Law. For as that famous Captain made War with the *Turks*, he had a Right to authorize, and undoubtedly did authorize, by way of Reprisals, the Slavery of the Prisoners of War.

XXX. (1) This *Paul Balioni* did not do, who was released upon Condition of setting Cardinal *Carvajali* at Liberty, who died whilst a Prisoner. And *MARIANA*, *Hist. Hisp.* Lib. XXX. blames *Balioni* for having acted in that manner. But *PARUTA*, Lib. II. relates the Fact with some little Difference. *GROTIUS*.

See further, upon the same Case, which happened to a *Venetian* General taken by the *Spaniards*, *PAULUS JOVIUS*, *Hist.* Lib. XII. Vol. I. p. 203. *Edit. Basil.* 1556. where he is called *Baleonus*.

2 As thus. A Person has given a Thing, in order to have another for it. He who was to give it, fails, whether he be able to give it, or not being able, he is or is not in Fault: In this Case, the other

other contracting Party may either bring his Action *præscriptis verbis*, for Damages and Interest, or redemand what he has given, even tho' the Thing, he ought to receive, has perished by some fortuitous and inevitable Accident; as well because he had given what was his with the View of something he has not had, as because in this Kind of Contracts, which had no proper and peculiar Name, he who had begun the Execution in this Manner, was at Liberty to retract, before the other had performed his Engagements. See *Digest*, Lib. XIX. Tit. V. *De Præscriptis verbis*, &c. Leg. V. § 1. and *Lib. XII. Tit. IV. De conditione causâ datâ causâ non*

sequuta, Leg. ult. Laws cited by our Author in the Margin. The Reader may consult Mr. NODD, *Probabil. Jur.* Lib. IV. Cap. IV. and V. where he learnedly and judiciously explains, according to his Custom, these Laws which are both difficult, and one of them corrupt in one Place. See also what I have observed, upon *B. II. Chap. XII. § 3. Num. 3.* According to these Principles of the Roman Lawyers, the Person who has released a Prisoner of War in the Case in question, would have a Right to oblige that Prisoner to return into Captivity after the Death of the other.

C H A P. XXII.

Concerning the Faith of inferior Powers in War.

I. The several Kinds of Commanders.

I. AMONG publick Agreements Ulpian¹ reckons this as one, *When the Generals of each Army agree some Things between themselves.* I promised, that after having discoursed on Faith given by Sovereign Powers, to say something of that given by Inferior ones, either between themselves, or unto others; whether those Powers be immediately next to the Sovereign, such as Generals, so called by way of Excellency; to which we may apply that of Livy,² *We allow no other as General, but he to whose Conduct the whole War is committed*; or those of a lower Rank, whom Cæsar thus distinguishes,³ *The Duty of a Lieutenant General is one Thing, and that of a Commander in Chief another. The one is to execute Orders, the other to do whatever he judges proper for the Management of Affairs.*

II. How far an Agreement made by them obliges the Sovereign Power.
^a B. 2. ch. 2. § 12.

II. There are two Things to be examined with respect to their Engagements. As whether they thereby engage the supreme Power, or whether themselves. The former¹ Query may be determined by what I have said^a elsewhere, *viz.* That we are obliged by those whom we depute to be Ministers of our Wills, whether that Will be specially expressed, or gathered from the Nature of their Commission. For he that grants a Power, grants, as much as he can, all Things necessary to the Exercise of that Power, which in moral Things is to be morally understood. Inferior Commanders therefore may bind their Sovereigns two several Ways, either by doing that which they think is probably included in their Office, or by doing that which belongs not to it, yet have a special order to do it, which is either publicly known, or to those with whom they treat.

III. Or gives Occasion to such an Obligation.

III. There are also other ways, whereby a Sovereign Power may be obliged by the previous Facts of his Ministers, but yet not so, that that Fact is the proper Cause

I. (1) *Publica Conventio est, quæ fit per pacem, quotiens inter se Duces belli quædam paciscuntur.* Digest, Lib. II. Tit. XIV. *De Pactis.* See upon this Law, the fine Treatise of Mr NODD, *De Pactis*, Cap. VII. where he shews, that *aut quotiens*, &c. should be read with some antient Editions, so that there are two different Examples in this Place; the one of Conventions made when a Peace is treated of; the other of those made during a War between the Generals of the two opposite Armies. It must be confessed however, that the Words, *quæ fit per pacem*, so explained, have something very stiff in them, as Mr. SCHULTING observes, *Enarrat. in primam partem Pandectarum*, ad Tit. *De Pactis*, § 2. I find in the Dissertation of a learned German Civilian, named STRAUCHIUS, (*De Induciis*, Cap. III. § 1.) which I have cited upon the preceding Chapter, an overture, of which use may be made here in joining to it the Particle *aut*, that he did not think of. He conjectures,

that ULPIAN intended to distinguish two Sorts of publick Conventions: The one made during Peace, or between those who live in Peace with each other; the other, made during a War, wherein the Generals usually treat in the Name and by the Authority of the State, for which they command. Upon this Foot the natural Signification of the Terms, *per pacem*, is preserved in all the Purity of the Latin Tongue.

² *Nec duces novimus, nisi sub cujus auspicio bellum geritur.* Lib. IV. (Cap. XX. Num. 6.)

³ *Aliæ enim sunt Legati partes, aliæ Imperatoris: Alter omnia agere ad præscriptum, alter liberè ad summam rerum consulere debet.* Comm. de Bell. Civil. Lib. III. Cap. LI.

II. (1) See CAMDEN, upon the Year 1594. where he relates the Sentence of Count Miranda in the Affair of Hawkins, (p. 629. & seq. Edit. Amst. 1625.) GROTIUS.

of that Obligation, but only the Occasion of it ; and that two Ways, either by consenting to it, or by the Thing itself. Their Consent will appear by their Ratification, which may be not only express, but tacit ; that is, when the Sovereign had Knowledge of what passed, and yet permitted Things to be done, which cannot probably be referred to any other Cause, than the Execution of the Engagements contracted without his Participation. In what manner, and how far, this Approbation may be presumed, we have ^a shewed in another Place. By the Thing itself he may be so far obliged, as not to enrich himself by another's Loss ; that is, either that he perform the Agreement, by which he is willing to receive a Benefit, or quit that Benefit ; of which Equity I have also ^b treated elsewhere. And thus far, and no farther, that Saying holds true, *Whatever brings Profit, is binding*. On the contrary, we must condemn them of Injustice, who refuse to perform the Agreement, and yet still retain that, which they could never have had without the Agreement ; as when the *Roman* Senate could neither approve the Fact of *Cn. Domitius*, nor would make it void, as *Val. Maximus* ^c observes : We meet with many such Examples in History.

IV. 1. And here we must repeat what we have formerly ^a said, viz. that the Sovereign is obliged by the Fact of his Agent, tho' he act contrary to his private Instructions, provided he keep within the Bounds of his publick Office. The *Roman* Prætor well observed this Equity in Actions relating to Factories. For not every Contract made by a Factor, ¹ binds the Person that employs him, but such only as regard the Affairs for which he is appointed Factor ; but ² if it be publickly notified, that no Man should henceforward contract with him, he shall not be any longer treated with as an Agent. But tho' such a Declaration be made, ³ yet if it be not known to the Contractors, he that employed him shall be obliged. It must likewise be considered, ⁴ on what Foot the Factor was appointed : For if he was ordered to treat under certain Conditions, or by the Intervention of a certain Person, he ought necessarily to follow the Method prescribed him ; in Default of which, we have a Right to disown what he has done.

2. Whence it follows, that Kings or People, some more, some less, may be bound by the Contracts of their Generals, if their Laws and Constitutions be sufficiently known. But if they be not well known, we must follow the most probable Conjectures, which always suppose that to be within their Power, without which they cannot well discharge the Functions of their Office.

3. If a publick Minister exceeds his Commission, and promise more, than he can perform, he himself shall be bound to full Restitution, unless some well known Law shall hinder it. Or if there be any Deceit in it, as if the Minister should pretend to a greater Power than really he has, he shall then be bound also to make Satisfaction for the Damages consequent thereto ; nay, he may be punished for his Deceit, in Proportion to the Greatness of the Crime. In the former Case his Goods are liable to make a Recompence, but if they are not sufficient, his Service or corporal Liberty. In the latter also, his Person or his Goods, or both, according to the Greatness of his Crime : But as to what I have said of Deceit, it will not be enough in Case of it, to declare beforehand, that he will not oblige himself, for both Satis-

III. (1) *Cneus Domitius* had taken by Treachery, and carried to *Rome*, *Bituitus* King of *Auvergne*. The *Roman* People did not approve that Action : However they would not set the King at Liberty, lest upon his return Home, he should renew the War. *Cujus Factum Senatus neque probare potuit, neque rescindere voluit, ne remissus in patriam Bituitus bellum renovaret.* Lib. IX. Cap. VI. Num. 3.

IV. (1) *Non tamen omne quod cum institore geritur obligat eam qui præposuit : Sed ita, si ejus rei gratiâ, cui præpositus fuerit, contractum est, id est, dumtaxat ad id, ad quod eum præposuit.* Digest, Lib. XIV. Tit. III. De *Institoria* Act. Leg. V. § 11.

2 *De quo palam proscripsum fuerit, ne cum eo contrahatur, is præpositi loco non habetur.* Ibid. Leg. XI. § 2. *Proscribere palam, sic accipimus, claris literis, unde de plano rectè legi possit : ante ta-*

bernâ scilicet, vel ante eum locum, in quo negotiatio exercetur : Non in loco remoto, sed in evidenti, § 3.

3 Whether the Bill fixed up be writ in such a Manner, as it cannot be well read, or has been taken away, or spoiled by the Rain, or some other Accident : *Proscriptum autem perpetuo esse oportet. Cæterum si per id temporis, quo propositum non erat, vel obscurâ proscriptione, contractum : Institoria locum habebit. Proinde si dominus quidem mercis proscripisset, alius autem sustulit, aut vetustate, vel pluvia, vel quo simili, contingit, ne proscriptum esset, vel non pareret : Dicendum, eum, qui proposuit, teneri.* Ibid. § 4.

4 *Conditio quæque præpositionis servanda est : Quid enim si certa lege, vel interventu cujusdam personæ, vel sub pignore, voluit cum eo contrahi, vel ad certam rem ? Equissimum erit, id servari, in quo præpositus est.* Ibid. § 5.

IV. *What if any Thing be done contrary to Command? This explained by Distinctions.*
^a B. 2. ch. 2. § 12, 13.

^a B. 2. ch. 4. § 5. and ch. 15. § 17.

^b B. 2. ch. 10. § 2.

faction for Damages received, and Punishment for an Offence committed are due,
⁵ not by a voluntary, but by a natural Connection.

V. *In such a Case whether the other Party stands obliged?*

V. But because in all such Agreements either the Sovereign, or his Ministers, stands obliged, therefore by Consequence the other Party stands engaged likewise, neither can it be said the Contract is imperfect. Thus we have done with the comparing the inferior Powers to their Superiors.

VI. *What the Generals in War, or Magistrates may do concerning their Inferiors, or for them.*

VI. Let us also see, what Power they have over their Inferiors; neither is it to be doubted, but that a General may oblige his Soldiers, and a Magistrate those of his Town, as far as the Power they generally have to command them extends; for as to other Things, there must be a Consent on their Part. On the contrary, an Agreement made by a General or Magistrate in Things merely advantageous, shall always turn to the Profit of the Inferiors; for that is plainly included in the Power of the Superior, and in such Things as may be burthensome, provided those Burdens are usually exacted, but otherwise not without their Acceptance: Which Things agree to what we have ^a already established concerning the Effect which, according to the Law of Nature, a Stipulation has in favour of a third Person. But these Generals will be more clearly illustrated by handling of the Particulars.

^a B. 2. ch. 2. § 18.

VII. *It is not in the Power of Generals to make a Peace.*

VII. ¹ It does not belong to a General to examine the Causes, or Consequences of a War, for it is his Business to manage the War, not to conclude it, no, tho' he has an unlimited Power in his Commission, that being only understood of the Conduct of War. *Agésilus* thus answered the *Persians*, ² *It was only in the Power of the State to make Peace. Therefore the Roman Senate made void that Peace, which Albinus made with King Jugurtha, as Salust ³ tells us, because it was made without the Order of the Senate. And in ⁴ Livy, How can that Peace be established, which is made without the Authority of the Senate, or Decree of the People of Rome?* Therefore the Treaty made at the *Furcæ Caudinæ*, and at *Numantia*, did not bind the People of Rome, as we have ^a shewed in another Place. And thus far is that of *Posthumius* true, ⁵ *If there be any Thing to which the People may be obliged, they may to all Things*; that is, those Things that do not belong to the Conduct of War; and this is evident from what that General had said just before concerning Conventions, whereby one should engage that the City of Rome should surrender, or that the Romans should abandon it, or set Fire to it; or that they should change the Form of their Government.

^a B. 2. ch. 15. § 16.

VIII. *Whether he may grant a Truce? This is distinguished.*

VIII. ¹ To grant a Truce is in the Power not only of a General, but of inferior Commanders, that is, unto those whom either they attack or besiege, as far as it concerns them

⁵ It is not so much for this, as because the other Party supposed in treating, that the publick Minister acted with Integrity, without which he would have been far from treating. Otherwise, if he had been so imprudent to treat, tho' he knew the Minister assumed more Power than he actually had; Whatever Knavery the latter was guilty of the other Party, because he knew it, and yet acquiesced in the Minister's Protestation, would have renounced his Right to exact any Punishment or Amends; and ought to be deemed to have been willing to risk the Default of the necessary Ratification.

VII. (1) *Belisarius* told the *Goths*, that he had no Power to dispose of the Emperor's Affairs. *PROCOPIUS*, *Gothic*. Lib. II. (Cap. VI.) *GROTIUS*.

² *PLUTARCH*, in *Agésil.* p. 601. B.

³ *Senatus, ita uti par fuerat, decernit, suo atque Populi injussu nullum potuisse foedus fieri. Bell. Jugurth.* Cap. XLIII. *Edit. Waff.* The Words, which our Author repeats in *Italick* Letters, as that Historian's, are not his.

⁴ *Aut cui rata ista pax erit, quam sine Consule, non ex auctoritate Senatûs, injussu Populi Romani, peregerimus?* Lib. XXXVII. Cap. XIX. Num. 2.

⁵ *Si quid est in quod obligari Populus possit, in omnia potest.* *LIVY*, Lib. IX. Cap. IX. Num. 7.

VIII. (1) *PUFENDORF* with Reason excepts such Truces, as Occasion all the Resemblance of War to disappear entirely, and come very near a real Peace: *Law of Nature and Nations*, B. VIII.

Chap. VII. § 13. In my Opinion, those should be also accepted, which, continuing the Appearance of War, are made for any considerable Time. This is the Thought of *AYALA*, *De Jure & Officiis Bellicis*, Lib. I. Cap. VII. Num. 6. and of *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. X. § 288, 289. and Cap. XII. p. 305. See also *MR. VITRIARIUS*, *Instit. Jur. Nat. & Gent.* Lib. III. Cap. XV. Quest. IX. And certainly Truces of this Kind are of too great Consequence to be left entirely to the Discretion of a General of an Army. Besides, Circumstances are not always so urgent, as not to admit of Time for consulting the Sovereign, which a General ought to do, as much as possible, both for the good of the Publick, and his own Interest, even in regard to Things, which it may be in his own Power to transact. Amongst the *Romans*, Truces of any Length were never granted but by the Senate and People. There have been Nations (as the late *MR. BARTIER* observes in his Dissertation *De Induciis Bellicis*, which I have cited upon the preceding Chapter) who would not give their Generals Power to make any Truce, tho' for a short Time. So *Agis*, King of *Lacedæmon*, on one Side, and *Thrasylus* with *Alciphron*, Generals of the *Argives*, on the other, having concluded a Truce for four Months, it was declared void by both States: And the *Lacedæmonians* were so much offended at *Agis* for having taken that Liberty, that they decreed he should do nothing for the

them, and the Forces under their Command. For they cannot thereby oblige other Commanders who are equal to them, as the History of *Fabius* and *Marcellus* in *Livy* informs us.

IX. 1. It is not in the Power of Generals to release Persons or dispose of Sovereignties, or Lands gained in a War; upon which Account *Syria* was taken from *Tigranes*, ¹ tho' *Lucullus* had bestowed it upon him; neither could *Masinissa* release *Sophonisba*, whom he had taken in War, ² for *Scipio* maintained, that she was under the Power, and at the Discretion of the People of *Rome*: But as to other Things, which are by way of Prey, the General has some Power given him to dispose of them, yet not so much by Virtue of his Authority, as from the Custom of each Nation, of which we have said ^a enough before.

IX. What Protection of Persons, or Things, may be granted by them.

^a B. 3. ch. 6. § 15.

2. But as to Things not as yet actually possessed, it is certainly in the General's Power to grant or leave them; because in War many Cities and Men often surrender themselves, upon Condition of preserving their Lives or Liberties, or sometimes their Goods, concerning which the present Circumstances do not commonly allow so much Time as to consult the Sovereign. By a Parity of Reason, this Right ought to be granted to inferior Commanders concerning Things within the Extent of their Commission. *Mabarbal* in the Absence of *Hannibal* had promised to some *Romans* that had escaped at the Battle of *Thrasymene*, to give them not only their Lives, as *Polybius* ³ too concisely expresses it, but also, upon delivering up their Arms, to let them depart every one ⁴ with a Suit of Cloaths. *Hannibal* detained them under Pretence ⁵ That *Maharbal* had not Power to grant such Security, without his Approbation, to People that surrendered themselves. And *Livy* censures his Action thus. ⁶ *Hannibal kept his Faith like a true Carthaginian*.

3. Wherefore let us consider *M. Tully* rather as an Orator, than a Judge, in the Cause of *Rabirius*. He would argue that *Saturninus* was lawfully killed by him, tho' *Marius* the Consul had got him out of the Capitol upon Promise of Life. ⁷ *How could*

the future without the Participation and Consent of ten Counsellors, whom they nominated. This is in *THUCYDIDES*, *Lib. V. Cap. LIX. LX. LXIII.* Edit. Oxon. and not in *DIONYSIUS HALICARNASSENSIS*, *Lib. II.* which Mr. *BATTIER* cites here, § 3. not being aware that *AYALA*, upon whose Authority he undoubtedly repeats it, (for he gives, as he does, the Name of *Thrasibulus* to one of the Generals of the *Argives*, whereas his Name was *Thrasillus*) that *AYALA*, I say, only cites that *Greek* Historian of the *Roman* Antiquities, to prove that the Kings of *Lacedæmon* were not absolute.

2 And much less, upon this Foot, superior Officers and Commanders in Chief. So that, if after the Truce be granted, and during its Continuance, some other Commander finds Occasion for attacking, with the Hope of good Success, the Enemy, who relies upon the Faith of the Treaty for Suspension of Arms; he may do it without Scruple or Treachery, according to the Principle of our Author. But Mr. *BATTIER* seems to have Reason to declare himself against this Opinion in the Dissertation I have cited, § 4. And indeed, as it is with the tacit Consent of the Sovereign, that the Truce has been made, as that was included in the Extent of the Power of him who granted it; no other Minister can break the Agreement, without indirectly injuring the Sovereign's Authority. Besides, this may make way for Fraud and Distrusts, that might tend to render the Use of Truces, so necessary on many Occasions, useless and impracticable. For there would be Reason to apprehend perpetually the Being surprized during that Time by some other Body of the Enemy's Army: And even he himself, who has granted the Truce, might understand Cause other Troops of his Party to come, and attack the Enemy, lulled asleep on the Faith of the Agreement made with him. Let us add to this another Reason from *ALBERICUS GENTILIS*. The General, says he, who commands an Army in Chief, may certainly oblige the Sovereign, by the Treaties which he makes, as to what regards the Con-

duct of the War intrusted to him: Wherefore then may not one of his Lieutenants oblige the General himself, by the Conventions which he makes within the Extent of his Office? *De Jure Belli*, *Lib. II. Cap. X. p. 289.*

IX. (1) It was not *Tigranes*, that was deprived of *Syria*, but *Antiochus*, the Son of *Antiochus Pius*, and Grandson of *Antiochus Cyzicenus*; as appears from *JUSTIN*, whom our Author cites in the Margin: *Igitur Tygrane a Lucullo victo, Rex Syriæ Antiochus, Cyziceni filius, ab eodem Lucullo adpellatur. Sed quod Lucullus dederat, postea ademit Pompeius, Lib. XL. Cap. II. Num. 2, 3.* Besides, as *GRONOVIVS* observes, *Pompey* had no more Right to take *Syria* from *Antiochus*, than *Lucullus* to give it him. According to the Rules of Right and the Laws, the Act of both the one and the other ought to have been ratified by the *Roman* Senate and People. See that learned Person's Note. So that the Example is not proper.

2 And *Syphax*, her Husband: *Et regem [Syphacem] conjugemque ejus—Romam oporteret mitti, ac Senatus Populique Romani de ea judicium atque arbitrium esse. LIVY, Lib. XXX. Cap. XIV. Num. 10.*

3 *Lib. III. Cap. LXXXIV.*

4 *Fidem dante Maharbale—si arma tradidissent abire cum singulis vestimentis passurum, sese dediderunt, &c. LIVY, Lib. XXII. Cap. VI. Num. 11.*

5 *POLYB. ubi supra, (Cap. LXXXVI.) Baza-zet made Use of as frivolous an Evasion in a like Affair, against the People of Crottovo in Servia, as LEUNCLAVIUS relates, Lib. VI.*

6 *Quæ Punica religione servata fides ab Hannibale est, atque in vincula omnes conjecit. Ubi supra, Num. 12. seu fin.*

7 *Ac, si fides Saturnino data est—non eam C. Rabirius, sed C. Maxius dedit: Idemque violavit, si in fide non stetit. Quæ fides, Labiene, qui potuit sine Senatus—consulto dari? Orat. pro C. Rabirio, Cap. X.*

Faith (says he) *be given, without a Decree of the Senate?* And so would infer, that the *Faith* given by *Marius* did only oblige himself; but *C. Marius* was empowered by the Senate to do whatever he should judge proper for maintaining the Empire and Majesty of the *Roman* People. This was the greatest Authority that could be ^s given according to the Custom of the *Romans*: And who can say that it did not include the Right of granting Impunity to any one, if that were absolutely necessary for the Security of the State?

X. Such Agreements are to be taken in a strict Sense, and why.

X. But in these Agreements made by Generals, because they act for another, the strictest Interpretation is to be taken, as far as the Nature of the Contract will allow, that by their Fact their Sovereign be not more obliged than he is willing, or themselves suffer Damage in doing their Duty.

XI. How a Surrender accepted by a General is to be understood.

XI. So he that is accepted of by a General upon an absolute Surrender, shall be judged to yield himself wholly to the Will of the Conqueror, whether of the King or People. An Instance of which we have in *Gentius*, King of *Illyria*,¹ and *Perseus* of *Macedon*, of which the former yielded to *Anicius*, the other to *Paulus*.

XII. How that Caution is to be understood, if the King or People please.

XII. Wherefore the adding of this Caution, *It shall be established if the Sovereign ratify it*, which we often find in Agreements, will provide, that if the Agreement be not allowed by the Sovereign, the General himself shall be bound to nothing, except so far as he has reaped an Advantage by the Convention.

XIII. How the Promise of delivering up a Town is to be understood.

XIII. And they who have engaged to deliver up a Town, may dismiss their Garrisons, as we read the *Locrians* did.

⁸ See SALLUST, *Bell. Catilin.* (Cap. XXX. Edit. Waff.) There is in GUICCIARDIN, *Hist.* B. VI. Chap. IX. Fol. 229. of JEROME CHOMEDÉY's old French Translation, p. 339. of the Italian Original. Edit. Genev. 1645.) a Chicane-

ry like this of CICERO's, used by *Gonsalvo* against the Duke of *Valentinois*. GROTIUS.

XI. (1) See APPIANUS ALEXANDRINUS, *De Bell. Illyr.* p. 761. Edit. H. Steph.

C H A P. XXIII.

Of Faith given by private Men in War.

I. That Faith given by private Men in War is not binding, considered.

I. THAT Saying of *Cicero*¹ is well known, *Whatsoever any private Person, urged by Necessity, shall promise to the Enemy, even in that very Thing he must keep his Faith.* Private here implies, either Soldier or any other Person that does not bear Arms, for Faith is to be kept by all. It is surprizing then, that any Lawyers should maintain, That Faith in publick Agreements made with the Enemy is to be kept, but not in private; for if private Persons have particular Rights which they can engage, and an Enemy be capable of acquiring some Rights, what should hinder such an Obligation? Besides, unless this be allowed, there would be an Occasion given for Massacres, and a Bar to Liberty; for if private Faith were not held obligatory, the Lives of Prisoners oftentimes could not be saved, nor their Liberty procured.

II. Faith given to Pirates and Robbers is binding, and how far.

^a B. 3. ch. 19. § 2.
^b B. 2. ch. 2. § 7.

II. Further, not only to those who are Enemies by the Law of Nations, but even¹ to Robbers and Pirates, we are to keep our private Faith, as we have said^a above concerning publick Conventions made with such People; with this Difference, that if an unjust Fear, occasioned by the other, shall force a Promise from us, the Promiser^b may demand Restitution, and upon Refusal may take it upon himself; which could not be done, if the Fear proceeded from a publick War according to the Law of Nations. But if that Promise were confirmed by an Oath, the Promiser must indispensibly perform his Word, unless he would be perjured. But if such^c a Perjury be committed against a publick Enemy, it is commonly pu-

^c B. 3. ch. 19. § 5.

I. (1) *Atque etiam, si quid singuli, temporibus adducti, hosti promiserint, est in eo ipso fides conservanda.* De Offic. Lib. I. Cap. XIII.

II. (1) But see what we have said upon B. II. Chap. XI. § 7.

nished by Men ; but if against Thieves, or Pirates, it remains unpunished in Detestation of those, with whom we had to do.

III. In this private Faith we are not to except Minors, if they are capable of understanding what they promise. ¹ For the Privileges allowed to Minors arise from the civil Law ; whereas we now speak of the Law of Nations.

III. *A Minor here not excepted.*

IV. And we have already said ^a of Promises made by Mistake, that we have a Power to retract them, when that which through Error believed, was according to the Intention of the Promiser, the Condition of the Promise.

IV. *Whether an Error does excuse it.*

^a B. 2. ch. 11. § 6.

V. 1. But how far the Power of private Men may extend in making any Contract, is a more difficult Question. It is certain, that no private Person can alienate what is publick ; for if this be not allowed to Generals, as I have proved ^a a little above, much less ought it to be allowed to private Persons. But yet it is to be disputed, whether the Covenants made with their Enemies of their own private Concerns, whether Actions or Things, may stand ; because we cannot grant those to the Enemy, without some Damage to our own Party. Whence it may seem, that all such Covenants are unlawful, whether they be made by Subjects, on the Account of the eminent Right of their State over them, or by listed Soldiers, in regard to their military Oath.

V. *An Objection made from publick Profit answered.*

^a B. 3. ch. 22. § 7.

2. But we must observe, that such Agreements, which prevent a greater or more certain Mischief, are to be esteemed ¹ rather beneficial than hurtful, even to the Publick ; because a lesser Evil has comparatively the Appearance of Good : *Of Evils the less is to be chosen*, as one says in ² *Appian*. Yet neither can that bare Faith, whereby a Man does not absolutely renounce all Power over himself, and what he has, nor can the publick Benefit, without the Authority of a Law, have that Power, as to make an Engagement void and of no Effect, tho' we should grant that what was promised was against the Duty of the Promiser.

3. The Law indeed can take away this Power from Subjects, whether perpetual or temporary, but yet it does not always do so, for it spares Citizens. Neither can it always do it, for human Laws (as I have ^a said already) have no Force to oblige, but when they are proportioned to human Infirmary, and not when they impose any Thing too burthensome, which is entirely repugnant to Reason and Nature. Therefore those Laws and particular Orders, which manifestly enjoin such Things, are not to be accounted Laws. And general Laws are to be taken in a favourable Sense, so as to exclude Cases of extreme Necessity.

^a B. 1. ch. 4. § 7. n. 2, 3. and B. 2. ch. 14. § 12. n. 2.

4. But if that Act, which was prohibited by any Law, or particular Order, and declared void, might justly be so prohibited, then that Act of the private Person shall be made void, and he may also be punished, because he promised what was not in his Power, especially if being bound by Oath he did it.

VI. The Promise of a Captive to return unto Prison is justly tolerated, ¹ because it does not render his Condition worse than it was. Therefore that Action of *M. Regulus* was not only glorious (as some account it) but what was his Duty. ² *Regulus*, says *Cicero*, *Ought not by his Perjury to have violated the Conditions and Covenants of War*, notwithstanding what *Horace* says,

VI. *These applied to our Faith given to return into Prison.*

³ *Atqui sciebat, quæ si barbarus
Tortor pararet—*

*What Cords and Wheels, what Racks and Chains,
What lingring Tortures for his Pains
The barbarous Hangman made, he knew.*

Creech.

For when he promised to return he knew what they might do. So of the ten

III. (1) See above, § 5. of the Chapter referred to in the preceding Note.

V. (1) As for Instance, when we promise to pay certain Contributions to prevent Pillage, burning of Places, &c.

2 It is a *Carthaginian* who says this to induce his Countrymen to submit to the *Romans*, as they were not in a Condition to resist them. *De Bell. Punic.* p. 55. Edit. H. Steph.

VI. (1) Without which he would not be suffered to go Home : And it is undoubtedly better for him to have that Permission for a Time, than to continue always a Prisoner.

2 *Regulus vero non debuit conditiones pactionesque bellicas & hostiles perturbare perjurio*, *De Offic. Lib.* III. Cap. XXIX.

3 *Lib. III. Od. V. Ver. 49, 50.*

Captives,

Captives, as *Gellius* relates it from old Writers, *Eight declared they had no Right of Postliminy, because^a they were bound by Oath.*

VII. Not to return to such a Place, or bear Arms against such a Party.

^a L. 2. c. 14. and l. 3. c. 36.

^b B. 2. ch. 5. § 10. n. 3.

VIII. Not to make an Escape.

IX. A Captive taken by one, cannot yield himself to another

^a B. 3. ch. 6. § 23, &c.

X. Whether private Men may be compelled by their Sovereign, to perform what they have promised.

XI. What Interpretation to be allowed in such Covenants.

^a B. 2. ch. 16. § 2. and B. 3. ch. 20. § 26.

XII. How we must take these Words, Life, Apparel, the coming of Aids.

VII. 1. Some Prisoners are released upon their Promise, not to return to such a Place, or not to bear Arms against the Releaser. We have an Example of the former in *Thucydides*, where those¹ of *Ithome* promised the *Lacedemonians* to depart out of *Peloponnesus*, and never to return again: The latter is now common. There is an antient Example in *Polybius*,² where the *Numidians* were dismissed by *Amilcar*, upon Condition, *That none of them should bear Arms against the Carthaginians.* *Procopius*³ has the like Condition in his *Gothicks*.

2. Some maintain this Agreement to be void, because it is contrary to the Duty which we owe to our Country: But not every Thing that is against our Duty, is immediately void, as I said^b before. Besides, it is not against our Duty, to procure our Liberty by promising to forbear a Thing, which it is in the Enemies Power to hinder. For whilst we are not released, we are as useless to our Country, as if we were really dead.

VIII. Some also promise not to make their Escape; this also binds them, tho' they were in Fetters when they made it; tho' some are of another Opinion. For by this very Promise sometimes our Lives are saved, or we have more Liberty allowed. But if after this Promise, a Person be laid in Irons, he is therefore discharged of that Promise, if he made it upon that Condition, that he should not be bound.

IX. It is a foolish Query some make, whether a Person taken Prisoner by one, may yield himself to another. For it is very plain, that no Man can by Contract take away that Right, which another has acquired. For by the very Right of War, or partly by the Right of War, and partly by the Grant of him that makes the War, a Prisoner taken in War belongs to the Captor, as we have said^a before.

X. There is a remarkable Question concerning the Effects of such Agreements, namely, whether private Men upon their neglecting to perform what they have promised, may be compelled to it by their Sovereign. And that they may, is the best grounded Opinion, but only in a solemn War, and that by the Right of Nations, which binds those that make War, to do what is right and just to each other, even concerning the Facts of¹ private Men; as if an Embassador sent from the Enemy should be insulted by a private Person. Thus *A. Gellius* quotes out of *Cornelius Nepos*,² *That many in the Senate agreed, that those of the ten Prisoners, who being obliged by Oath to return, refused, should by a strong Guard be delivered up to Hannibal.*

XI. We must observe those Rules which we have several Times mentioned,³ concerning the Interpretation of Words in such Agreements, that is, we ought not to recede from the proper Signification of the Words, unless to avoid an Absurdity, or when there is any other Conjecture, sufficiently certain, of the Intention of the Promiser; so that where the Words are dubious, we are to incline rather to that Sense that is against him who gives the Conditions.

XII. He that agrees for his Life, has not therefore a Right to his Liberty; under the Name of Apparel, Arms are not comprehended, for they are distinct Things.

⁴ *Tum octo ex iis postliminium iustum non esse sibi responderunt, quoniam de iurio vineti forent.* Noct. Attic. Lib. VII. (Cap. XVIII.) *De iurio vineti*, that is to say, *capitis minores*, as *HORACE* expresses himself, (*ubi supra*) speaking of *Regulus*. GROTIUS.

This *De minutio capitis* was a Consequence of the Oath, by which the Prisoners were engaged to consider themselves always as in the Enemy's Power, and his Slaves: So that they had lost all the Rights of *Roman Citizens*.

VII. (1) Or rather the *Helotæ*, and some others who had taken Refuge at *Ithome*, Lib. I. Cap. CHII.

2 The Historian does not speak of a Promise expressly given by the Prisoners not to bear Arms: He only says, that *Hamilcar* in releasing them, threatened to punish them severely and without Mercy, if they bore Arms against the *Carthaginians*, Lib. I. Cap. LXXVIII.

³ For Instance, *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. XI. Compares *PUFENDORF* with this Place, *Law of Nature and Nations*, B. VIII. Chap. II. § 2.

X. (1) It would be to no Purpose, that they stood engaged by Promise, if there were Nobody, who could compel them to perform it. This *ALBERICUS GENTILIS* says in the Chapter cited in the foregoing Note towards the End. Let us add, that this Kind of Promises either have been, or ought to be tacitly approved by the Sovereign: So that he ought to see them made good to the utmost of his Power.

2 *Cornelius autem Nepos*, &c. Noct. Attic. Lib. VII. Cap. XVIII. Before this Time the same Roman Senate had compelled some Prisoners to return to *Pyrrhus*, who had dismissed them upon that Condition. *APPIAN*, *Excerpt. Legat.* Num. 6. [p. 348. *Eclg. Fulv. Ursin.*] GROTIUS.

Aids are said then to come when they are in fight, tho' they do nothing ; for the bare Presence has its Effect.

XIII. But he cannot be said to return to the Enemy, who returning privately, departs again immediately; for our Promise to return is to be so understood, that we shall be again in the Power of our Enemy ; to take Advantage of an Explication quite contrary, is according to *Cicero* ¹ a notorious Cheat, a foolish Cunning, which adds Perjury to Chicanry. ² *Gellius* calls it a fraudulent Trick, branded by the Censors with Infamy, and says the Practicers of it were rendered odious and execrable.

XIII. *Who may be said to return to the Enemy.*

XIV. ¹ In Agreements made not to surrender, if just Succours should come, we must by them understand, such as are sufficient to free us from the Danger we were in.

XIV. *Succours, when said to be sufficient.*

XV. This also is to be observed, if any Thing be agreed on concerning the Manner of Execution, that alone does not render the Agreement conditional : As if it be stipulated that we should pay in a certain Place, and that Place happen afterwards to change its Master.

XV. *The manner of Execution makes no Condition.*

XVI. We must judge of Hostages as ^a abovesaid ; for the most Part they are but a bare Accessary of the principal Engagement ; but yet it may be so covenanted, that the Obligation may be alternatively understood, that is, that such a Thing shall be done, or the Hostages may be detained. But in a dubious Case, we must incline to that which is most natural, that is, that they shall be reputed as an Accessary only of the Agreement.

XVI. *Of Hostages to perform such Covenants.*
^a *B. 3. ch. 20. § 28.*

XIII. (1) *Reditu enim in castra, &c. De Offic. Lib. III. Cap. XXXII.*

² *Hæc eorum fraudulenta, &c. Noct. Attic. VII. 18.*

XIV. (1) There is in *PROCOPIUS* four Examples of this Sort of Convention. *Gothic. Lib. III. (Cap. VII. XII. XXX. XXXVII.)* And one,

in *AGATHIAS*, concerning the City of *Lucca*, *Lib. I. (Cap. VII.)* Another in *BIZARRO*, concerning a Castle in the Island of *Corfica*, *Hist. Genuef. Lib. X.* See others of the same Kind, *B. XVIII. and in the War against the Moers, CROMER* has also one, *Lib. XI. GROTIUS.*

CH A P. XXIV.

Of Faith tacitly given.

I. **T**HAT some Things ¹ agreed only by Silence, was not ill observed by *Javolenus*, which takes Place, in publick, private, and ² mixt Agreements. The Reason is this, because it is the Consent, howsoever signified and accepted, that has the Power of transferring Right. But this Consent may be declared otherwise than by Words and Letters, as we have more than once shewed ^a already. And some Signs are included in the Nature of certain Acts.

I. *How Faith may be given by Silence.*
^a *B. 2. ch. 4. § 4, 5. and B. 3. ch. 1. § 8.*

II. As for Example. He that coming from an Enemy, or a strange Country, commits himself to the Faith of another King, or People; does without doubt tacitly oblige himself to do nothing against that State, whose Protection he desires ;

II. *An Example in one desiring to be received into Protection by any Prince or People.*

I. (1) *Videtur autem in hac specie id silentio convenisse, ne quid præstaretur, si ampliore pecunia fundus esset locatus. Digest, Lib. XIX. Tit. II. Locati conducti, Leg. LI. princip. See Mr. NOODT's Treatise, De Pactis, Cap. II.*

² Our Author understands by mixt Conventions what he calls *Sponsio*, that is to say Conventions made by publick Persons and upon publick Affairs ; but without any express or tacit Order of the Sovereign : For in that Respect they have something of private Agreements in them, those, who make them, having at the same Time they are made, no more Power than mere private Persons.

II. (1) *ALBERIGUS GENTILIS, (De Jure Bell.*

Lib. II. Cap. IX. init.) ascribes this to *VALERIUS MAXIMUS*, from whom he cites some Words, to which our Author seems to allude in this Place after him. But that Historian says nothing at all of *Zopyrus*; he speaks of Stratagems in general: *Illæ vero pars calliditatis egregia, & ab omni reprehensione procul remota, cujus opera, quia adpellatione nostra vix aptè exprimi possunt, Græca pronunciatione STRATEGEMATATA dicuntur. Lib. VII. Cap. IV. princ.* It is true, he puts in the Number of these innocent Stratagems a like Action of *Sextus Tarquinius*. For the rest, see *PUFENDORF*, on this Case, *Law of Nature and Nations, B. VIII. Chap. XI. § 5.*

wherefore we are not to join with them ¹ that justify the Act of ² Zopyrus; for his Loyalty to his King could not justify his Treachery to those unto whom he had fled. The same may be said of Sextus ³ the Son of Tarquin, who retired to Gabii. Virgil upon Sinon, says,

⁴ Accipe nunc Danaûm insidias, & crimine ab uno
Disce Omnes—

Now hear how well the Greeks their Wiles disguis'd;
Behold a Nation in a Man compris'd. Dryden.

III. He that desires or admits a Parley.

III. So he that demands, or admits of a Parley, silently promises, ¹ that during the Parley both Parties shall be secure. Livy ² calls it a Breach of the Law of Nations, to hurt an Enemy under the Pretence of an Interview. He terms it, ³ *An Interview perfidiously violated*. Val. Maximus ⁴ passes this Censure on Cn. Domitius, who had invited Bituitus King of Auvergne to a Conference, and had entertained him as his Guest, and then treacherously bound him, *His insatiable Ambition of Glory made him be perfidious*. Wherefore I admire, why he that wrote the 8th Book of Cæsar's Gallick Wars, whether Hirtius, or Oppius, relating the like Act of T. Labienus, adds these Words, ⁵ *He supposed, that Comius's Infidelity might be prevented without any Imputation of Treachery to himself*. Unless this be rather the Judgment of Labienus, than of the Writer.

IV. It is lawful for either Party to promote his own Interest, so that he does not hurt the other.

² B. 3. ch. 1. § 6, &c.

IV. But we must not extend this tacit Consent beyond what I have said; for if those with whom we have an Interview receive no Hurt, it is no Breach of Faith to make use of that Conference to divert the Enemy from his military Projects, and in the mean while to advance our own Affairs. It is one of the innocent Artifices of War. Wherefore they who blamed the deluding of King Perseus, ¹ with the Hopes of Peace, had not so much regard to Justice and Fidelity, as to a generous Mind, and martial Glory, as may be sufficiently gathered from what has been ² already said of warlike Stratagems. Of this Kind was that Policy, by which ³ Asdrubal saved his Army out of the Ausetan Defiles; and by which Scipio Africanus the elder discovered ⁴ the Situation of Syphax's Camp, both recorded by Livy. Whose Example L. Sylla followed in the Social War at Esernia, as Frontinus ⁵ tells us.

V. Of some dumb Signs, to which Use has given a Signification.

V. There are also some dumb Signs, ¹ significant through Custom; as of old Hair-

² See it related by HERODOTUS, Lib. III. Cap. CLIV. & seqq. JUSTIN, Lib. I. Cap. ult. &c.

³ This is in LIVY, Lib. I. Cap. LIII. and LIV.

⁴ Æneid. Lib. I. Ver. I. 65. 66.

III. (1) It is therefore with Reason, that AGATHIAS blames Ragnaris, General of the Huns, for having treacherously attempted to kill Narfes, as the latter returned from a Conference demanded by the former. Lib. II. (Cap. VII.) GROTIUS.

² Deinde, quod ipsi Consuli, parum cauto adversus colloquii fraudem, insidiabantur—& successisset fraudi, ni pro jure Gentium, cujus violandi consilium initum erat, stetit fortuna, Lib. XXXVIII. Cap. XXV. Num. 7, 8.

³ Major multo pars perfide, [it must be read so instead of perfidem] violati colloquii pœnas morte luerunt. Ubi supr. (in fin. Cap.) GROTIUS.

This Correction of our Author's is entirely unnecessary, as appears from many Examples of the same Kind cited here by GRONOVIUS. See also CÆSAR, De Bell. Gall. Lib. I. Cap. XLVI. and the Note of Mr. DAVIES. The Sense is the same at Bottom.

⁴ Cn. autem Domitium, &c. Lib. IX. Cap. VI. Num. 3.

⁵ Quum Comium comperisset, &c. Cap. XXIII. Mr. COCCEIUS, during his Life, celebrated Professor of Law at Frankfort upon the Oder, criticises our Author (in a Dissertation De Officio & Jure Mediatorum Pacis, § 24.) as if he doubted, whe-

ther there was any Perfidy in this Action of Labienus. I confess, for my Part, I cannot see the least Foundation for that Censure, and do not believe, that any Body, who will read the Passage with never so little Attention, can find any. It was the Fate of our Author to be ill understood by those who take the most Liberty in reproving him.

IV. (1) Decepto per inducias & spem pacis Rege, &c. LIVY, Lib. XLII. Cap. XLVII. Num. 1.

² He demanded a Conference for the next Day, but decamped without Noise at the beginning of the Night. See LIVY, Lib. XXVI. Cap. XVII.

³ Scipio sent Soldiers disguised like Slaves with his Officers, who during the Time the latter conferred with Syphax, dispersed themselves throughout the Camp, and examined every Thing. See the same Historian, Lib. XXX. Cap. IV.

⁴ Strategem. Lib. I. Cap. V. (Num. 17.) and by Julius Cæsar, during his Dictatorship, when he made War against the Teneteri and Usipetes. APPIAN. Excerpt. Legat. Num. 16. GROTIUS.

V. (1) Amongst the Persians [or rather amongst the Assyrians] the Hands joined together behind the Back was a Sign of Submission, as AMMIANUS MARCELLINUS relates, Lib. XVIII. (Cap. VIII.) upon which See LENDENBROG's Notes, (p. 222. Edit. Vales. Gron.) Amongst the Romans they had also this Sign, to put the Shield under the Arm-pit, and throw down the Standards, as appears in the same Historian, Lib. XXVI. Cap. IX. p. 512. (upon which the Reader may consult the Note of

Hair-laces, and Branches of Olives ; and among the *Macedonians*, ² the Erection of Pikes ; among the *Romans*, ³ their covering their Heads with their Shields, were Signs of a submissive Surrender, and consequently obliged to the laying down of Arms. But whether he that signifies his accepting of a Surrender, be obliged, and how far, may be easily learnt from what has been said ⁴ already. ⁵ Among us the hanging out a white Flag is a tacit Sign of demanding a Parley, and shall be as obligatory, as if expressed by Words.

VI. We have already ⁶ declared how far an Agreement made by a General without the Order of the State, may be believed to be tacitly approved by the Prince or People ; as when the Act is fully known, and thereupon some Thing done, or not done, of which no other Reason can be given, but their Consent to their Agreement.

VII. ⁷ A Punishment cannot be supposed to be remitted from its being for a Time neglected ; but some positive Act must necessarily intervene, which may either by itself argue a good Will, as a Treaty of Friendship ; or at least so great an Opinion of the Virtue of the Person to be punished, that his former Actions may merit a Pardon, whether this Opinion be expressed by Words, or by such Actions as are usually taken to signify as much.

VI. Of a silent Approbation of a Treaty.

² B. 2. ch.

15. § 17.

and B. 3. ch.

22. § 3.

VII. When a Punishment is tacitly remitted.

Mr. VALOIS the Standards were also bowed down. LATINUS PACATUS mentions such a Sign in his *Panegyrick*, (Cap. XXXVI. Edit. Cellar.) The ancient *Germans*, and others in Imitation of them, presented Grass to the Conqueror. See PLINY, *Hist. Natur.* Lib. XXII. Cap. IV. SERVIUS observes, that those who surrender themselves, lay down their Arms, to appear in the Posture of Suppliants: [MANUS INERMES] — *Aut supplices* — *qui enim victi se dedunt, INERMES supplicant.* In *Æneid.* Lib. I. (Ver. 478.) GROTIUS.

² This LIVY confirms: *Quia erigentes Hastas Macedonas conspexerat — ut accepit hunc morem esse Macedonum tradentium sese, &c.* Lib. XXXIII. Cap. X. Num. 3, 4. The learned GRONOVIVS refers to this Passage.

³ APPIANUS ALEXANDRINUS, to whom our Author refers here in a little Note, and VALOIS has cited upon AMMIANUS MARCELLINUS, relates this, speaking of the Troops of *Afranius*, *De Bell. Civil.* Lib. II. p. 454. Edit. H. Steph.

⁴ The People of the North kindle a Fire to signify that Demand, as appears from the History of JOHANNES MAGNUS, and other Authors. PLINY observes, that in his Time, it was customary to present a Laurel, to signify a Desire that Hostilities might be discontinued: *Ipsa [Laurus] pacifera, ut quam prætendi, etiam inter armatos hostes, quietis sit indicium.* *Hist. Natur.* Lib. XV. Cap. XXX. GROTIUS.

VII. (1) POLYBIUS handles this Question, whether when we pardon the Person who actually commits the Crime, we are not supposed by that alone to pardon him also by whose Order it was committed. *Excerpt. Legat.* Num. 122. For my Part, I think not. For every Man is answerable for his own Faults. GROTIUS.

The Citation from POLYBIUS was faulty (to make a transient Observation) as well as an Infinity of others in all the Editions before mine : For it was marked Num. 22. where there is nothing like it. The Fact in the true Passage, as I have corrected, is this. A Roman Ambassador had been killed by *Leptines*. The latter was delivered up to the *Romans* by King *Demetrius*, whose Subject he was. But he was sent back, with another of his Accomplices : And the Historian, who relates it, believes, that the Reason why the Senate acted in this Manner, was, because they were for reserving to themselves the Liberty of punishing on a proper Occasion such an Attempt upon their Ambassador, for which Satisfaction might be supposed to be taken, had they punished the Authors of the Murder, p. 1324. *Edit. Amstel.* But it does not appear by the Narration, that *Demetrius* had any Share in the Crime, and much less that he had commanded it. And as for the Question in itself, the Decision of our Author does not always take Place in my Opinion. For if he, who has commanded, or otherwise occasioned a Crime to be committed, gives up the Author of it, expressing thereby his Desire to obtain Pardon for himself ; the Party, against whom the Crime hath been committed, ought to be deemed to grant the Pardon, whether he punishes the Criminal delivered up or no ; unless in punishing him, or sending him back, he declares in a proper Manner, that he does so without Prejudice to the Right he reserves to himself against him who was the first Cause or Accomplice in the Crime. Otherwise, there is a tacit Consent to Pardon implied, which answers to the formal Demand of it, and which may be presumed with as much Reason as in the other Examples alledged by our Author.

C H A P. XXV.

The Conclusion, with Admonitions to preserve Faith and seek Peace.

I. I. **A**ND here I hope I may make an End ; not that I have said all that might have been said, but that which hath been said may be enough to lay a Foundation, on which if any other will build a more stately Fabrick, I shall be so far from envying

I. *Admonitions to Princes to keep their Faith.*

envying him, that I shall heartily thank him. Yet before I dismiss my Reader, as before, when I treated of the Design of undertaking War, I brought some Arguments to persuade all Men, to the utmost of their Power, to prevent it. So now I shall add some few Admonitions that may be of Use, both in War and after War. These Admonitions regard the Care of preserving Faith and seeking Peace. We ought to preserve our Faith for several Reasons, and amongst others, because without that we should have no Hopes of Peace. ¹ For by Faith, (says Cicero) not only every State is preserved, but that grand Society of all Nations is maintained. If this be taken away, says ² Aristotle rightly, All human Correspondence ceases.

2. Therefore the same Cicero ³ calls it detestable to break Faith, the Observation of which is the Bond of human Life, and, as Seneca ⁴ says, Faith is the most sacred Good of the rational Soul. Which Sovereign Princes ought the more solemnly to keep, by how much they offend with more Impunity than others. Wherefore take away Faith, ⁵ they will be like wild Beasts, whose Rage all Men dread. Justice indeed in other Parts, has often something that is obscure, but the Bond of Faith is self-evident, and to that End do Men engage their Faith in their Dealings, that all Doubts may be removed.

3. How much more then does it concern Princes religiously to observe their Faith, first for the sake of their Conscience, then for that of their Reputation, on which depends the Authority of their Government. Let them not then doubt, but that they who endeavour to instill into them the Art of Deceiving, practise the same they teach. Their Practices cannot possibly prosper long, which render Men unfociable to Men, and hateful to GOD.

II. The Design of War to settle a firm Peace.

II. Further, it is impossible that we should have a quiet Conscience, and a just Confidence in the Protection of Heaven, unless we aim at Peace in every Thing we do throughout the whole Course of a War. For it was very truly said of Salust, ¹ That wise Men, for the sake of Peace, make War. To which agrees the Opinion of St. Augustine, ² We seek not Peace, to make War; but we make War, in order to establish Peace. Aristotle himself often condemns those Nations that make War their chief End. Violence is in itself brutish, which is yet most eminent in War; wherefore it ought to be the more carefully tempered with Clemency and Humanity, lest by too much imitating Beasts, we absolutely forget the Man.

III. Peace to be embraced, tho' with Loss, especially among Christians.

III. A safe and honourable Peace then is not too dearly bought, at the Expence of forgiving Offenders, Damages, and Charges, especially among Christians; to whom our LORD bequeathed Peace, as his last Legacy, whose best Expositor St. Paul, Rom. xii. 18. Would have us live peaceably with all Men, as far as in us lies. A good Man unwillingly enters into a War, nor is willing to push it to the utmost, as Salust ¹ tells us.

IV. This

I. (1) *Nec enim ulla res vehementius rempublicam continet, quam fides.* De Offic. Lib. II. (Cap. XXIV.)

² Rhetor. Lib. I. Cap. XV. p. 545. B. Vol. II. Edit. Paris.

³ *Æque enim perfidiosum & nefarium est, fidem frangere, quæ continet vitam, &c.* [Orat. pro Q. Rosc. Comæd. Cap. VI.]

⁴ *Fides sanctissimum humani pectoris bonum est, &c.* Epist. LXXXVIII. p. 390. Edit. Gron. Maj.

⁵ The Emperor Justinian's Embassadors said to Cosroez, King of Persia, according to PROCOPIUS: "If we did not speak to yourself, O King, we should never have believed, that Cosroez, the Son of Cabades, could have entered the Roman Territories in Arms, without regard to the Oath he had lately taken, that is to say, what is deemed amongst Men the most certain and most sacred Pledge of Promise given; and in Breach besides of Treaties, which are the sole Resource of those, who, from their bad Success in War, are not secure for the future. Is not this changing human Life into that of wild Beasts? For if Confidence be no longer to be reposed in Treaties, Wars must necessarily be eternal; and War without

"End, makes Men renounce all Sentiments of "Humanity." Persic. Lib. II. (Cap. X.) GROTIUS.

II. (1) *Postremo sapientes, pacis causâ, bellum gerunt, laborem spe otii sustentant.* Orat. I. Ad Cæsar. De Rep. ordinand. Cap. XL.

² *Non enim pax quæritur, ut bellum excitetur: sed bellum geritur, ut pax adquiratur.* Epist. Ad Bonifac. CCVII. This Passage with many other Thoughts, which follow and precede it, is repeated in the Canon Law, Caus. XXIII. Quæst. I. Can. III. I find something like it in PLATO. That famous Pagan Philosopher says, that a good Legislator ought so to conduct the Affairs of War that all Things may tend to Peace, rather than direct the Affairs of Peace by the Views of War. De Legibus, Lib. I. p. 628. E. Vol. II. Edit. H. Steph. Long Time after a Platonick Philosopher, who lived under the first Roman Emperors, inculcated strongly the same Maxim, by declaring in the Preface to a Work, intended to establish the Principles of the military Art, that this Book ought to be regarded as an offering to Peace, p. 2. See the Note of NICHOLAS RIGAUT upon it.

III. (1) *Viri boni est, initia belli invitum suscipere, extrema non libenter persequi.* In this Manner

IV. This Reason alone might indeed be sufficient ; but very often our own Interest requires it. First, when we are weaker than our Enemy, because it is dangerous to contend long with one more mighty ; and here, as at Sea, we must by some Loss redeem a greater Mischief, without listening to revenge or hope, bad Counsellors, as *Livy* ¹ rightly calls them ; which ² *Aristotle* thus expresses, *It is much better to part with some of our Substance to those that are stronger, than being overcome to perish with all we have.*

IV. *Peace is profitable to the Conqueror.*

V. Yea, and to the stronger Party Peace turns to account ; because as the same *Livy* most truly says, ¹ Peace is glorious and advantageous, when we give it in our Prosperity ; it is better and safer, than a hoped-for Victory. For we must consider, that the Success of War ² is uncertain. *Aristotle* says, ³ *We must remember how many and unforeseen Changes happen in War.* *Diodorus* ⁴ in an Oration for Peace blames those, *Who boast of their great Exploits done in War, as if it were not usual for Fortune to favour sometimes one Side, sometimes another.* And ⁵ the bold Attempts of desperate

V. *And to the Conqueror.*

our Author expresses the Passage, which he ascribes to SALLUST. (*apud Sallustium legimus*, says he) but without marking the Place, or putting the Words in *Italick* Characters. I can find no such Passage in the two perfect Works of that Historian, nor in his Fragments : Neither does Mr. WASSÉ's *Index*, which is very ample, and sufficiently exact, give any Light concerning it ; tho' there are Expressions in this Passage, which he undoubtedly would not have failed to observe. I almost believe, that our Author, deceived by his Memory, or otherwise, has cited this Author for some other. What might have given Occasion for it, is a fine Passage in the History of the War against *Jugurtha*, where there is something that relates to this Place, which the Reader will not be offended at my repeating. It says, that War is easily entered into, but as hard to be got out of again ; that the beginning and end are not in the same Person's Power : That any Coward may begin it, but to conclude it, depends upon the Victor's Pleasure : *Omne bellum sumi facile, ceterum ægerrime desinere : non in ejusdem potestate initium ejus & finem esse : incipere, cuius etiam ignavo licere ; deponi, quum victores velint.* Cap. LXXXV. Edit. *Wass.*

IV. (1) It is in the seventh Book in an Harangue, wherein *Titus Quintius*, constituted General against his Will by the seditious Soldiers, exhorts them to Peace and Submission : *Pacem, etiam qui vincere possunt, volunt, quid nos velle oportet ? Quin ommissis ira & spe fallacibus auctoribus nos ipsos nostraque omnia cognita permittimus fidei.* Cap. XL. in fin.

2 The Passages cited here, and in the following Paragraph, by our Author, without saying from what Work they are taken, are both in the Rhetorick addressed to *Alexander*. Cap. III. p. 616. C. Vol. II. Edit. *Parif.*

V. (1) It is in the Speech of *Hannibal* to *Scipio* : *In bonis tuis rebus, nostris dubiis, tibi ampla ac speciosa danti est pax—Melior tutiorque est certa pax, quam sperata victoria.* Lib. XXX. Cap. XXX. Num. 18, 19.

2 *Quum tuas vires, tum vim fortunæ, Martemque belli communem, propone animo.* *LIVY*, ubi *supr.* Num. 20.

3 *Rhetoric. ad Alexand.* Cap. III. p. 616. *PHILO* maintains, that Peace, tho' very disadvantageous, is always better than War. *De constit. Princip.* (p. 733. D. Edit. *Parif.*)

4 In the Oration recited by *DIODORUS SICULUS*, from which our Author says he took this, without specifying the Place, or even the Book, it is not the Speaker that blames a presumptuous Confidence, founded upon good Success : On the contrary, the Speaker, that is to say an Athenian Demagogue, named *Cleophon*, exhorting the People, not to Peace but War, amongst other Reasons employs that,

which he knew was very proper to animate the Multitude. The opposite Reflection is the Historian's own, who did not think fit to relate more of it than this Passage. *Bibl. Histor. Lib. XIII. Cap. LIII. p. 356. Edit. H. Steph.*

5 There is an antient Greek Verse that says, the Den of a Lion even dying is dangerous :

Δεῖναι γὰρ καὶ κοῖται ἀποικορμύοιο λέοντος.
GROTIUS.

Mr. BARBEYRAC in his *Additions and Corrections* says : After this Note was printed I found the Greek Verse by Accident in *PLUTARCH*, towards the End of the Life of *Marius*, p. 432. C. Edit. *Wech.* Where there are two Words differently placed from the Manner in which our Author here repeats them.

Δεῖναι γὰρ κοῖται καὶ ἀποικορμύοιο λέοντος.

Besides the Word ἀποικορμύοιο is translated *absent*, and not *dying* by the *Latin* Interpreter, and two *French* Translators ; which at first seems to agree very well with the Sequel of the Discourse. So that GROTIUS's Application would not be just, or else we must say, that citing by Memory, he had forgot the Sense of the equivocal Word ἀποικορμύοιο in the Place from which he took it. However when I examine well the Circumstances of *Marius*'s Condition, who is said to have heard some Voice perpetually rebounding this Verse in his Ears ; our Author seems to have had good Reasons for explaining ἀποικορμύοιο by *even dying* : Which we should find if we had the antient Poet, from whom this Verse had probably passed into a Proverb. In the Terror and extraordinary Agitation of Mind, in which *Marius* was, he did not consider *Sylla* as absent, to whom the ἀποικορμύοιο ought to be applied, according to the Sense commonly given to that Word : On the contrary, he represented that young and vigorous Army, as present, and at the Gates of *Rome*, from the News he received of his approach. I therefore imagine, that he applied the Greek Verse to himself, and that he took it at the same Time as a Preface of his approaching Death, and an Exhortation to perish like an old Lion, as he was. The Word ἀποικορμύοιο is often applied to those who die, especially in the Poets : And I find an Example very like this in an antient Oracle repeated by *LUCIAN*, in which a Wolf is spoken of :

Μιᾶδ' ἔχρη πάμπαν ἀποικορμύοιο λύκοιο.

De Mort. Peregrin. Vol. II. p. 579. Edit. *Amstel.* Mr. DACIER makes the chief Point of the Appli-

VI. And to those whose Affairs are doubtful.

VII. Peace once made to be religiously kept.

VIII. The Author's Wish, and the Conclusion.

perate Men are as much to be feared, as the most violent Bitings of ⁶ dying Beasts.

VI. But if both Parties think they are of equal Strength, then (in the Opinion of ¹ *Cæsar*) it is the fittest Time to treat of Peace, whilst each Party has a good Opinion of his own Strength.

VII. But Peace being made, whatever the Conditions be, they ought to be punctually observed, on account of ¹ the Faith given, the Obligation of which I have proved to be sacred and indispensible. And we ought to be very careful to avoid not only Perfidiousness, but whatsoever may exasperate the Mind. For what ¹ *Cicero* said of private Friendship, may be fitly applied to publick. That all the Duties of Friendship are to be observed religiously at all Times, but especially when it has been renewed by a Reconciliation.

VIII. May the *ALMIGHTY* then (who alone can do it) impress these Maxims on the Hearts of Christian Powers; may he enlighten their Minds with the Knowledge of every Right, ¹ Divine and Human, and inspire them with the constant and dutiful *Sense* of their being the *Ministers* of *Heaven*, ordained to govern *Men*; *Men*, for whom, of all his Creatures, ² *GOD* has the greatest *Regard* and *Affection*.

cation of the *Greek* Verse consist in *Rome's* being the Country of *Sylla*. But that Circumstance did not make it more terrible to *Marius*, than before: It was the present Situation of Affairs, and especially the Augmentation of *Sylla's* Power, from the Victories he had lately acquired, which terrified *Marius*, and would have frighted him any where else. So that this Observation of the new Translator is no better than many others of his, for Instance, that which he makes a little lower, (*Vol. IV. p. 188. Edit. Amstel.*) upon *PLATO's* thanking his good Genius, for having occasioned his being born a *Man* and not a *Beast*. If ever Commentator endeavoured to find, *Nodum in scirpō*, it was certainly in this Place.

⁶ *GRONOVIVS* properly refers us here to this Passage of *FLORUS*: *Sed ut quammaximè mortiferi esse morsus solent morientium bestiarum: sic plus negotii fuit, semirutâ Carthagine, quam integrâ.* Lib. II. Cap. XV. Num. 13. And *FREINSHEMIUS* cites one from *SENECA* upon it, *Excerpt. Controv. Lib. IX. Controv. VI.*

VI. (1) *Hoc unum esse tempus de pace agenda, dum sibi uterque consideret, & pares ambo viderentur.* De Bell. Civil. Lib. III. Cap. X.

VII. (1) It is in a Fragment of his Oration for *Gabinus*: *Ego, quum omnes amicitias tuendas semper putavi summâ religione & fide, tum eas maximè, quæ essent ex inimicitiiis revocatæ in gratiam.* Apud *HIERONYM. Apolog. adv. Ruffin. Lib. I. init. p.*

196. D. Vol. II. Edit. Basil. 1537.

VIII. (1) Our Author, as the learned *GRONOVIVS* remarks here, uses the express Terms of the Prayer of *Tiberius* to the Gods, according to *TACITUS*: *Hos [Deos precor] ut mihi, ad finem usque vitæ, quietam & intelligentem humani divinique juris mentem duint, &c.* Annal. Lib. IV. Cap. XXXVIII. Num. 4.

² So *St. CHRYSOSTOM* says, *Serm. De Eleemossyna. GROTIUS.*

The famous *SOCRATES* often spoke of the Love, which the Gods had for Mankind, *Φιλανθρωπία*, as appears from the Memoirs, which *XENOPHON* has left us of his Discourses and Actions. See for Instance, *Lib. IV. Cap. III. Edit. Oxon. SIMPLICIUS*, in his Commentary upon *EPICETUS*, says, that Man is a Possession of *GOD*, neither vile nor contemptible; and uses that Reason to prove, that *GOD* cannot neglect to take Care of him, as of his Creature. In *Cap. XXXVIII. p. 239. Edit. Ludg. Batav.* That Philosopher Reasons upon a Principle, which *PLATO* had long before laid down, which is, that Man is a Kind of Possession peculiar to *GOD*, whom consequently he loves. In *Phædone*, Vol. I. p. 62. B. Edit. Hen. Steph. I cannot conclude my Notes better than with these fine Passages, which are the more remarkable, as they are taken from Heathen Authors, whose Authority in this Point is of more Weight, than that of a Father of the Church.

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P A S S A G E S

O F

S C R I P T U R E,

Illustrated, examined, or corrected in this TREATISE.

- Gen. iv. 14. **B**EHOLD thou hast driven me out this Day, from the Face of the Earth; and from the Face shall I be hid, and I shall be a Fugitive and a Vagabond in the Earth, and it shall come to pass, that every one that findeth me shall slay me. Page 29.
- iv. 24. If Cain shall be avenged sevenfold, truly Lamech seventy and sevenfold. *ibid.*
- ix. 5. And surely your Blood of your Lives will I require; at the Hand of every Beast and I require it; and at the Hand of Man, at the Hand of every Man's Brother will I require the Life of Man. 28.
- ix. 6. Who so sheddeth Man's Blood, by Man shall his Blood be shed; for in the Image of GOD made he Man. *ibid.*
- xiv. 16, 17. And he brought back all the Goods, and also brought again his Brother Lot, and his Goods, and the Women also, and the People. And the King of Sodom went out to meet him (after his Return from the Slaughter of Chedorlaomer, and of the Kings that were with him) at the Valley of Shaveh, which is the King's Dale. 678.
- xiv. 20. And blessed be the Most High GOD, which hath delivered thine Enemies into thy Hand; and he gave him Tithes of all. 26, 579.
- xviii. 23. And Abraham drew near, and said, Wilt thou also destroy the Righteous with the Wicked? 518.
- xx. 12. And yet indeed she is my Sister; she is the Daughter of my Father, but not the Daughter of my Mother; and she became my Wife. 524.
- xxv. 6. But unto the Sons of the Concubines which Abraham had, Abraham gave Gifts, and sent them away from Isaac his Son (while he yet lived) Eastward, unto the East-Country. 228.
- xxxviii. 24. And it came to pass about three Months after, that it was told Judah, saying, Tamar thy Daughter-in-Law hath played the Harlot; and also behold she is with Child by Whoredom: And Judah said, Bring her forth, and let her be burnt. 30.
- Exod. xvii. 14. And the LORD said unto Moses, Write this for a Memorial in a Book, and rehearse it in the Ears of Joshua, for I will utterly put out the Remembrance of Amalek from under Heaven. 27.
- xx. 2, 3, 4, &c. I am the LORD thy GOD, which have brought Thee out of the Land of Ægypt, out of the House of Bondage. Thou shalt have no other Gods before me. Thou shalt not make unto thee any graven Image, &c. 442.
- xxi. 14. But if a Man come presumptuously upon his Neighbour, to slay him with Guile; thou shalt take him from mine Altar, that he may die. 461.
- xxii. 2. If a Thief be found breaking up, and be smitten that he die, there shall be no Blood shed for him. But if the Sun be risen upon him, there shall be Blood shed for him. 54, 138.
- xxii. 28. Thou shalt not revile the Gods, nor curse the Ruler of thy People. 113.

Defile not you yourselves in any of these Things: For in all these the Nations are defiled which I cast out before you. And the Land is defiled; therefore I visit the Iniquity thereof upon it, and the Land itself vomiteth out her Inhabitants. (For all these Abominations have the Men of the Land done, which were before you, and the Land is defiled). Page 197.

Doubtless ye shall not come into the Land, concerning which I sware to make you dwell therein, save Caleb the Son of Jephunneh, and Joshua the Son of Nun. 316. Num. xiv. 30.

Then shall ye do unto him, as he had thought to have done unto his Brother. 432. Deut. xix. 19.

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When thou shalt besiege a City a long Time, in making War against it to take it, thou shalt not destroy the Trees thereof. 651. — xx. 19.

Thou shalt not seek their Peace, nor their Prosperity, all thy Days for ever. 343. — xxiii. 6.

And Joshua made Peace with them, and made a League with them, to let them live: And the Princes of the Congregation sware unto them. 317. Josh. ix. 15.

But when the Children of Israel cried unto the LORD, the LORD raised them up a Deliverer, Ehud the Son of Gera, a Benjamite, a Man left-handed: And by him the Children of Israel sent a Present unto Eglon the King of Moab. 124. Judg. iii. 15.

And blessed be thy Advice, and blessed be thou, which hast kept me this Day from coming to shed Blood, and from avenging myself with my own Hand. 318. 1 Sam. xxv. 33.

And ye shall smite every fenced City, and every choice City, and shall fell every good Tree. 652. 2 Kings iii. 19.

And Elisha said unto them, this is not the Way, neither is this the City. 535. — vi. 19.

And Elisha said unto him, go say unto him, Thou mayest certainly recover: Howbeit the LORD hath shewed me, that he shall surely die. ibid. — viii. 10.

And his Brethren, Men of Valour, were two thousand and seven hundred chief Fathers, whom King David made Rulers over the Reubenites, the Gadites, and the half Tribe of Manasseh, for every Matter pertaining to GOD, and Affairs of the King. 125. 1 Chron. xxvi. 32.

And Jehu, the Son of Hinani the Seer, went out to meet him, and said to King Jehoshaphat, Shouldst thou help the Ungodly, and love them that hate the LORD? Therefore is Wrath upon thee from before the LORD. 344. 2 Chron. xix. 2.

Be wise now therefore, O ye Kings, be instructed, ye Judges of the Earth: Serve the LORD with Fear. 33. Psal. ii. 10, 11.

The LORD hath made all Things for himself; yea even the Wicked for the Day of Evil. 405. Prov. xiv. 4.

Then shall the Dust return to the Earth as it was; and the Spirit shall return unto GOD who gave it. 392. Eccl. xii. 7.

They shall beat their Swords into Plowshares, and their Spears into Pruning-Hooks. Nation shall not lift up Sword against Nation, neither shall they learn War any more. 37. Isai. ii. 4.

Then Zedekiah the King said, Behold, he is in your Hand: For the King is not he that can do any Thing against you. 90. Jer. xxxviii. 5.

Then thou shalt say unto them, I presented my Supplication before the King, that he would not cause me to return to Jonathan's House, to die there. 523. — xxxviii. 26.

All his Righteousness that he hath done shall not be mentioned: In his Trespasts that he hath trespassed, and in his Sin that he hath sinned, in them shall he die. 430. Ezek. xviii. 24.

Then I turned and lift up mine Eyes and looked, and behold a Flying Roll. And he said unto me what seest thou? And I answered, I see a Flying Roll, the Length thereof is twenty Cubits, and the Breadth thereof ten Cubits. Then said he unto me, This is the Curse that goeth forth over the Face of the whole Earth: For every one that stealeth shall be cut off, as on this Side, according to it: And every one that sweareth shall be cut off, as on that Side, according to it. I will bring it forth, saith the LORD of Hosts, and it shall enter into the House of the Thief, and into the House of him that sweareth falsely by my Name; and it shall remain in the Midst of his House, and shall consume it. 314. In the Notes, Num. 7. Zech. v. 1, 2, 3, 4.

Repent ye, for the Kingdom of Heaven is at hand. 34. Matt. iii. 2.

Think not that I am come to destroy the Law or the Prophets: I am not come to destroy but to fulfil. 35. — iv. 17. — v. 17.

Ye have heard, that it was said by them of old Time, thou shalt not kill: And whosoever shall kill, shall be in Danger of the Judgment. But I say unto you, &c. 31. — v. 21, 22.

Let your Communication be Yea, yea, Nay, nay. 327. — v. 37.

Ye have heard that it hath been said, An Eye for an Eye, and a Tooth for a Tooth; but I say unto you, resist not Evil; but whosoever shall smite thee on thy right Cheek, turn to him the other also. 38. — v. 38, 39.

And if any Man will sue thee at the Law, and take away thy Coat, let him have thy Cloak also. ibid. — v. 40.

And whosoever shall compel thee to go with him one Mile, go with him two. 39. — v. 41.

Give to him that asketh thee, and from him that would borrow of thee, turn not thou away. ibid. — v. 42.

- Matt. v. 43, 44. *Ye have heard that it hath been said, Thou shalt love thy Neighbour and hate thine Enemy. But I say unto you, Love your Enemies, bless them that curse you, do Good to them that hate you, and pray for them who despitefully use you and persecute you.* Page 40.
- xxiii. 13. *Hearing they may hear and not understand.* 528.
- xxiii. 21. *And who so shall swear by the Temple, sweareth by it, and by him that dwelleth therein.* 321.
- xxiv. 51. *And shall cut him asunder, and appoint him his Portion with the Hypocrites.* 327.
- xxvi. 29. *I will not drink henceforth of this Fruit of the Vine, until that Day that I drink it new with you in my Father's Kingdom.* 528.
- xxvi. 52. *All they that take the Sword shall perish with the Sword.* 44.
- Mark vi. 48. *And he saw them toying in Rowing: (For the Wind was contrary unto them) and about the fourth Watch of the Night he cometh unto them, walking upon the Sea, and would have passed by them.* 525.
- x. 19. *Thou knowest the Commandments, do not commit Adultery, do not steal, do not bear false Witness, defraud not.* 436.
- Luke ii. 1. *That all the World should be taxed.* 479.
- xiv. 23. *Go out into the Highways and Hedges, and compel them to come in.* 448.
- xvii. 3. *Take Heed to yourselves: If thy Brother trespass against thee, rebuke him; and if he repent, forgive him.* 417.
- xxii. 30. *That ye may eat and drink at my Table, in my Kingdom, and sit on Thrones, judging the twelve Tribes of Israel.* 528.
- xxiv. 28. *And they drew nigh unto the Village whither they went, and he made as tho' he would have gone further.* 525.
- xxiv. 29. *But they constrained him.* 448.
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- viii. 7. *So when they continued asking him, he lift up himself, and said unto them, He that is without Sin among you, let him first cast a Stone at her.* 404.
- xi. 11. *Our Friend Lazarus sleepeth.* 528.
- xviii. 36. *Jesus answered, My Kingdom is not of this World: If my Kingdom were of this World, then would my Servants fight, that I should not be delivered to the Jews: But now is my Kingdom not from hence.* 480.
- Acts xvi. 3. *Him would Paul have to go forth with him; and took and circumcised him, because of the Jews which were in those Quarters: For they knew all that his Father was a Greek.* 525.
- xvii. 4. *And some of them believed; and consorted with Paul and Silas: And of the devout Greeks a great Multitude; and of the chief Women not a few.* 17.
- Rom. i. 25. *Who changed the Truth of GOD into a Lye, and worshipped and served the Creature more than the Creator, who is blessed for ever.* 446.
- iii. 27. *By what Law? Of Works?* 32.
- xii. 17, 18, 19, 20, 21. *Recompense to no Man Evil for Evil. Provide Things honest in the Sight of all Men. If it be possible, as much as lieth in you, live peaceably with all Men. Dearly Beloved, Avenge not yourselves, but rather give Place unto Wrath; for it is written, Vengeance is mine; I will repay, saith the LORD. Therefore if thine Enemy hunger, feed him; if he thirst give him Drink: For in so doing thou shalt heap Coals of Fire on his Head. Be not overcome of Evil, but overcome Evil with Good.* 42.
- xiii. 1. *Let every Soul be subject unto the higher Powers.* *ibid.*
- xiii. 2. *Whosoever therefore resisteth the Power, resisteth the Ordinance of GOD: And they that resist, shall receive to themselves Damnation.* 105.
- xiii. 4. *For he is the Minister of GOD to thee for good. But if thou do that which is Evil be afraid; for he beareth not the Sword in vain: For he is the Minister of GOD, a Revenger to execute Wrath upon them that do Evil.* 32, 105.
- xiv. 23. *And he that doubteth, is damned if he eat, because he eateth not of Faith: For whatsoever is not of Faith, is Sin.* 483.
- 1 Cor. v. 1. *Such Fornication, as is not so much as named amongst the Gentiles, that one should have his Father's Wife.* 197.
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- i. 20. *For all the Promises of GOD in him are Yea, and in him Amen.* *ibid.*
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- But I fear lest by any Means, as the Serpent beguiled Eve through his Subtilty, so your Minds should be corrupted from the Simplicity that is in CHRIST. Page 144. 2 Cor. xi. 3.
- Children ought not to lay up for the Parents, but the Parents for the Children. 226. — xii. 14.
- The Law was our School Master to bring us unto CHRIST. 23. Gal. iii. 24.
- Now I say, that the Heir, as long as he is a Child, differeth nothing from a Servant, tho' he be Lord of all. 161. — iv. 1.
- Among whom also we had our Conversation in Times past, in the Lusts of our Flesh, fulfilling the Desires of the Flesh, and of the Mind; and were by Nature the Children of Wrath, even as others. 311. Eph. ii. 3.
- Put on the whole Armour of GOD, that ye may be able to stand against the Wiles of the Devil. For we wrestle not against Flesh and Blood, but against Principalities and Powers, against the Rulers of the Darknes of this World, against spiritual Wickedness in high Places. 43. — vi. 11, 12.
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- Exhort Servants to be obedient to their own Masters, and to please them well in all Things. 212. Tit. ii. 9.
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I N D E X I.

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MAR 31 1936

