

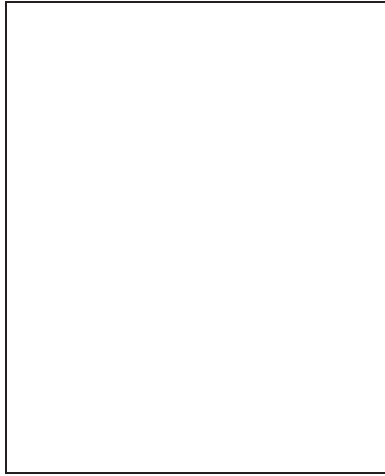
THE RIGHTS OF WAR AND PEACE

BOOK II

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

Knud Haakonssen

General Editor



Hugo Grotius

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

*The Rights of
War and Peace*

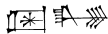
BOOK II

Hugo Grotius

Edited and with an Introduction by
Richard Tuck

From the edition by Jean Barbeyrac

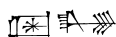
Major Legal and Political Works of Hugo Grotius



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THE RIGHTS OF WAR AND PEACE

BOOK II

❧ CHAPTER I ❧

*Of the Causes of War; and first,
of the Defence of Persons and Goods.*

I. 1. Let 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

I. *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, *Αιτίαι*, *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 *Agesilaus'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 An-

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 *Aeneas*. But tho' there be a manifest Difference between those three Things, yet the Terms made Use of to <128> 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 the* ⁷ *BEGINNINGS, or because you do not undertake them without Reason.*

tiochus 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*, *Aeneid. VII. 40.* GROTIUS.

4. *Aen. VII. 481, &c.*

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 *Ἐμβαλεῖ*. 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. Legation. *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 *Eléans*, calls them *Προφάσεις καὶ ἀρχαί*, *Lib. XIV. (Cap. XVIII. p. 404. Edit. H. Steph.)* and PROCOPIUS, *Δικαιώματα, Justifications.* Gothic. *Lib. III. Cap. XXXIII.* See the Beginning of *Chap. XXII.* of this Book. The Emperor JULIAN makes Use of the Word *ὑπόθεσις*. *Orat. II. De Laudib. Constantii*, (p. 95. *Edit. Spanheim*). GROTIUS.

In which Sense *Aelian* stiles them ἀρχὰς πολέμων; and *Diodorus Siculus*, treating of the War of the *Lacedemonians* with the *Aelians*, calls them προφάσεις and ἀρχὰς.

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.*

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, quae sunt sine causâ suscepta.* Thus our Author quotes the Passage, and in his Margin refers us to the third Book of *CICERO's* Treatise *De Republicâ*. 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 Δῆμαρχοι) 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 *Aetius* 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.

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 <129> 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*,

14. *Epist.* XCV. p. 464. *Edit. major Elzevir.* 1672.

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 Desart.* 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. *Faelix Praedo; 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.

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* ἀδικία instead of ἀδικημα. 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*.

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.*

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 adversae 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 adversae justa bella ingerit gerenda Sapientii.* 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.

25. *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 ancient 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 [Praetor] vetat aliquid fieri; veluti vim, sine vitio possidenti, vel mortuum inferenti, quo ei jus*

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 <130> 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

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 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 waived 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, *πατρῴα πάντα 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 datî*, *causâ non sequutâ*. A personal Action for redemanding a Thing, which was given on a Condition which is not fulfilled. See DIGEST. Lib. XII. Tit. IV. De *Conditione 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.

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*.

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 quae 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*,

Baldus ad Leg.
2. *Cod de serv.*
& aqua. n. 71.
Wilh. Matt. de
Bello justo, &
licito.

7. See PUFENDORF, *B. IV. Chap. XIII. § 5. Note II. 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 Concurrence 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, quae 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, Murther, 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.*

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 <131> 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 Diodorus¹⁷ informs us) accuse Semiramis, that *she had commenced War against him, without having received any Manner of Injury.* Thus the Romans argued¹⁸ 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

12. *De Benef. Lib. III. Cap. XIV.*

13. Lrvy, *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. Wass.*

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 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. Quaest. X. on Joshua. This Passage is quoted in the *Canon Law, Caus. XXIII. Quaest. II. Quod Bellum sit justum, &c. Can. 2.*

16. SERVIUS 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 *Aeneid. 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. Lrvy, *Lib. V. Cap. XXXV. Num. 5.*

19. *Analytic. post. Lib. II. Cap. XI. p. 171. Ed. Paris.*

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.

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.

²⁰. *Lib. VII. Cap. VI. Num. 11.*

²¹. PLUTARCH says, that Hercules, *by defending himself, conquered all whom he engaged*. In Vit. Niciae (p. 539. Tom. J. 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 Defense*. 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, listed 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. *But only against the Aggressor.*
Card. Q. 33. 1.
1. Pet. Navar.
1. 2. c. 3. n.
147. Cajetan.
2. 2. Art. 67.
Qu. 2.
- 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. <132>
- 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

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 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*

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 οἶδα, &c. *I have known many People moved either by some false Report, or by Suspicion, who for Fear of others, and to be beforehand 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

Ἐτι γὰρ σ' ἐμελλεν, &c.

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. Graecis*, 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*.

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 <133> 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

8. The Historian's Words are these, *What may happen in Regard to the War (which the Corcyreans apprehending, exhort us to begin the Attack) is as yet uncertain, &c.* Lib. 1. 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.*

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. Caes. Cap. XXX.*) and *PLUTARCH*, (*Vit. Caes. p. 730.*) have inserted it in their Writings.

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 of¹ *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 of¹ *Chastity*, can scarce be here any Matter of Dispute; when not only the² *Opinion* of the *World*,

Bann. q. 64.
Art. 7. Dub. 4.
Bald. in Leg.
17. Cod. *De*
Liberali Causa,
& in. l. 1. Cod.
unde vi, Less. l.
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.
l. 5. tit. 4. *De*
Homicid. &c.
leg. si furiosus,
&c. *Covarr.* ib.
part 4 § 1 n. 2.
Sylvest in
Verbo Homici-
dium, 3. q. 4.

VII. *Especially*
in Defence of

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, *Saepe audivi, 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. 2. *Chap.* V. § 10.

VII. (1) See the Place last quoted from PUFENDORF, § II. 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*

Chastity.
Sylvest. in
Verbo Homici-
dium, c. 3.
q. 4.
Pro Milon.
c. 4.
Declamat. Tri-
bunus Mari-
anus. Vit. Mar.
p. 413. Ed.
Wech.

but even the ³ *Law* of *GOD*, has made it equivalent to Life itself. So *Paulus* the Law-<134>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*
Defence may

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 com-

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 ariseth 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 Legislator means only, that in the Case before us, a Damsel 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. APOLLODORE *Bibliotheca*, Lib. III. (Cap. XIII. § 2. *Edit. Gall.*) Add to this a remarkable Story in GREGORY of *Tours*, Lib. IX. GROTIUS.

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.

mendable 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.*

sometimes be omitted.
Soto ubi supra,
Sylvest. de
verbo Bellum,
p. 2. n. 2.

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

IX. *Self-Defence against a Person, very useful to the Publick. A Crime from the Law of Charity.*
Soto ubi supra.

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).* GROTIUS.

IX. (1) See *B. I. Chap. I. § 9.*

only *honest*, but of an *indispensable Obligation*. Besides that, as to what we were now speaking of, ² *Charity* does also oblige us.

Lib. 1. 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 <135> 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 wish well to the *Commonwealth*, and that therefore he ought to prefer his own Good to that

2. I should think that *Charity*, that is, the Interest of others, and of a great Number, should not indispensably 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: 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.

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 extri-

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 Clementiâ*, 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.

cating 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. *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. Navarr. c. 15. n. 3. Sylvest. in Verbo Homicidium, 1. q. 5. Lud. Lopez, c. 62. Ubi supra.

X. I. 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 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

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 struck; and that Hercules being tried for Murther, pleaded the Law of Rhadamanthus, which acquitted 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.

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?

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.

3. From hence it appears too, that we ought not to approve what many Casuists 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 below 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 possibly suffer? There are those who assert, that a Man may lawfully kill such Persons 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.

*Navarr. c. 15.
Henr. de Irreg.
c. 11. Victor. de
jure belli, p. 5.*

*Soto, art. 8.
ubi sup. q. 5.
Doct. in Leg.
3. Dig. de Just.
& Jure, & in
Leg. 1. Cod.
Unde vi. Vas-
quez ub. sup.
c. 18. n. 13, 14.
Sylvest. in
Verbo Bellum.
p. 2. n. 4.
In Addit. ad
Alex. Cons.
119.*

*Pet. Navarr. l.
11. c. 3. n. 376.*

XI. *Murder in
Defence of our
Goods permit-
ted by the Law
of Nature.*

XI. We now proceed to those Injuries that affect our Estates or Possessions; ¹ and here, if we have Regard to *expletive* Justice, I must own, that for the Preservation 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 observed: 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 Method of my recovering them. So *Demosthenes* in his Oration against *Aristocrates* <137> *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. *How far
permitted by
the Law of
Moses.
Soto ubi supra.
Mathesilanus*

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,

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.

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 *Wisigoths*, *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.*

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 stolon from

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 perfo-
diens. De
 Homicid. *Les-*
sus, D. c. 9.
Dub. 11. n. 66.

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.

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, <138> במחזרת 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

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.

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.

10. DIGEST. *Lib. XLVIII. Tit. VIII. Ad. Leg. Cornel. de Sicarii, &c. Leg. IX.* Mr. NOODT, in his *Probalia Juris*, *Lib. I. Cap. IX.* and his Treatise, *Ad Legem Aquilian*, *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 Murther. His Opinion is grounded on the following Considerations. *First*, The *Cornelian Law* punished only such Murthers 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 Mosaic & Roman. 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. Aquilian*, *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 Murther, or any other publick Cause, but of some private Causes only. *Thirdly*, *ULPIAN*'s Fragment, preserved in the *Collatio Leg. Mosaic. & Roman.* 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 Corneliam, &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 *impune* 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 *Observa-*

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, <139> 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.

Deut. xxii. 23,
&c.

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;

tiones 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 Justinianea*. p. 760.

II. 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. NOODT 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 to do 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.

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.*

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 *Mosaick* 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?

XIII. *Whether permitted at all, and how far, by the Gospel.*

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.

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.

*Soto ubi sup.
Lessius, Dub.
II. n. 74. Sylv.
in Verb. Bel-
lum, 2. n. 3.*

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 <140> *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. II.
De Homic.
Less. ubi supra.*

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 RIT-

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 where 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.

XIV. *Whether the Civil Law permitting Murder in one's own Defence, gives a Right to the Fact, or only dispenses with the Punishment of it. Explained by a Distinction.*

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

XV. *When a Duel, or single Combat, may be lawful.*

TERSUS, *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. (i) 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. (i) 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 *Rencounters*, or Cases in which a Man is unexpectedly attacked, without any Appointment.

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
Defence in a
publick 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 ¹ <141> 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,

2. See my *Discourse on the Nature of Lots*, § 20.

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 renitente 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.

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.

XVII. *War only to weaken a neighbouring Power, not lawful.*
Alberic. Gentil.
l. 1. c. 14.

Bald. in Leg. 3.
De Rerum divis.

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

XVIII. *Nor in him who himself gave the just Occasion for a War.*

Alberic. Gentil.
l. 1. c. 13. Cast.
l. 5. *de Justitia.*

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.

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 threatned 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 <142> 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 *Thebans* ³ had offered to the *Lacedemonians* all that they could in Justice

² Kings xviii.
7, 14, and xix.

XVIII. (1) See PUFENDORF, *B. I. Chap. V. § 19.* and *B. V. Chap. XIII. § 1.*

2. LIVY, *Lib. IX. Cap. I. Num. 3, 4, 7, 8.*

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. Graec. Lib. VI. Cap. V. § 33, &c. Edit. Oxon.*

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.

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.* Basil. 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.

*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 vertue 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 ¹ of Property, which our Lawyers do generally call *Dominion* or *Demesne*.

II. *The Beginning and
Improvement of
Property.*

II. I. 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*, <143> as ¹ *Justin* has it, *were at first common, and all the World*

I. (1) See PUFENDORF, *B. IV. Chap. IV.* with the Notes in the second Edition, where this Subject is treated more at large, and with greater Exactness.

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 antient 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.

had, as it were, but one 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 the³ 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 the⁴ *Essenes*,

Gen. i. 29.
— ix. 2, 3.

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 *Getae*, 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 chearfully 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.*) *DIAGENES 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

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* <144> *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

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 Stile 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 Discovery.

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.

9. *In Somn. Scipion. Cap. X.*

Simplicity is what was by a ¹⁰ wise Jew called ἀφθαρσία, *Integrity*, and by St. Paul, ¹¹ ἀπλότης, which he opposes to τῇ πανουργίᾳ, *Subtilty* 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.

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 — xii. 2.

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 Purity 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*, ἐνθεος 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 DICAËARCHUS 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 DICAËARCHUS, 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. DICAËARCHUS, 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 plenty 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.

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 μέσσην*, 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*, ἔρρεπον εἰς πανουργίαν, *they became subtle*, ¹⁶ as *Philo* on that Passage expresses himself. So *Dion Prusaensis*, 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 <145> 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 Inclination, immediately produced Jealousy, and afterwards Murder. At

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 DIOCAEARCHUS produced by the Authors already quoted. (*Note* 13.) GROTIUS.

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 *χειροδίκας*, 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 Gen. x. xi
went afterwards 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 Gen. xiii
of Grounds was as yet so great in Proportion 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

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. Quaest. 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. *Χειροδίκαι*. 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*. Quaest. 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 Babylonicae* of the late Mr. PERIZONIUS.

24. *Georgic.* Lib. I. ver. 126.

Gen. xxi they were only divided by Nations. And as the Wells of Water, a Thing very necessary in 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
 Mar. liber. was common, and of the Divisions that followed. The Testimonies of
 c. 5. these Authors I have had Occasion to produce in another 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, ²⁸ <146> as by a Division; or else

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 *Scritofinnians* lived, of whom PROCOPIUS gives us an exact Account. *Gothic*, Lib. II. (Cap. XV.) See likewise PLINY, *Hist. Nat.* Lib. XII. *Prooem.* and VITRUVIUS, *Architect.* Lib. II. Cap. I. GROTIUS.

27. There was no Need of a Contract for founding 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.

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 have²⁹ 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 *Thesmophoria,* they intimated,³³ that the Division of Lands produced a new Sort of Right.

Macrob. Saturn. 3. 12.

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 antient 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 *Aeneid. IV. 58.* GROTIUS.

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

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 (*projiciendi, protegendive*) is annexed to the Building; which amounts to a Proof, that the Air is in itself considered as part of a Man's Property.

posted on the Surface of the Earth. But this is necessary, in Order to enjoy the <147> Benefit of it: And therefore Fowling, ⁴ for Instance, is permitted so far only as the Owner of the Land thinks fit.

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 Praelect. 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,

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 ἀφορισθείσαν, ⁷ *limited and bounded by us*; but Liquids having no Bounds of their own, (τὸ ὕργον ἀόριστον οἰκείω ὄρω, says ⁸ *Aristotle*) can never be ⁹ possessed,

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 caedendis.* 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 jugera* (*Lib. III. Od. XXIV. v. 12.*) GROTIUS.

6. *Charging the People of Megara, with ploughing Ground that was sacred, and not distinguished by Boundaries, ἀορίστον. 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 Repub. Ordinanda.* p. 71. *Edit. Basil. 1572.* And HARPOCRATION, under the Word Ὀργὰς; as also POLLUX [*sic: POLLUX*], *Lib. I. § 10.* with the Commentators on those Authors.

7. In his *Panegyric*, p. 48. *Edit. H. Steph.* where the Word ἀφορισθείσαν 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 Pu-

unless they are <148> 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 ὠκέανον δεσμοῦ ἔνεκα, &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

FENDORF, B. IV. Chap. V. § 3, &c. with the Notes in the second Edition; and Mr. DE BYNKERSHOEK's Dissertation *De Dominio Maris*, Cap. IX.

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 ὑγρὰ ὄυσία, the whole Aether, 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 ὑγρὰ ὄυσία. 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, *Suasor.* I. p. 2. *Edit. Elzivir*, 1672. LUCAN *Pharsalia*, Lib. V. ver. 619, 620.

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 Bembris, 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 desart 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

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, *Acarnania*, 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.*

that Country, whether King or People; such as Rivers, Lakes, Ponds, Forests, and uncultivated Mountains. <149>

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 For- eigners. 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 Privi- lege 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 con- sequently, 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. pec- catum. part 2. § 8. Dd. in C. cunctos popu- los. C. de summ. Trin. Innoc. & pan- orm in Can. 21. l. de Sent. excomm. Co- varr. ubi supra.

VI. I. 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 Establish-

VI. *In Case of Necessity Men have a Right of using that*

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.

*which others
have a Property
in, and from
whence this
Right arises.*

ment 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.

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.

*Thom. 2. 2.
66. 7. Covarr.
cap. peccatum.
p. 2. § 1. Soto,
l. 5. q. 3. art. 4.*

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

VI. (1) See PUFENDORF, *B. II. Chap. VI. § 5, 6, 7.*

2. DIGEST. *Lib. XIV. Tit. II. Ad Leg. Rhod. De Jactu.* 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.

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 <150> 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. 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

VII. *This holds good, unless where the Necessity is avoidable some other Way.*

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* *Ἐμβρυοθάλαστρον*, 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 *Ἐμβρυοπάκτην*, others *Ἐμβρυοσφάκτην*. 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. § II.

VII. (i) *De Legib.* Lib. VIII. p. 844. Tom. II. *Edit.* H. *Steph.*

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 λάρ, &c. *He thought it convenient to assist Mens Necessities, but not to indulge their Sloth.* And *Xenophon*, in his Answer to the *Sinopenses*, ὅποι δ' ἂν ἔλθοντες ἀγοράν, &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 Obliga-
tion to Restitu-
tion, 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,

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.*

and argue thus, that ¹ whoever makes use of his own Right only, is not obliged to Restitution: Where-<151>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.

Adr. quod lib.
1. art. 2. col. 3.
Cov. ubi sup.

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.

X. An Instance of this Right in War.

Expedit. Cyri.
l. 5. c. 1.

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.*

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. *Men have a Right to use those Things which are another's Property, if thereby there arises no Detriment to the Proprietor.* Sympos. 7.

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*, οὐτε γὰρ τροφὴν, &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. *From hence is there a Right to running Water.*

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*

XI. See PUFENDORF on these *innocent Advantages*, B. IV. Chap. III. § 3, 4.

2. This Passage, tho' distinguished in *Italick* 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, *Unâ ex re satis praecipit [Ennius] ut quicquid sinè 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; quae 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.

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 a⁵ 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* asserted⁷ Water to be *cunctis patentem, open to all Men.* <152>

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

XIII. *The Right of passing Lands and Rivers, explained. Bald. III. Consil. 298.*

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. *Aeneid.* VII. 230.

XIII. (1) *SERVIVS*, on the Passage quoted from the *Aeneid*, 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 [*sic*: in that] 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.

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.

3. Thus too the *Greeks* ⁴ under *Clarchus*, πορευόμεθα δὲ, &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 *Agesilau's* Question, who returning out of *Asia*, and being come to ⁵ *Troas*, asked them whether

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 *DICTYS* of *Crete*, Lib. II. Cap. I. &c.

3. On *Numb. XX. Quaest. XLIV.* This Passage is quoted in the *Canon Law*, Caus. XXIII. Quest. 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*, Τραλλείς, as *PLUTARCH* himself calls them, in the Life of *Agesilau*, Tom. I. p. 604.

they would permit him to pass as an Enemy or a Friend. So *Lysander* to the *Baeotians*, 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*, ⁶ *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 *Lacedemonians*, 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, ⁷ <153> 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 Megarenses? 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 *Agesilaus*, 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.*

Idem. Apo. & Vit. *Lysand.*

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

6. TACITUS, *Hist. Lib.* IV. Cap. XX. Num. 2.

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.

See an Example
in Procopius.
Persic. I. 2.
Plut. in Demet.

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 *Aelians*; 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

10. We have an Example of this Kind in the *Excerpta Legation* 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 Caesar*, 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.

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.

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 Nation¹⁶ from trading with another distant Nation; it being for the Interest of Society in general, and no <154> 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*, πᾶσα δὲ θάλαττα, &c.¹⁸ *Under a good Government, Merchant Ships sail securely on every Sea, in Order to carry on Trade*,¹⁹ *whereby dif-*

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.

17. In his Treatise *De Mari Libero*. Cap. VIII.

18. *De Legat. ad Caium*. p. 998, 999. Edit. Paris.

19. SERVIUS 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 SERVIUS 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.

ferent 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, ἄγριον ὄνγα, &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 οὐ 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,

Πόντου τε ναυστολήμαθ', &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 Country ¹ 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 Coun-

²⁰. *De Aquae & 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.

try, 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 <155> 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 Justice ³ 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, *πραττόμενοι τοὺς, &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 *Aegean* to the *Ionian* Sea, by Land, to avoid going about the Cape of *Malea*: The same did the *Romans* ⁷ require for

1 Kings x. 28.

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.

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. GROTIIUS.

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. GROTIIUS.

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 *Tencterians*, 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 excuse the Payment of Customs, and other Impositions on Goods.

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.*

Chap. de
Dom. l. i. tit.
9. Pereg. de
jure Fisci, c. i.
n. 22. Ang.
Cons. 199.
Zabar. Con.
38. Firm. in
Tract. de
Gabell.

XV. A Right to
stay for some
Time.
Vict. de Indis.
Rel. 2. n. i.

XV. 1. 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 likewise ¹ an innocent Utility. And therefore *Ili- oneus*, 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*, παρὰ τὰ κοινὰ δίκαια, ³ *contrary to the Law of Nations*: So that the *Lacedemonians* looked on it as one of the most just Causes of War.

Thuc. l. i. c.
67. Diod. l. 12.
c. 39.

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

8. *De Constantiâ. 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. *Aeneid. Lib. I. ver. 543, &c.* SERVIUS 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. Chap. 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 adquir. rerum Dominio. Leg. I.* See the following Chapter, § 9.

Shore, relates only to such Structures as are permanent and lasting. To which Purpose is that of the Poet,

*Contracta Pisces aequora sentiunt
Jactis in Altum molibus. <156>*

⁵ *The Fish perceive the Waters of the Sea shrunk, by the huge Piles of Stone that are raised in it.*

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 *Aeneas* 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*, [[³]] pronounced the Cause of *Aeneas* 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*, *Phorbas* and his Companions; the People of *Caria*, those of *Melos*; the *Lacedaemonians*, the *Minyae*; and the *Cumaeans*, some others who came over to them. But when the *Minyae*, after their Reception, demanded a Share

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. l. 1. c. 150. *Paus.* l. 7. c. 11. *Diod.* 5. c. 58. *Herod.* 4. c. 145. *Oros.* l. 7.

5. HORAT. *Lib.* III. *Od.* I. ver. 33, 34.

XVI. (1) See PUFENDORF, *B.* III. *Chap.* III. § 10.

2. *Aeneid.* *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 CRAGIUS, *De Repub. Lacedaem.* *Lib.* III. *Tab.* III. *Instit.* 3. p. 210, &c.

6. *De Offic.* *Lib.* III. *Cap.* VII.

in the Government, what *Herodotus* says of them is very just, ἐξύβρισαι καὶ ποιήσαι οὐκ' ὅσια, ⁷ *They acted insolently, and against all Right and Reason.* And *Valerius*, ⁸ that *They basely requited a Favour with an Injury.*

XVII. *A Right 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 Prusaensis*, οὐδεν ἀδικοῦσιν, &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 hearing, they asked them, whether they could bear to look on those uninhabited Lands, and whether they would not*

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 alledged 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 himself 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 Inconveniences. 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* [*sic: LUCIUS*]] *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 Aeneid. XI. 316.*

3. *Orat. VII.*

4. *Annal. Lib. XIII. Cap. LV. Num. 4. 5.*

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?* <157>

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*

XVIII. *A Right to such Actions as the Occasions of human Life require.*

5. LIVY, *Lib. V. Cap. XXXVI. Num. 5.*

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. *Quaest. 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.

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. *A Right to purchase Necessaries.* Covarr. Var. Res. l. 3. c. 14. ibi, tertio. De Offic. l. 3. c. 7.

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 no Right always to sell their own Commodities.* Molina, Disp. 105. Aegi. Reg. de Act. supern. Disp. 31. du. 2. n. 52. Caes. 1. Bell. Gall.

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 *Belgae* prohibited the Importation of Wine, and other foreign Goods. So *Strabo*, ² speaking of the *Nabatean Arabians*, says, εἰσαγώγιμα δὲ, &c. that *Some Commodities may be imported there, and some not.*

XXI. *A Right to Marriage explained.*

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

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,

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* <158> *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. 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,

XXII. *A Right of doing what is permitted indifferently all Strangers to do.* Vict. ubi supra Rel. 2. n. 2, 3. Judges xx.

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. 1. Cap. IX. Num. 4.*

3. *Idem. Lib. IV. Cap. III. Num. 4.*

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.*

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. 105.

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. *Whether a Contract made with a People to oblige them to sell their Commodities to those*

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

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.

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. <159>

*only with
whom they
have bar-
gained, and not
to any others,
be lawful?*

2. This will be treated more fully in *Chap. XII. § 16.* of this Book.

*Of the original Acquisition of Things;
where also is treated of the Sea and Rivers.*

I. *Original Acquisition made by Division or Seizure.*
Ch. 2. § 2.

I. The 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.

II. *Other Means of*

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

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.

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.

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.

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,

IV. Possession is double. Jurisdiction and Property. The

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 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.

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

*Distinction
explained.*

as to what belongs <160> 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*

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 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,—& de voir aussi si c'est un moyen primitif & 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 anteriour 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. Caesar 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*

Dominions; but yet every Man has his distinct Property. Dion Prusaeensis thus, ἡ χώρα τῆς πόλεως· ἀλλ' οὐθὲν, &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 as-<161>igned to a Colony were not*

which they remit to their Governors, and other Officers acting under them, and from which they receive their yearly Revenue. De Plant. Noë. (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, (πᾶν τὸ κράτος) 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. Th. 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 be, and the Jurisdiction in that Case is merely local.

7. Page 25. Edit. Goës. The last Words of this Passage, as quoted by our Author, are, *Sed Jurisdictio in agris, qui adsignati 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 adsignati 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

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 Haloneso*, calls those Lands that were possessed by the People of the Country, ἐγκτήματα, but those that belonged to Foreigners, κτήματα.

V. *The taking
of Things
moveable may
be hindered by
a Law.*

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

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 Agrariâ*, in 1674, reads *cis agros*. This Conjecture comes nearer to the Manuscripts; and the other forms a Sense not conformable to Truth, as that learned Commentator has shewn against SALMASIUS, 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. Ἐγκτήματα. Κτήματα. The Passage runs thus, *They (the Cardians) pretend that they inhabit their own Land, and deny it to belong to you. They likewise affirm, that your Lands are ἐγκτήματα, as lying in the Country of others; and that those by them possessed, are κτήματα, 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.*

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. ¹ 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.

VI. Upon what Right the Property of Infants and Madmen is founded.

Gal. iv. 1.

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

VII. Rivers may be held in Property.

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

discharge themselves be within our Territory, but they join to both, or to the Sea. It is <162> 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 for-
merly in Coun-
tries 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

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.

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.

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, κοινὸν 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*

2. *Lib. II. Tit. I. § 1.*

3. *DIGEST. Lib. VIII. Tit. IV. Communia praediorum, &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 *Quaedam naturali jure communia sunt omnium; quaedam publica*, we ought to read, *Quaedam naturali jure communia sunt omnium, quae 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,

⁶ to all Men by the Law of Nature, and others which are only publick: 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*, Φυσικῶ μὲν οὖν δικαίῳ 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*

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, *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 adquir. 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 informs us, could not be done without the *Praetor'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 Praetor 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 <164> let into the Land of some private Person, as

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.

12. DIGEST. *Lib. XLI. Tit. I. De adquir. rerum Dominio*, Leg I. The Term here used by GROTIUS, is *Praetor*, and the common Reading in the Place quoted is *decretum Praetoris*. 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 primae 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. praescript. &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 *straightening 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

L. 9. c. i. 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 Basons, 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

raised several magnificent Works at Baiae, in Honour of his Relations, and Ponds of a stupendous Bigness, by letting in the Sea. LAMPRIIDIUS, 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 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. *Πρόθυρα.* See LEONIS, *Novell.* LVII. CII. CIII. CIV. MICHAEL ATTALIATES, *Pragmat.* Tit. XCV. HARMENOPULUS, *Prochir. Jur.* Lib. II. Tit. I. § *περὶ προθύρων.* See also CUJAS, *Observ.* Lib. XIV. Cap. I. GROTIUS.

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, by⁸ 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. 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

XI. *Such a Property may be had, and how long it may endure.*

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.*

to an Edifice built on the Shore, and Fishing in the Turning of a publick River. <165>

XII. *Such a Property can give no Right of obstructing an inoffensive Passage.*

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. *That there may be a*

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

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 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 TOULLIEU, *De Luitione Pignoris, & Rebus morae 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 *Halonesos*, 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. *Praef.* ver. 7, 8.) Hence it is that the *Roman* Authors, as SALLUST, 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. Wass.* 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 *Hellespont*, the *Egean*, *Pamphylian*, and *Aegyptian 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 antient 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 I *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. 1.*) 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 Aedific. Justinian. Cap. II. de Augustaeo*). *Constantine Monomachus*, Emperor of the East, is stiled *Lord and Master of the Earth and Sea*. (JOANNES, *Episcop. in Euchait.* p. 51.) The *Egean* Sea is reckoned among the Provinces of the *Roman* Empire. (CONSTANTINE *Porphyrogon. Lib. I. Them. XVII.*) The antient *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 *Uscochi*. The Bounds of the Kingdom of *Sweden* are in the Middle of the Streights of *Oresand*. 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 Judaeis. Cap. XVII.* BALDUS, on the Title of the *Digest. de rerum divisione*, Col. II. AFFLICTUS, on the Title *Quae 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 alledged 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. Jurisdiction 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

think, that that Law <166> 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 that² neither People should permit the Enemies of the other to pass, διὰ 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 θάλασση ὅσα ἂν κατὰ τὴν ἐαυτῶν καὶ κατὰ τὴν συμμαχίαν. So *Dion Cassius* said,⁴ θάλασσαν, τὴν τῶν ῥωμαίων πάσαν, *Every Sea that belongs to the Romans*. And *Themistius* speaking of a *Roman Emperor*, τὴν γῆν καὶ θάλασσαν ὑπήκοον ἔχων, *Having both Land and Sea subject to him*. So *Oppianus*⁵ to the Emperor,

Σοῖς μὲν γὰρ ὑπὸ σκῆπτροισι θάλασσα εἰλείται.

The Seas roll under thy Scepter. So *Dion Prusaensis*, in his second Oration to the People of *Tarsus*, among the many Privileges that were granted by *Augustus* to that City, mentions, ἐξουσίαν τοῦ ποταμοῦ τῆς θαλάττης τῆς κατ' αὐτὴν,⁶ *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

Jurisdiction over Part of the Sea, and how.
Bossius. tit. de Aquis. n. 36. allegans Bal. Caepoll. & al. See *Cod.* l. 11. tit. 12. *De Classicis.* Leg. unic.

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. *Halieutic.* *Lib. III. ver. 4, 5.*

6. *Orat. II. ad Tarsenses, § 34.*

7. *Aeneid.* 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 εἰσω θάλασσα.* 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.)*

the People of *Marseilles* took abundance of Prizes, when in their Engagements at Sea, *They conquered* τοὺς ἀμφισβητούντας τῆς θαλάσσης ἀδίκως, *those who unjustly disputed the Dominion of the Sea with them.* And that ¹⁰ *Sinope* commanded the Sea among the Cyaneae Islands. <167>

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 ¹¹ 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. *A Duty upon some certain Occasions may be imposed on those who go by Sea.*

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

10. *Lib. XII. p. 821. Edit. Amst. 545, Paris.*

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.)* CAESAR, speaking of the *Veneti*, the antient People of *Vennes*, observes, that *Tho' 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.*

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. 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 XV. Of Treaties which forbid some People to pass

(p. 350. *Edit. Elziv.*) As to the Quantity of Customs, see CAMBDEN'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. II. 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, Δεκαευντηριον. 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 *Thrasibulus* 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 Aeschin. Ed. Basil.* GROTIUS.

See also XENOPHON, *Hist. Graec. 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. Olear.*

beyond certain
prescribed
Bounds.

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 *Cymon's* <168> Time, that no *Median Ship* of War should sail between the *Cyaneae* and the *Chelidonian Islands*, and between the *Cyaneae* and *Phaselis* ³ after the Battle at *Salamin*. In the one Year's Truce of the *Peloponnesian War* ⁴ it was stipulated, that the *Lacedemonians* should not send to Sea any Ships of War, or Ships of

2. This is that famous Treaty of Peace, *εἰρήνη περιβόητος*, 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 DIODORUS SICULUS, *Lib. XI. (Cap. XLI.)* ISOCRATES takes Notice of this Treaty in his *Penathenaic.* (p. 244. *Edit. H. Steph.*) GROTIUS.

This *Equi cursus*, ἵππου δρόμος, 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 ἵππου δρόμον ἡμέρας. *Orat. Panath.* p. 294. Tom. I. *Edit. Paul. Steph.* See also his Oration in praise of *Rome*, p. 349. where we read ἵππου δρόμος ἡμερήσιος ἐπὶ 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 ἵππου 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 (*Sect. III. Cap. III. p. 113.*) confounds ἵππικὸς δρόμος with what PLUTARCH elsewhere calls ἵππικόν, *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.*

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

Appian in Illy.
p. 760. Edit.
H. Steph.

5. POLYBIUS, *Lib. III. Cap. XXII.*

6. SERVIUS, on *Aeneid. 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 Virtue 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 *ἔξω τοῦ Λισσοῦ*, *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*, *Massia* and *Tarsejus* are omitted in CELLARIUS's antient Geography; an Omission which may be supplied by consulting BOCHAT, *Phaleg. Lib. III. Cap. VII.*

8. LIVY, *Lib. XXXVIII. Cap. XXXVIII. Num. 9.*

such Ships as should carry Tribute, Ambassadors, or Hostages of War. <169>

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. *Whether if the Course of a River be changed, it alters the Territory, explained with a Distinction.*

XVI. I. 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, which² *Florentinus* the Lawyer calls

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 Praediorum, &c. Leg. XIII.*

XVI. (1) FRONTINUS, *De Agrorum Qualitatibus.* p. 38. *Edit. Goës.*

2. DIGEST. XLI. *Tit. I. De adquirendo rerum Dominio. Leg. XVI.*

limited,³ because it is inclosed by Limits made by the Hands of Man: Another is⁴ *assigned in Gross*, or comprised within some certain and determinate Measure, as⁵ Hundreds, suppose, and Acres: And a third

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, *Jugerum*, 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 re-

is *arcifinious*, <170> 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

fused them likewise to a People, in Regard to such Lands as had been given them 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 Verses 7, and 28.

6. *FRONTINUS*, p. 38. But *SICULUS FLACCUS* 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 Sarmatae and the Dacians, either by their mutual Fear, or by Mountains.* *De morib. Germ. Cap. I. Num. I.* *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.

Aggenus Urbicus stiles 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.

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, ποταμοῦ τὴν χώραν ὀρίζοντος, *The River bounding the Country.* And *Xenophon* ¹³ calls such a River simply, τὸν ὀρίζοντα, *The Bounder.*

See *Joan. And.*
and others,
cited by
Reinkink, 1. 1.
class 5. c. 1.

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-<171>to a Bull and a Serpent) was

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 *Vedassus*, (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* σύνοπος, 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 ὀρίζων; which may have been its proper Name, on the Account of its serving as a Boundary.

Strabo. l. 10.
p. 703. *Ed.*
Amst. (458, *Ed.*
Paris.)

the Occasion of frequent Wars between the *Etolians* and *Acarmanians* 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 *Aetolians*.

XVII. *What*
Judgments must
we make if the
Channel be
quite altered?

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.

See *Digest*. l.
43 tit. 20. *De*
Aqua quotid.
& astiva. 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

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 *Vardarus*) 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.

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 gen-
eral 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

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 Lusoriae*, on them. See SALMASIVS, on VOPISCUS, *Vit. Bonosi*. 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.*

Property; if not, as ⁴ the Right of a Vassal upon the Right of his <172> Lord; or the Right of a ⁵ Tenant, upon the Right of him who owns the Farm; however, by some slighter 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*

4. See *Note 4.* on PUFENDORF, *B. IV. Chap. VIII. § 12.*

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. Ante-Justin.* *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 CUJAS'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 Benef.* which, it is well known, has but seven Books. As to what concerns the Thing itself, see *B. I. Ch. III. § 16.*

conditionally such. So *Dion Prusaeensis*, ⁹ μυρίους γὰρ εὐρήσετε τρόπους, &c. *There are many Ways, and those very different, by which Things are said to belong to one; so that sometimes he to whom they belong can neither sell nor dispose of them as he pleases.* And in *Strabo* ¹⁰ we meet with, κύριος ἦν πλὴν τοῦ πιπράσκειν, *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 So-<173>ciety or superior Master. And even

9. *Orat. Rhod.*

10. *Lib. XII. p. 558. Edit. Casaub.*

11. From a Passage in the Close of the second Book of the *Odyssey*, 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,

——— *Χηρωσται δὲ διὰ κτήσιν δατέοντο.*

Ver. 158.

For by *Χηρωστής* 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 *Odyssey*, 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.

Κτήματα γὰρ κεν πάντα δασαίμεθα· οἰκία δ' αὖτε

Τούτου μητέρι 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 Af-*

the Civil Law, without this Reason, may establish such a Right; as we¹² have already hinted.

fliction. Then follow the Words in Question. The Word *Χηρώσται* 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 DACIER indeed thinks the Word *Χηρώσται* 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 dévoreroient déjà des Yeux, & auxquelles elle n' étoit pas Destinée*. That is, *In an Affliction and Mourning, which was encreased 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.

——— 'Ο δ' οὐ βιότου ἐπιδευῆς
Ζῶει, ἀποφθιμένον δὲ διὰ κτήσιν δάτεονται
Χηρώσται

Theogon. ver. 605, &c.

That Lady indeed makes the *Χηρώσται* 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.

12. See the foregoing Chapter, § 4, 5.

*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

I. *Why Usucaption or Prescription, properly so called, has nothing to do among different People or their Sovereigns.*
Controv. Illus.
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 antient *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 Usucaptionibus, &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*

States; which seems true ³ enough, unless the ⁴ <174> 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.

against a foreign Possessor. Adversus Hostem aeterna 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.

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

II. For in the Holy Scriptures, when the King of the *Ammonites* demanded of *Jepthah*, 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 καὶ τὰς ἰδιὰς καὶ τὰς κοινὰς, ἣν ἐπιγίνεται πολὺς χρόνος, κυρίας καὶ πατρῶας, ἅπαντες εἶναι νομίζουσι.* And the same *Isocrates*, writing to *Philip*, *Κάτοχον καὶ βέβαιον τὴν κτήσιν πεποικηκότος τοῦ χρόνου.* *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*,

II. But even among these long Possession is frequently urg'd as a Right. Judges xi. 14, &c.

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. *Vindiciae Grotiani Dogm. de Praescript. inter Gentes liberas, &c.* § 47.

II. (1) *Orat. Archidam.* p. 121. *Edit. H. Steph.*

Our Author quotes the next Passage, as belonging to *ISOCRATES*, *Orat. ad Philip-pum.* 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.*

the reviving of ⁶ old Pretensions. And *Diodo*-<175>*rus*, ⁷ *Μυθικὰς 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. *The Reason inquired into, from the Conjectures of a Man's Will and Intention, which Conjectures are derived not from Words only.*

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, ¹ 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

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*, καὶ ταῦτα δὴ τὰ πρὸ Ἐυκλείδου ἀνυποστόλως ἀνακινῶν. *He was not ashamed to go and seek for that which was before Euclides*.

This *Euclides* was *Archon* at *Athens*, soon after that Office was introduced. Our Author might have shewn the Use of this Proverb from more antient Writers; such as *LUCAN* in *Cataplo*, Tom. I. p. 426. and in *Hermotimo*, p. 563. *Edit. Amstel*. The learned *CASAUBON*, in his Remarks on *ATHENAEUS*, 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.

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.

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, ¹ 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 [[sic]] or
Deeds done.

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. § II.*

2. *DIGEST. Lib. XIV. Tit. II. De Pactis, &c. Leg. II. Princip.* and § 1. See *PUFENDORF, 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. & praesumptionibus, 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. haeredit. Leg. XCV.*

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-^{<176>}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 שׁוֹמֵר.

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 II, 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

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 Praetor.* Leg. III. and JAMES GODEFROY's Commentary on it, in his miscellaneous Dissertations.

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 ULPIAN, says he, does not speak of a Man's having or not having Hopes of recovering what he has

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.*

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

*Thomas I. 2.
Qu. 97. Art. 3.*

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.

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 Foenore & 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

tolerates and connives at it. <177> 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.

Suarez. l. 7. de
Legib. c. 15.

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 one ⁶ forbears to act through mere Ignorance, it can have no Effect:

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 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. THOMASIIUS, *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 BARTHOLSOCIN, *Consil.* CLXXXVII. Col. 8. MEISCHREN, *Decis. Cameral.* IX. Num. 113. Tom. III. GROTIUS.

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 protest his Right, or, which is better, appeal to proper Judges or Arbitrators.

VI. *How Time joined with Non-Possession, and with Silence, conduces to the Conjecture that the Right to the Thing is quitted.*

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

VII. *That a Time exceeding*

VI. (1) I have shewn in the second Edition of my PUFENDORF, *B. IV. Chap. XII. § 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. & aestivâ*, 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

the Memory of
Man is com-
monly sufficient
for such a Con-
jecture, and
what such a
Time is.
Menochius, 1
Cons. 90. Eus-
tath. in Iliad. I.
I. v. 250.

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 <178> 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

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 in-

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 Praescriptionibus*; and COVARRUVIAS on the same Subject; as also REINKING, *Dict.* Lib. I. Class V. Cap. XI. Num. 40. Concerning *Time immemorial*, see the learned ANT. FAUKE, *Consil. pro Ducatu Montisferrat.* GROTIUS.

3. This is what JUSTINIAN calls *Ἀιώνος μᾶλλον ἥπερ χρόνου*. 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 *Aegypt*, 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 Aegyptiacae*, 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.

clined 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.

Objection, that no one is to be presumed willing to abandon or throw away what he has got.

2. 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,

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 *bonâ 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 Expiration 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 for easing him of too ⁵ large and troublesome a Province, by contracting his Do-<179>minions. Among several bright Passages in *Lucan*, ⁶ this is none of the least beautiful.

*Tantone Novorum
Proventu scelerum quaerunt 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 (Caesar 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

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 Desart 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 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.*

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* [[⁹]] says in *Thucydides*, ὅπερ ἐδέξατο σχῆμα τῆς πολιτείας, τοῦτο συνδιασώζει, *preserves the same Form of Government as was delivered down to him*; which *Isocrates* terms, τὴν παρούσαν 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.

7. (CICERO, *De Offic.* Lib. II. Cap. XXIII) Thus at *Athens*, when the Peace was concluded, *Thrasybulus* left the Possessions as he found them. GROTIUS.

I know not where our Author found what he says of *Thrasybulus*. 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. Graec.* Lib. II. *in fine*. DIODORUS SICULUS, *Lib. XIV. Cap. XXXIV.* AESCHINES, *Orat. de falsâ 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 *Thrasybulus* did.

8. This Saying is recorded by MACROBIUS, with several others of the same Emperor, and the learned GRONOVIVS has not failed of pointing out the Place. *Saturnal.* Lib. II. Cap. IV. p. 334, 335. *Edit. Jacob Gronov.*

9. [[The footnote number is missing in the text.]] 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.

Aug. de Clavasio, in Summa.
verb. *Inventa.*
Crantz Saxon
l. II. n. 10, 13.

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.* <180>

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.*

IX. (1) NICEPHORUS GREGORAS reports, that the *Greek* Emperors had given the City of *Phocaea* 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. XII. § 4.

4. Lib. XXXV. Cap. XVI. Num. 7, 8, 9.

5. *Idem.* Lib. XXXIV. Cap. LXII. Num. 13.

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.

X. Whether Persons not yet born, may not, in this Manner, be deprived of their Rights.

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 intro-

X. (1) See PUFENDORF, *B. IV. Chap. XII. § 10.*

2. When he who would have transmitted his Right to his Descendents, 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.*

duced and fancied, that *The Law personates* ⁴ *those who are not yet in Being*; and by this Means pre-<181>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 Rea-

C. *Possessor.*
p. 3. § 3. *Spec.*
tit. *de feud.*
§ *Quoniam.*
ver. 3. *quaeri-*

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 adquir. 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.

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 *Praescriptio 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. *Fuig.*) as also ANDREW GAILL. *Observ. Practic. Lib. II. Obs. 159.*

sons, extends to the Rights of ⁸ *Majorasgo*, 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.

tur. See Chass. de Cons. Burg. Des maines mortes § 6. ver. par An & par Jour. Cravet. de Antiq. temp. p. 4. § Materia, n. 90.

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* ¹ *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

XI. That even the Right of Sovereign Power may be obtained either by a King or by a People by long Possession.

8. *Majorasgo*. 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.

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. <182>

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

XII. 1. It is also worth our While to enquire, whether those Laws ¹ 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 we ² 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,

3. See VASQUEZ, *Controv. illustr.* Lib. I. Cap. XXIII. § 3. Lib. II. Cap. LXXXII. § 8, 9, &c. as also PANORMITAN, *Lib. I. Cons.* LXXXII. and PEREGRINUS, *De Jure Fisci*, Lib. VI. Cap. VIII. § 10. GROTIUS.

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.

and by Reflexion, as he is a Member of ³ 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 Matter ⁴ 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

antiqu. p. 4.
versic. *Materia*
ista n. 62. *Ant.*
Corset. de exc.
reg. q. 104.
Balb. de Prae-
scrip. 2. p. 5.
pr. q. 2. *Castal.*
de Imp. q. 53.
Covar. in C.
peccatum, De
reg. Jur. in 6.
p. 2. § 9. in
fin.

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 SEYSSEL*, *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. *BODIN*, *De Repub.* Lib. I. Cap. 8. And *REINKING*, I. *Cap.* XII. *GROTIUS*.

4. See *Chap.* XIV. of this Book, § 5.

Sovereignty itself, but only the Manner of holding it: Which Distinction we have spoken of somewhere else.

XIII. *These
Rights of Sover-*

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

XIII. (i) The Author here employs the Distinction made by the scholastick 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 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. THOMASIVS 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, *Quae 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. THOMASIVS'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

it, or at least be <183> 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.

eignty that may be separated from it, or be communicated to others, are gained and left by Usucaption or Prescription. Covar. C. Possessor. p. 2 § 21 n. 12, 13.

XIV. I. 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 ¹ 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, ² *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,*

XIV. *The Opinion that Subjects may at any Time assert their Liberty, refuted. As Vasquez, Controv. illust. l. II. c. 82. n. 3.*

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 Praescriptione 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.*

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, ³ *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* <184> *like Madmen and Desperadoes, and not like Lovers of Liberty.* And 'twas this very Answer that Cyrus ⁴ 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. *Those Rights which*

XV. As for those Rights, ¹ which are not daily exercised, but only once, and when it is convenient, as the *Right of recovering a* ² *Pledge by paying;*

3. *Ibid.* Lib. VI. Cap. XXV. We find almost the same Words in the Count *De Blanderatè's* Speech to the *Milanese*. RADEVIC, *Lib. I. Cap. XL.* GROTIUS.

4. *Cyroped.* Lib. III. Cap. I. § 6, 7.

XV. (i) The late Mr. HUBER, in his *Praelectiones 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 redemand 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 merae 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, *Quae sunt merae 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, insomuch 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 merae 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. THOMASIVS observes, in his Notes on this Place; and as is shewn also by Mr. DE TOULLIEU, my very much honoured Colleague, in a learned Dissertation, *De Luitione Pignoris, & Rebus merae 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 merae 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. THOMASIVS, (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 GALLIUS, *Observat. Practic.* Lib. II. Cap. LX. Num 9. To return to Mr. HUBER, one of the Instances by him alledged 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

consist in a
bare Power of
doing such or
such a Thing,
are never lost
by Time. This
explained.
See Parut. hist.
Venet. l. 7.

as also <185> 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,

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 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 Praescript. 30. vel 40. Ann. BACHOVIVS, De Pignorib. & Hypoth. Lib. V. Cap. XX. VINNIUS, Select. Quaest. Lib. II. Cap. XXVI. JAC. GOTHOFRED, in Cod. THEODOS. Tom. I. p. 255. J. VOET. in. Tit. D. De Pigneratitia Actione, Num. 7. HUBER, in Tit. D. Quibus modis Pignus vel Hypotheca solvitur, Num. II. with the Notes of Mr. THOMASIVS, &c. but above 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 merae 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 alledges 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.*

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.

4. See Note 2. on this Paragraph.

*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. *The Right of
Parents over
Children.*

I. We 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,

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 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 Palaeologus* and *Irene*, observes that,

the Father's Authority is to be preferred in Regard to the Dignity of the Sex. <186>

II. 1. And here in Children, three Seasons are to be carefully observed and distinguished. The first Season, that τοῦ βουλευτικοῦ ἀτελοῦς, 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 ἂν μὴ χωρισθῇ, 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 Aeschylus's Opinion and Observation, *Aetas 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.

II. A Distinction of Seasons in Children; where too of Children's Property in Things.

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. XI.VII. De Patriâ Protestate*, 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. Poenitential. Cap. VI. § 2. GROTIUS.*

5. The Author quotes this Passage in *Latin* only, according to his own Version of it, in the *Excerpta ex Tragoed. & Comoed. Graecis*, p. 34. In the Original it stands thus,

——— Τὸ μὴ φρονεῖν γὰρ, ὥσπερ εἰ βοτὸν,
τρέφειν ἀνάγκη (πῶς γὰρ οὐ;) τρόπῳ φρένος.

Coephor. (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.*

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 κτήσει, 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 <187> 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

6. *Jus ἐν κτήσει, 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 Conversation, 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.*

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.

IV. *Of the Right of Chastising Children.*
Ch. 20. § 7.

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 ¹ sell him too, if there be a Necessity for it, and no other Way of maintaining him; as it was authorized ² by

V. *Of the Right of selling Children.*

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. AELIAN, *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*

an antient Law of the *Thebans*, (which *Aelian* mentions in his second Book) who had borrowed it from the *Phoenicians*, 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. *Of the Season past Childhood, and when Children go out of the Family.*

VI. In the third and last Season, the Child is altogether *αὐτεξούσιος*, 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. *A Distinction of the natural and civil Power of Parents.*
Numb. xxx. 2, &c.

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

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.

House. Thus the *Roman* Citizens had a <188> 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 *Epictetus's* Manual, οἱ δὲ παλαιοὶ 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.

Lib. *De Praeceptis Regis*, Praecept. vetante 242.

VIII. 1. That Right over Persons which arises from Consent, is derived either from Association or Subjection. The most natural Association is

VIII. *Of the Husband's*

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.*

*Right over his
Wife.*
Eph. v. 23.

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 Con-
finement to
one, are Essen-
tial to Mar-
riage from the
Law of Nature*

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*

VIII. (1) Concerning this whole Matter, consult PUFENDORF, who treats of it at large, *B. VI. Chap. 1*, 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.

and Horses; where the *Hebrew* Interpreters remark,³ that the King was allowed eighteen Wives or Concubines; and GOD <189> observes to *David*, that he had given him⁴ several Wives, and those too Women of Note and Quality.

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 the⁵ 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, as⁶ *Tacitus* relates, was formerly proposed to the Priests, *Whether she who had con-*

or only from
that of the Gos-
pel.

Deut. xxi. 15.

— xvii. 16, 17.

2 Sam. xii. 8.

Deut. xxiv. 4.

3. See SELDEN, *De Uxore Hebraicâ*, Lib. I. Cap. VIII.

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. Ebraeorum*. 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.*

Matt. v. 32.
— xix. 9.

ceived, 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

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, Παρεκτός λόγου πορνείας, ἐκτός, 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. *Παρεκτός λόγου 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 ἐπὶ πορνείᾳ*, as it is in the common Editions, we read *μὴ ἐπὶ πορνείᾳ*, 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 GELLIUS, *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 early 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 *Μοιχᾶσθαι* 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 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. ii. 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 *μοιχᾶται*, which is rendered *committeth Adultery*; but which ought to signify the same as *ποιεῖ μοιχᾶσθαι*, *maketh her commit Adultery* in the parallel Text of the same Evangelist, according to the Stile 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

his Wife, <190> except for Adultery, and him who marries her, guilty of Adultery. And his Apostle and Interpreter, St. *Paul*, not only gives
 1 Cor. vii 4. the Husband Power over the Wife's Body, which in the State of Nature also was allowed him, (ὁ γὰρ μὴνύμενος, &c. *For he who is joined to a Woman, is, by the Laws of Marriage, <191> 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 reestablished that which GOD the Father at the very Creation
 Mark x. 6. 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 <192> is best, and most

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. *Oneirocrit.*

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 Loose 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. Basil.) GROTIUS.

10. Several wise Men of Antiquity have likewise preferred the Marriage of one Man to one Woman to Polygamy. EURIPIDES maintains, that *It is not decent for one Man to command two Wives*; and that, *Whoever 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*

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, *Gen. ii. 24.* *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

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 our selves 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. 1. § 15.* and Note 3. on § 17.

II. 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. GRATIAN 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

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 the¹³ *Persians*, and the¹⁴ *Indians*.¹⁵ Among the¹⁶ *Aegyptians*, the Priests alone took up with one Wife. And among the *Greeks*, <193> *Cecrops* was the first, as *Atheneaus* testifies, who *μίαν ἐνὶ ἑξέεσσι*,¹⁷ *coupled one Woman with one Man*; which tho', by the By, was not long observed, even at

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 BRISSON, *De Regno Persarum*, Lib. II. 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 Aegyptians 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 *Aegyptians*, in his second Book. But then he tells us the direct contrary; for, having spoken of the *Aegyptians*, who live beyond the Marshes, he remarks, that *Those who lived in the Marshes observe the same Customs as the other Aegyptians; 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.

17. ATHENAEUS, *Lib. XIII. Cap. I.*

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 [[²²]] in so doing.

X. I. 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 Tur-

X. *By the Law of Nature only. Marriages are not void for want of the Consent of Parents.*

18. See his Life in DIOGENES LAERTIUS, *Lib. II. § 26. Edit. Amst.*

19. As EURIPIDES, quoted by AULUS GELLIUS, *Noct. 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. Syllburg.)* VALERIUS MAXIMUS, *Lib. II. Cap. I. Num. 4.* AULUS GELLIUS, *Noct. Attic. Lib. IV. Cap. III. and Lib. XVII. Cap. XXI. and their Commentators.*

21. AULUS GELLIUS, *Noct. Attic. Lib. X. Cap. XV.*

22. [[The footnote number is missing in the English text and has been restored from the Latin.]] 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. Quaest. 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 PITHOU, this Passage is restored to its true Author, from the antient 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*, Quaest. XLVII. in *Genes.*

X. (i) 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

Ch. II. of this
Book.

pititude 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 <194> Law of Nature, but the mere Will of the

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, *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*.

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.

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*

*Cod. l. 5 tit. 4.
De Nuptiis,
Leg. 20.*

vii. 36.

*Gen. xxix. 7, 8.
— xxxvi.*

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. Quaest. 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 CUJAS, *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. Quaest. 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.* MUSAEUS, (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

*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. *By the Evangelical Law, Marriages with another Woman's Husband, or another Man's Wife, are null and void.*

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 contracted² 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. *By the Law of Nature the Marriages of Parents with their Children*

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 Mar-

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 Inconveniencies 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.

riages are unwarrantable, in the Manner <195> 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

are unwarrantable and void.

XII. (1) We may be convinced of this, on reading the subtile 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 *Tractatus Moralis de naturali Pudore, & dignitate Hominis; in quo agitur de Incestu, Scortatione, Voto coelibatus, Conjugio, Adulterio, Poligamia, & Divortiis, &c.* Tom. I. of his Works, printed at Rotterdam in 1680. See also a Dissertation by Mr. THOMASIIUS, *De fundamentorum definiendi causas matrimoniales hactenus receptorum insufficiencia*; 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? Quaest. Rom. Quaest. 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. Quaest. I. Can. 1.

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.

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 *ἐπίκληροι*, 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 <196> therefore, there is no Room to doubt, are

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 FORTUNATIANUS, (*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 *Adelph.* 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.

unwarrantable, and *ipso Facto* void, because the Effect of them is attended with a perpetual Crime.

3. Nor ought we to be any ways influenced by *Diogenes's* ¹⁰ and *Crypsippus's* Argument, 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 Beginning of this Work, it is enough to repute a Thing unwarrantable, if it be repugnant to human Nature. And such is the Conjunction of Parents with Children, which *Paulus* the Lawyer calls ¹¹ *An Incest, according to the Law of Nations*: 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 Ephesus* very well observes, is, *Τὸ παρὰ τοῖς πλείστοις καὶ ἀδιαστρόφοις καὶ μετὰ φύσιν ἔχουσιν, practised 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 ἀμέτρους ἐπιθυμίας, ἀκατασχέτους ὁρμᾶς, ἀνοσιωπάτας ἡδονὰς, unnatural and immoderate Lusts, unbridled Passions, most impious*

B. I. Ch. I.
§ 10, II.

10. See PLUTARCH, *De Stoicorum repugnantiis*, p. 1044, 1045. Tom. II. Edit. Wech.

11. DIGEST. Lib. XXIII. Tit. II. *De ritu Nuptiarum*, 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 horrible 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 EURIPIDES, *Hermione* speaks of this Custom as generally 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, *Prooemium*, § 7. Edit. Amst. with the Notes of his Interpreters: As also QUINTUS CURTIUS, Lib. VIII. Cap. II. Num. 19. and the Note of PRITISCUS on that Place; who mentions a great Number of Authors speaking on the same Subject.

14. MICHAEL EPHEUS, 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.

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 Prusaeensis very judiciously ascribes this Custom of the Persians in particular, to their bad Education.

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 disproportionate, 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 naturally shew such an Abhorrence. For many have been of this Opinion; and *Arnobius*, 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 it in *Oppianus, Of*

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. Gentes, 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

Hunting, B. I. 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

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.*

Case fell on the Groom; from which the Historian concludes, that *Even Beasts have some Knowledge of the Degrees of Kindred*. 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

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, Eph. ii. 14. 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, 1 Cor. v. 1. *It was a Fornication not so much as named amongst the Gentiles.* The Truth of which Assertion, among ² several other Proofs, appears

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 Tragoed. & Comoed. Graecis*. p. 918, has given a good Version of the Law in Question, expressed in Verse by an antient Poet unknown,

‘Ο παισὶν αὐτοῦ μητρὶν ἐπεισάγων,
Μήτ’ εὐδοκιμείσθω, μήτε μετεχέτω λόγου
Παρά τοῖς πολίταις ———

from *Charondas's* Laws, <198> which put a Mark of Infamy upon such a Marriage; and from that Passage in *Lysias's* Oration, *Συνώκει ὁ πάντων σχετλιώτατος 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,

Orat. pro
Cluentio. (c. 6)

Vit. Demetr.
Appian, De
Bello Syriac.

Thalamos ausum incestare Novercae,

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.

*Natis Novercam si quis induxit suis,
Expers honorum vivat atque inglorius
In Civitate*——

Let the Man who sets a Mother-in-Law over his 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, *STOBAEUS* thus expresses the Law of *Charondas*, in Prose, *Ὁ μητρυνὴν ἐπιγαμῶν, μὴ εὐδόξειτω· ἀλλ' ὀνειδιζέσθω, ὥσπερ αἴτιος ὢν οἰκείαις διαστάσεως. Sermon. 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 πιγῆμης τοῖς δὲ μητρυνὴν τέκνοις
Alcest. ver. 305.

Our Author here quotes *LYSIAS* instead of *ANTIGONUS*, who has those very Words, in *Orat. I. p. 235. Edit. Wech. 1619.*

More
Nebochim l. 3.
c. 49.

3. The antient *Hebrews*, who in this Matter are no contemptible Expositors of the Divine Law, and after them *Moses Maimonides*, who has read, and with great Judgment digested all their Writings, say, that there are two Reasons assignable for those Laws, mentioned in the xviith 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 <199> every Child immediately represents.

3. PHILO the Jew says on this Occasion, *Tho' the Parts are divided, they retain the Right of Fraternity, and are joined by Relation as a natural Tie.* GROTIUS.

The Passage stands thus in the Original, Ἀδελφὰ δὲ, εἰ καὶ διαίρετα τὰ μέρη γεγόνασιν, ἀλλ' οὖν ἀρμόζονται 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.*

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 Granddaughters, 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 administring 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

5. But this Tradition of Precepts delivered to *Adam* or *Noah* is very uncertain, as I have already observed elsewhere.

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.

See *Cajet.* in
Matt. xix.

6. *Michael Ephesius*, at the fifth Book ⁷ of the *Nicomachia*, has these Words, concerning the Marriage of Brothers and Sisters, Τὸν ἀδελφὸν μίγνυσθαι 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 *Aegyptians*; and *Dion Prusaensis*, 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

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 Aegyptians, 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.

Matches, Μηδαμῶς ὄσια καὶ θεομισῆ, ¹⁰ *Unlawful, and detested by GOD.* <200>

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, ¹¹ 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. 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 Daugh-

XIV. *Marriages with Relations of a more distant Degree, do*

10. PLATO adds, καὶ αἰσχρῶν αἰσχισα, *And the 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 *De 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 Consession 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

not seem so
unwarrantable.

ter, 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. Isaëus*,⁴ and *Plutarch*⁵ in the Life of *Lysias*,

from the Patriarch's own Words, *Genesis* xx. 12. on which see Mr. LE CLERC. In SÆTONTIUS'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, ἀδελφιδὴν, 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. CEDRENUS, 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 *Iscah*, 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 *Iscah* 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 *Archimedes*, 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 Neaeran.* 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. Graec.* Lib. IV. Cap. XI. where he likewise observes, that at *Lacedemon* Marriages with collateral Relations, in the second

observe, that it was allowed of at *Athens*. The <201> 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

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 *Lysias* married the Daughter of 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.

Exod. vi. 20.
Eust. in Iliad.
I. 12. v. 224.
Id. in Odys. I.
7. v. 146.

See Euripides's
Electra, v. 312,
313.

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.

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

8. *De Civit. Dei*. Lib. XV. Cap. XVI. The Poet AESCHYLUS, speaking of the *Danaids*, 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, *Paenul.* (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 *Arcadius* 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 Nuptiae 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 CASSI-

Cousin-Germans to marry, <202> 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 *Eliberis*, 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.

ODORUS, who gives the Form of the Dispensation, *Var. Lib. VII. Ep. XLVL. 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. Quaest 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 those 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. *There may
be some very
warrantable
Matches which
yet may be
termed by the
Laws Concu-
binage.*

XV. I. 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 *Aelian*. 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. <203>

XV. (1) See PUFENDORF, *B. VI. Chap. I. § the last*; and a Dissertation by Mr. THOMASIUS, *De Concubinatu*, 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. GOTTIUS*.

3. In the Comedy of the *Birds*, where *Pisthaterus* 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 *Aeneid* *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

See *Decretal*, l. 4. tit. 9. *De Conjugio Servorum*, c. 1.

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. CCLV. GROTIUS.

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.

XVI. *Some unlawful Marriages may yet be valid.*

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 forbad to give above a certain Sum, but did not make void the Gift which exceeded that Sum. <204>

8. *Code*, Lib. V. Tit. XXVII *De natural. Liberis*, 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 CUJAS, 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 Assium, *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 Inconveniencies³ that follow the Recision of such an Act, are also frequently greater than the Indecency or Inconvenience of the Act itself.

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

XVII. *The Right and Authority in all Sorts of Societies, is in the Majority.*

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 *Selectae Juris Quaestiones*, Lib. I. Cap. I. To whom Mr. SCHULTING likewise refers, in his Explication 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*. APOLLODORUS, *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 Minervae* Tom. I. p. 226. &c.

Victor, de
potestate civili.
n. 14.

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, κύριον εἶναι ὃ, τι ἂν τὸ πλῆθος ψηφίηται, ⁴ *What the Majority Vote, must stand good.* *Appian*, ἔστι δ' ἐν τε χειροτονίαις καὶ δίκαις αἰεὶ τὸ πλεόν δικαιότερον, ⁵ *In Elections and Judgments, the Plurality of Voices always carries it.* So *Dionysius Halicarnassensis*, ὃ, τι ἂν δόξη τοῖς πλείοσι τοῦτο νικᾶν, ⁶ *What the major Part approve of, must prevail.* And in another Place, ὃ, τι δ' ἂν οἱ πλείους ψηφοὶ καθαιρώσι τοῦτο ποιεῖν, *What the Plurality of Voices shall repeal we must submit to.* And again, ὃ, τι ἂν αἱ πλείους γνώμαι καθαιρώσι, τοῦτο εἶναι κυριὸν, *What the Majority of Opinions declare to be null and void, that must be so in Fact and Law.* So *Aristotle*, κύριον τὸ τοῖς 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 Patriae nec Curia constat. <205>*

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. GROTIIUS.

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. GROTIIUS.

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. Syll.*) and *Lib. VII. Cap. XXXVI.* p. 428. (445 *Syll.*) 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 *Syll.*)

7. *Politic.* 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, *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 πράττειν πάντα, *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, that ¹ when the Yea's and No's are equal, the Defendant is supposed to be acquitted. And this Right of

XVIII. *What Opinion ought to prevail when the Number of Votes is equal.*

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 *Com-mendation 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. *Praecept. jubent. XCVIII. & vetant. CXC.* 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, *Decis. I. Num. 12.* And ANTHONY TESAURO, *Decis. I. Num. 13.* I know that in the Canton of *Berne* in *Swisserland*, the Magistrates have by this Means prevented this Inconveniency of Equality of Votes in all Sorts of Causes.

Discharge the *Greeks*, from the Story of *Orestes*, call ² *Minerva's Suffrage*: You have this Matter display'd in *Aeschylus'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 observed ⁴ 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.

XIX. *What Opinions are to be divided, what to be joined.*

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 <206> be joined as to what they

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. 1. 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 in the Senate, ought to be done*

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 *Praeter*, 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

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 Vitâ 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 *Paraemiae Juris Germ.* by the late Mr. HERTIUS, *Lib. III. Cap. VIII. § 3. & ult.* As also the late Mr. COCEIUS's Dissertation, *De eo quod justum est circa numerum suffragiorum.* Sect. III.

3. *Lib. VIII. Epist. XIV. Num. 13, 14.*

4. *Except. Leg. CXXIX. p. 1331. Edit. Amst.* See FULVIUS URSINUS's Note on the Place.

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*

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

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. ZASIVS 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. Caesar. in Controversia Saxonied.* GROTIUS.

See a Treatise written by JAMES GODEFROY, *De Jure Praecedentiae*, 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. III.

any Regard to other Qualifications: For, as *Aristotle* says, ἴσοι γὰρ (οἱ ἀδελφοί) πλὴν ἐφ' ὅσον ταῖς ἡλικίαις διαλλάττουσι, *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.

Equals, even if they be crown'd Heads.

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 proportione*, 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

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. *Depositum vel*

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, *Cons. Latino*. LXXVII. Num. 16. AFFLICTUS, *Decis Neapolit.* I. Num. 8. BARTOL. in *Leg. I. Digest. De Albo Scrib.* INNOCENTIUS, in *C. Tua. De Majoritate & Obedientiâ*. ANTHONY TESSAURUS I. *Quaest. for.* XLVIII. Num. 5. TIBERIVS DECIANUS, *Resp.* XIX. Num. 183, &c. INNOCENTIUS BUTR. FELIN, in *C. Statuimus*, Tit. *De Majoritate*, &c. BALDUS, in *Decernimus*, in 2. Notabili. C. *De sacro sanctis Eccles.* But above all consult AENEAS SYLVIUS, 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, *Κιβύρα*; 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.

contra, leg. 14.
l. 42. tit. 5. *De*
rebus Auctorit.
Jud. &c.
leg. 16.

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 Author³ 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, *εὖ κτήματα χάριν ἐκοινωνήσαν*, *When they are associated on the Account of Goods and Possessions.*

XXIII. *The*
Power of a
State over its
Subjects.

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 the¹ 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, *Τοὺς νόμους ἀγορεύειν περὶ πάντων*,² *That the Laws prescribe concerning all Sorts of Things.*

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 ἀγορεύουσι περὶ πάντων.* *Lib.* V. *Cap.* III. p. 59. All Editions before mine had *ἀπαγορεύουσι*, 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. 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 <208> 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 Liberty ³ 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 arose ⁴ from thence in Regard to Contributions.

XXIV. *Whether Subjects may leave the State they belong to, explained by a Distinction.*

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

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. SERVIUS, 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 *Aeneid.* II. (v. 156.) MARIANA's History affords us some Instances of Persons who have declared they have disengaged 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 praejudicium, & 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.

ought not to go out ⁵ 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

Bembo, l. 7.

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*. ZONORAS, Tom. III. in *Justino Thrace*. 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. & Postilimin*. 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. § I.

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 themselves 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 *Heracidae* 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 δικάιως ὥς Μυκηναίους ἄγοι
 ‘Ὡδ’ ὄντας ἡμᾶς, οὓς 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’ οὐδὲν αὐτῷ τῆς 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.

XXVI. *What Power is*

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.

*granted a Man
over his
adopted Child,
from his volun-
tary Subjection
to him.*

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.

XXVII. *What
Right a Person
has over his
Slaves.*

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 Prusaensis*, in his fifteenth Oration relates, *Μύριοι δῆπου ἀποδίδονται ἑαυτοῦς ἐλεύθεροι ὄντες, ὥστε δουλεύειν κατὰ συγγραφὴν, Thousands who are free* ² *oblige themselves by Contract to be Slaves.* <210>

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. Num. 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 *Bocchoris*, 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.*

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,

See *Busbeq.*
Legat. Turc.
Ep. 3.

Ἐθέλει δ' ἄνευ μισθοῦ παρ' αὐτοῖς καταμένειν
Ἐπὶ σιτίοις

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*

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.

3. On this Subject see *PUFENDORF*, *B.* VI. *Chap.* III.

4. These Words may be found in *ATHENAEUS*, *Lib.* VI. *Cap.* XII. *p.* 247. but our Author has put ἐπὶ σιτίοις, instead of Ἐπισίτιος. 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. Graecis*, where we have not so much as the Name of that Comedy.

The Passage of *EUBULUS* here quoted, is in *STOBAEUS*, *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 *Spoletto*, the Grammarian, would not accept of his Freedom. (*SUETONIUS*, *Illustr. Gramm.* *Cap.* XXI.) *GROTIUS*.

6. *Deipnosoph.* *Lib.* VI. *Cap.* XVIII. *p.* 263. *Ed. Ludg.* 1657.

Service they were able. Others add an Instance of this in the *Maryandini*; who, for the same Reason, made themselves Slaves ⁷ to the *Heracleotae*.

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, ¹ *If the Necessity he 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

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 antient 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*.

Roman Laws, granted Pa- < 211 > rents over their Children. Thus *Sopater*, Ἐξήν πατρί 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, in the Presumption that he would certainly prove a very equitable Judge.* And *Dion*, in his fifteenth Oration, says, that the same Right does prevail, παρὰ πολλοῖς καὶ σφόδρα εὐνομουμένοις, *among several People, and these the most eminent for good Discipline and Constitutions.*

Sext. Empiric.
Pyrrhon. hypotyp. l. 3. c. 24.
§ 211. *Ed. Fabric.*

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

XXIX. *What the Law of Nature directs about Children born of Slaves.*

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 *Jurisprudentia Ante-Justiniana*.

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.* GROTIUS.

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 Conj. 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 ISI-

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 to⁵ 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 <212> their Master, and their Work then can only answer the Expence of their pres-

See *Leo Afer*, l.
6. de *Barca*.

DORE'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 Angliae*. These Laws differ from the *Roman Civil Law*; but THOMAS of *Aquino* owns they are not repugnant to the Law of Nature, (*Supplement. Quaest. 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 For-eigners, the Child was so too. ULPIAN, *Tit. V. De his qui in potestate sunt.* § 8. GROTIUS.

The *Sclavonians* (*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. Ante-Justin.* p. 380.

4. This was established by CHARLES the Bald, Cap. XXXIV. *Edict. Pist.* GROTIUS.

5. Add here what I have said in a Note on PUFENDORF's *Duties of a Man and a Citizen*, B. II. Chap. IV. § 6. of the third and fourth Edition.

ent 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 inconsistent with the Liberty of Christians.

Less, l. 5. c. 5.
Dub. 5.
 1 Cor. vii. 21.
Eph. vi. 5.
Coloss. iii. 22.
 1 Pet. ii. 18.
Caus. 17. Qn.
 4. C. 37. 38.
 See B. iii. Ch.
 7. § 6. of this
 Treatise.

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

XXX. *Several
 Sorts of Servi-
 tude.*

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.

Exod. xxi. 2.
Lev. xxv. 40.

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 *Penestae* among the *Thessalians*; that which they call the Service of ⁶ *Mortmain*; and lastly, that of ⁷ hired Servants: All which Differences

3. *Nexi*. Persons who voluntarily made themselves Slaves to their Creditor till they could discharge the Debt. *Addicti*. 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 Glebae*. Husbandmen, who belonged to the Lands given them, [and changed Masters with the said Lands]. The *Grecians* called them ὁμόδουλοι τῷ ἄγρῳ, 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 CUJAS on the *Code*, Lib. XI. Tit. XLVIII. *De Agricolis, censitis & colonis*; as also JAMES GODEFROY's Commentary on the Place in the *Theodosian Code*, quoted in Note 3. of the foregoing Paragraph.

5. *Penestae*. ATHENAEUS gives the following Account of their Origin from ARCHEMACHUS, an antient Historian. "A Colony of *Boeotians* 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 *Μένεσται* from μένω, *to remain* or *stay*; but afterwards *Πενέσται*]. JULIUS POLLUX ranks the *Penestae* with the *Ilotae* among the *Lacedemonians*; and says they were a middle State, between Freeman and Slaves, *Lib. III. § 83. Edit. Amstel.* DIONYSIUS of *Halicarnassus* 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 *Πενέσται*.

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 mortuae*, 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 Deceased 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

do depend either upon <213> 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,

XXXI. *What Power there is over a People who voluntarily become Subjects.* B. i. Ch. 3. § 8.

*Themselves, and whate'er'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.

B. i. Ch. 3.

Slavery, during their Apprenticeship. GROTIUS. See THOMAS SMITH, *De Repub. Anglic.* Lib. III. Cap. X.

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. *Act.* 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. *What
Power over a
Person who has
forfeited his
Liberty by some
Crime.*
Ch. 20 of this
Book.

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 an-

XXXII. (1) Thus when *Ulysses* came into *Aegypt*, 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 *Latona* 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 sell 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. Caecina*, 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. *Incensi.* The Lawyers speak of them. See ULPIAN, Tit. XI. § II. *Servius Tullius*, one of the antient 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 Incensis latae, 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 *Wisigoths* 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.

other'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 <214> 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.

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.

B. iii. Ch. 7.

6. See some Examples of this Kind, *Chap. XIII.* of this Book, § 4. with the eighth Note.

7. *Noxa caput sequitur. Crimes are personal.* Thus our Author understands these Words, which frequently occur in the *Roman Law*, as in PAUL's *Receptae Sententiae*, Lib. II. Tit. XXXI. § 8. in the *Digest.* Lib. XIII. Tit. VII. *Commodati, vel contrà*, 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.

*Of an Acquisition (Possession or Purchase)
derived from a Man's own Deed; where
also of the Alienation 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.

I. 1. 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, *Ὅρος τοῦ οἰκεῖον εἶναι, ὅταν ἐφ' αὐτῷ ἢ ἀπαλλοτριώσαι, 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.

I. (1) See *Chap. III.* of this Book, § 1.

2. On this Question consult PUFENDORE, *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.*

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 <215> 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.

Less. 1. 2. c. 3.
Dub. 3.

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

II. *What in the Receiver.*

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 Proprietor, 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 antient 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.

6. As, for Example, according to the *Saxon* Law. See HERTIUS, *Dissert. de Conventionib. domini translativis.* § 15. in Tom. III. of his *Opusc. & Commentat.* p. 77. and the *Differentiae Juris Communis & Saxon.* by Mr. MENKENIUS, at the End of the third Volume of HUBER's *Praelectiones 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.

Ch. II. of this
Book.

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.

III. *Crowns
may be alien-
ated sometimes
by the King,
sometimes by
the People.*
B. i. Ch. 3.
§ 12.

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 anUsufructuary, which Right he ought not to be deprived of contrary to his Will. And this regards the whole Extent of Sovereignty.

IV. *The Gov-
ernment over
one Part of the
People cannot
be alienated by
the other, if*

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,

II. (1) For which Reason Presents may be sent to the absent by Messengers, as SERVIUS observes, on those Words of VIRGIL, *Quae mittit dona*. Aeneid. 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. § II. Note 4.* and § 12. *Note 20.*

3. See BALDUS and OLDRADUS, in *Cap. Intellecto, &c. De Jure jurando*. The same BALDUS, *Cons. CCCXXVII. Num. 7.* Cardinal THUSCUS, *P. I. Concl. XL. Num. 1.* and *Conclus. DCXCIV.* We have Instances of such an Alienation in FRANCIS HARRAEUS, *Annal. Ducum Brabant. & utriusq; Belgii*, Tom. II. at the Year 1526. And in GUICCIARDINI, *Lib. XVI.* GROTIUS.

IV. (1) This is the Opinion of GAILIUS, *De Pace publicâ*, Cap. XV. Num. 14. See DE SERRES, *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.

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 <216> 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.

*that Part do
not give their
Consent.*

V. So, on the other Hand, no Part has a Right to separate from its Body,
¹ unless it plainly appears, that it is absolutely necessary for its own Pres-

*V. Nor can
such a Part*

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 GRONOVIVS 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 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 HERTIVS pretends, who founds an Objection on it against our Author, in his Treatise *De Feudis Oblatis*, Part II. § 28. Tom. II. *Comment. & Opusc.* 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. Graec.* 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. PROCOPIVS, who relates this in his Treatise on *Justinian's Buildings*, (Lib. III. Cap.

*transfer the
Government
over its own
Self, unless in
Case of extreme
Necessity.*

B. i. Ch. 4.
§ 7. and B. ii.
Ch. 2. § 6.

ervation; 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,* ² *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 Differ-
ence.*

VI. And from hence it is easy to comprehend, why in this Case a Part has a greater Right to preserve itself, ¹ than the Body has Power over the Part; because <217> the Part makes Use of that Right it had before it

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 *Cephales* 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 subtile 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

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

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 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 subtile, 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

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. *The Jurisdiction over a Place may be transferred.*

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

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. § II. 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 Consequence 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.*

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.

B. i. Ch. 3.
§ 11, 12.

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 <218> 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 before observed, the Part should be compelled to separate from the Body.

VIII. *The Opinion, that a Prince may for Advantage, or out of Necessity, make over some Parts of his Kingdom, refuted.* Belluga in pr. spec. in rub. 8. p. 3. & 4. *Roch. de Curte de Consuet. q. 5. col. 6. tom. 1. & alii allegati a Vasq. l. 1. c. 4.*

IX. Under the Title of Alienation, is justly comprised an Infeoffment, or granting 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 considered 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 Deputies commissioned thereunto, and invested with a suf-

IX. *Infeoffment and Mortgaging are a Sort of Alienation.* Smith, de Rep. Ang. l. 1. c. 9. *Buch* in Baliol. Frossar. l. 1. c. 214, & 246. *Monstrel. Hist. C. 22, 5. Guic. l. 16.*

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.

ficient Power from the integral 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 Alienation usually follows such an Engagement, but because a King is bound to the People, 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 indeed was the Motive of their first entering into a civil Society.

X. *The People's Consent and Approbation, either particularly expressed, or founded on Custom, is required to the transferring even of Juris-*

X. But as for Jurisdictions 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 itself; 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

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. GROTIUS.

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 valid, whether such Alienation be made in Favour of a Foreigner, or some other Member of the Empire. See BOECLER's Note on this Paragraph, p. 220, &c. and the late Mr. HERTIUS's Dissertation *De Superioritate Territor.* § 91, 92, 93. Tom. II. *Comment. & Opusc.* p. 363, 364. as also the *Juris Publici Prudentia*, by the late Mr. COCCEIUS, *Cap.* XIV. § 9, &c.

X. (1) *Minores Functiones Civiles*. In the Summary 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 being 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 indeterminate 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

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 <219> 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.

*dictions and
Employments
in the State
that are not
Sovereign.*

*Cravet. Cons.
894. num. 2.
Zoafnet. de
Rom. Imp. n.
162.*

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

XI. *Princes
cannot alienate*

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 conferring 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 considerable. Princes themselves have sometimes found by Experience how prejudicial such Sort of Concessions have been to them; because those who have been favoured with them, have in Process of Time made themselves so great, that they have entirely shaken off the Yoke, and set up for Sovereigns. So that, unless the People either expressly or tacitly, consent to the Perpetuation or Alienation 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 confirm them any farther than he pleases.

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 Ionia and Aeolis the perpetual Command of each respective City.* *Vita Miltiad. Cap. III. Num. I.* See also the Life of *Themistocles*, *Cap. X. Num. 3.*

XI. (1) See *PUFENDORF, B. VIII. Chap. V. § 8, 11.*

2. The ancient *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 *Glaucus* the *Lycian*, *Lib. XII. (v. 313, &c.)* GROTIUS.

*the People's
Demain.*
Alberic. in C.
Intellecto, de
Jure Jur. Bar-
tol. in Leg. 3.
§ 4. Dig. Quod
vi, &c. Cors. in
Tract de excell.
Reg. q. 4.
Loazes, all. a
Vasq Nata
cons. 367.
Bonif. Rug.
cons. 49. n. 43.

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. *The Reve-
nue of the
Demain, or
Patrimony,
must be distin-
guished from
the Demain, or
Patrimony,
itself.*

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.

We have a memorable Passage of the Grammarian SERVIUS, on that Verse of VIRGIL,

Insuper his, campi quod Rex habet ipse Latinus.
Aeneid. 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 *Lacedemonia* 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. 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.

XIII. *How far, and why some Part of the People's Patrimony may be mortgaged by the Prince.*

XIV. 1. 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 <220> 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 τῶν 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 burthen-*

XIV. *That a Will or Testament is a Kind of Alienation, and of natural Right. Arist. Pol. l. II. c. 7.*

XIII. (1) *Digest. Lib. XX. Tit. I. De pignoribus & hypothec. Leg. XIII. § 2.*

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.*

some, 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.

4. SOPHOCLES has given us the Will of *Hercules*. *Trachin. ver.* 1164, &c. That of *Alcestis* appears in EURIPIDES, (*Alcest.* 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 *Alcestis* contain no Disposals of Goods, but only Directions for doing certain Things. We find in EURIPIDES's *Alcestis*, a Sort of Donation in Case of Death, made not by *Alcestis* 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.

*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. 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 <221> Laws ² that are plainly unjust; as those by which ³ all shipwrecked Goods are confiscated. For to take away a Man's

I. Some Civil Laws are unjust, and therefore do not transfer a Property; such are those that confiscate the Goods of shipwrecked People.

I. (1) See *Chap. II.* of this Book, § 1.

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*. (Ἐν στάσει, p. 107. Edit. Venet. 1509.) mention such a Law as established among the antient *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.

Property, without any apparent Cause, is manifest Injustice. Very well then has *Euripides* said in his *Helena*,

Ναυαγὸς ἦκω ξένος ἀσύλητον γένος.

⁴*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 Prusaensis, in his seventeenth Oration, speaking of a Shipwreck, Μη γὰρ εἶη ποτέ, ὦ ζεῦ, &c. GOD forbid that I should gain by Mens Misfortunes.*

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 *Andronicus*, calls this a most unreasonable Custom, ἔθος ἀλογώτατον. (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. I. 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-^{<222>}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 Pro-

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. Sylv. in Verb. Bellum, p. 2. q. 13.*

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 operae, viz.*

2. The Definition in the Original runs thus, *Quoties id quod meum nondum est, sed mihi dari debet, aut loco rei meae aut mihi debitae, &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 debitae*. 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 meae, aut mihi debitae, &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. IRENAEUS justifies the Conduct of the *Israelites*, who took the Gold and Silver Vessels of the *Aegyptians*, in Compensation for what was due to them for their Work. *For*, says he, *the Aegyptians 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 Aegyptians*, 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.

prietor 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

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.

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, CAESAR (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.

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-^{<223>}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

III. *How the Succession to the Estate of him who dies without a Will does originally and naturally arise.*
Soto, De Just. q. 3. art. 2.
Cajet. d. q. 66.
Ch. 6. § 14.
and last.

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. GROTIVS.*

3. *Epist. Lib. IV. Ep. X.* See also *Lib. II. Ep. XVI. GROTIVS.*

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

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. Whether
any of the Par-
ents Effects are
by the Right of
Nature their
Children's Due.
This is
explained by a
Distinction.

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

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.

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 παῖδες ὡς ὀφείλημα τὴν κλῆρον ἐκδεχόμενοι,* ³ *Our Sons expect our Estates after us,* ⁴ *as a Debt that we owe <224>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 Tyanaeus*, what was said by *Euripides*, ⁵

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, νόμιμον*] *that Children should inherit their Father's Estates.* In *Caesarib. (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. Quaest. 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 Eremito*, if the Piece last mentioned is really *St. AUGUSTIN's*. *PROCOPIUS* observes, that *The Laws, tho' in other Respects different 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.* *Persic. Lib. I. Cap. XI. GROTIUS.*

5. *Androm. ver. 418.*

Ἄπανσι δ' ἀνθρώποισιν ἡ ψυχὴ τέκνα.

All Men look on their Children as their own Life. Has thus altered,

Ἄπανσι δὲ ζώοισιν ἡ ψυχὴ τέκνα.

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 *Dictys*, 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 Children ⁶ 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 Tenderness 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*, Ἀγαθὴ γὰρ 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

PLINY, speaking of Swallows, says, *They feed their young ones by Turns, with the greatest Equity.* Nat. Hist. Lib. X. Cap. XXXIII. GROTIUS.

6. *Institut.* Lib. I. Tit. II. *De Jure Naturae*, &c. See also *Digest.* Lib. I. Tit. I. *De Just. & Jure*, Leg. I. § 3.

7. *Code*, Lib. V. Tit. XIII. *De rei uxoriae actione*, &c. Leg. unic. § 5.

8. *Code*, Lib. VI. Tit. XLI. *De bonis, quae 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 *Arsaces*, 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. Wass.*

obliged to provide for ⁹ 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 were ¹⁰ 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 <225> 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 qui duxit in Matrimonium quam polluit 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

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, Νοθεΐα*, and which was fixed at a thousand Drachms, or ten *Minae*, 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 *Νοθεΐα*: 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.*

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.

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. *In a Succession Children are preferred to the Father and Mother of the Deceased, and why?*

V. 1. Children too ought to support their Parents; a Duty not only prescribed by the Laws but also taught by a common Proverb, ¹ Ἀντιπελαργεῖν, *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 Sustenance rather due to Children than to Parents: And in this Sense it is that I understand that of *Lucian*, καὶ 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 συνωκεῖωται, &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*.

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 hand-

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. & alendis liberis, &c. Leg. VIII.*

V. (1) Ἀντιπελαργεῖν. See [a Passage of PHILO, quoted in the *Preliminary Discourse*, § 7. Note I. and] what LEO AFRICANUS observes on a Bird of *Africa*, called *Nestus*, Lib. IX. (toward the End). GROTIUS.

2. DIOGENES 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.*

somely; 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 <226> 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, οὐ γὰρ ὀφείλει, &c. *Children ought not to lay up for their Parents, but the Parents for the Children*. 2 Cor. xii. 14.

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 Origin-

VI. *The Original of that Succession called a Representation where one Person comes in the Room of another who was deceased before.*

5. *Digest*. Lib. XLVIII. Tit. XX. *De bonis damnatorum*, Leg. VII.

6. *Ibid*. Lib. XXXVIII. Tit. VI. *Si Tabulae Testamenti*, &c. Leg. VII. § I. *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. Mosis*. 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*.

7. *Lib*. V. *Cap*. IX. *Num*. 2.

nal, which entitles the ¹ Grandchild to succeed in the Son's Room, ² as *Ulpian* expresses it. *Modestinus* termed it, τὴν τοῦ πατρὸς, &c. * *To fill up the Place of the dead Father.* And *Justinian*, τὴν πατρῶαν ὑπείσιναί τάξιν, ** *To come into the Father's Room.* *** *Isaeus*, in his Oration, where he speaks of *Philoctemon's* Estate, calls this ἐπανιέναι, *To enter upon again.* And *Philo the Jew*, Υἱωνοὶ 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

VI. (1) *JUSTINIAN* pronounces this, just and equitable, *aequum*. *Institut. Lib. III. Tit. I. De haereditatibus*, quae 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 *Jacchi*, 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.*

*** *ISAEUS*. 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 οὐκ ἐὰ ἐπανιέναι, ἐὰν μὴ υἱὸν καταλίπη 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 *Leochares*. The same Expression occurs in the same Oration, p. 673. *Edit. Basil.* 1572. where it is explained by ἐπανιέναι ἐπὶ τὴν πατρῶαν οὐσίαν. *Return to inherit his Father's Substance.* And *ISAEUS* himself elsewhere terms this, ἐπανελθεῖν εἰς τὸν πατρῶον οἶκον. *Returning to his Father's Family.* *Orat. IX. De haereditate Aristarchi*, p. 553. See also *HARPOCRATION*, under the Words ὅτι οἱ παῖδες ποιητοὶ, &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 *Heraclidae*, *Procles*, and *Eurysthenes*, as representing their Father *Aristodemus*, drew Lots for one Portion only, against *Temenes* and *Ctesiphon*, who each drew one; as we learn from *APOLLODORE*, *Biblioth. Lib. II.* (Cap. VIII. § 4. *Edit. Th. Gal.*) *PAUSANIAS, Messeniac.* (Chap. III. p. 113. *Edit. Wech.*) *STRABO, Lib. VIII.* (p. 560. *Edit. Amst.* 364 *Paris.*) *GROTIUS.*

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. 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 *Disherison*; 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. <227>

VII. *Of Abdication and Disherison.*

VIII. I. 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,

VIII. *Of the Right of natural or illegitimate Children.*

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) Ἀποκήρυξις. ARISTOTLE calls this ἀπείρασθαι, and ἀποστῆναι. *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. (1) *Odys. Lib. I. ver. 215, 216.*

Οὐ γάρ πω τις ἔον γένος αὐτὸς ἀνέγνω.

No Man is certain of whom he is descended. And ² *Menander* after him,

Αὐτος γὰρ οὐδεὶς οἶδε πῶς ἐγένετο.

No Man can tell himself how he was born. And again in another Place, *

Ἔστιν δὲ μήτηρ φιλότεκνος, &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 οὐδὲν ὄντες ἐνδεεῖς
Νόμῳ νοσοῦσιν.

2. EUSTATHIUS ON HOMER, p. 1412. *Edit. Rom.*

Ἄυτὸν γὰρ οὐδεὶς οἶδε τοῦ πότ' ἐγένετο,
Ἄλλ' ὑπονοοῦμεν πάντες, ἧ πιστεύομεν.

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 STOBÆI *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 *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 <228> 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, [[⁷]] or at least be excluded from the Bulk of the Estate. Now a Marriage

4. *Ex Andromed.* Fragm. Barnes. 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, 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 Selectae Antiq.* Lib. III. Cap. XIII. as likewise *GODEFROY*, on the *Theodosian Code*, XII. 1.

7. [[Footnote number missing in text, replaced from Latin edition.]] This was formerly the Case of all the Children but the eldest, in the Country of *Mexico*. *GROTIUS*.

See *FRANCIS LOPEZ DE GOMARA's Gen. Hist. of the West Indies*, B. II. Chap. LXXVI.

that was contracted in this Manner, notwithstanding it was with a free Woman, was what the *Hebrews* called *Concubinage*; such as was that of
 Gen. xxv. 6. *Abraham* with *Keturah*, whose Children, as also *Ishmael*, 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

IX. *Upon Failure of Issue, and where there is no* 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 Dif-

8. *Matrimonium ad Morgangabicam*; or, as the Writers on Fiefs call it, *ad Morgenaticam*, 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 Morganaticâ*, 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 morganicam*; or *ex Lege morganaticâ*.

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.

ference 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 <229> former, this Passage of *Plato* may take Place, 'Εγὼ οὖν νομοθέτης, &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 πατρῶον*, *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

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) This Form may be seen in the Lawyer PAUL's Collection of *Receptae Sententiae*. It runs thus, *Seeing that you squander away your Father's patrimonial Estate, and are bringing your Children to Poverty, I (the Praetor) 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 מורשה and that which was lately acquired נחלה. 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.

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, *ἐνεργέτη ἀνταποδοτέον, &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 require 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

6. These Words are not a Decision but a Question. The Philosopher places it in the Rank of problematical Questions, *Ἀπορίαν δ' ἔχει καίτοιιάδε, &c.* And if he doth afterwards decide it, it is with some Restriction, adding, that this *most commonly* takes Place, *ἐπιπολὺ*; in short, *caeteris 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.* *Persic. 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.*

IO. 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,

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; <230> Brothers by the same Father, but different Mothers; Brothers by the same Mother only; and also in some^a other Questions. Ἀδελφοὶ ἀλλήλους φιλοῦσιν, &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 *Justin*¹³ 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

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.*

a. *Novel. 84. De cons. & 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 quae 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 *Arideus*, 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.*

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*, Περὶ ὄντα τοῦ κλήρου,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 *Isaeus*³ says, that it was customary with the *Grecians*, Τοῖς ἐγγυτάτῳ, &c. *For the Effects of the Deceased to pass to the next of Kin*; and then adds, Τί ἄν, τι δικαιότερον, &c. *Why not, for what is more equitable than that the Estate*

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. *SERVIVS* treats of this upon that Passage of the sixth *Aeneid*.

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 ἀγγιστέων, &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 Nicostrati haeredit.* p. 413. in fin. Edit. Wech. Τὶ ἄν, &c. *Ibid.* p. 417. init.

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 *Cicero*, ⁵ *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 Place ⁶ 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-
<231>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

4. Page 611.

5. *De Offic.* Lib. I. Cap. XVI.

6. *Ibid.* Cap. XVII.

7. *Vit. Agricol.* Cap. XXXI. Num. I.

8. *De Offic.* Lib. I. Cap. XVII.

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.*

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. *A Variety
of Laws about
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.

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

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 followed, (*Jus Aesdomicum*, 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.

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 < 232 > 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. 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

XII. *What Kind of Succession there is in patrimonial Crowns.*
B. i. Ch. 3. § 11.

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, § 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.

before. Patrimonial Kingdoms may be ¹ divided even between the Males and Females, ² as we find it was usual formerly in *Aegypt* and *Great Britain*.

Nullo discrimine Sexus

Reginam scit ferre Pharos.

Pharos no Distinction makes,

But Male or Female Monarch takes.

Says ³ *Lucan*: And ⁴ *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 *Aepalius* the King of *Locris*. So *Pyrrhus*, ⁵ hav-

Strabo, l. 9.

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 Gotthic*. GREGOR. B. VII. speaking of *Irene* the Wife of *Andronicus Palaeologus* Τὸ δὲ καίνωτορον, &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 *Aeneid*. (ad ver. 654) says, *Because Women governed before*. And upon the ninth *Aeneid*, 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. 1.

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*, *Hector'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.

ing no lawful Issue, declared *Molossus*, ⁶ his natural Son, his Successor to the Crown of *Epirus*; so King *Atheas* promised <233> 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, ⁷ the Right of Succession did belong to his Father.

Sal. Bell. Jug.

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, ¹ the eldest

XIII. If such Kingdoms are

On *Aeneid*. 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.* SERVIVS 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*, *Νόθον οὐ σφι νόμος ἐστι βασιλεύσαι γνησίου παρέοντος*, *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 BREMEN. *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 *Aeneid*, about *Molossus*, *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. (i) Concerning the *Swedes*, see BRIGITT, IV. 3. the *Danes*, SAXO, XII. and XIII. APPIAN, *Mithridatic.* *Δικαιοῦντα τὴν πρεσβύτερον ἄρχειν*, *Thinking it just that the Elder should enjoy the Crown*. NICETAS CHONIATES, in his Life of *John Comnenus*, *Ἡ φύσις τοῖς πρωτοτόκοις, &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 *Isaa-*

not to be
divided the
Eldest is to be
preferred.

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.* Νομιζόμενον πρὸς, &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, Νόμον, *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 elsewhere ⁵ stiles *The Law of Nations:* As ⁶ *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 *Ptolomy* in the same *Trogus*. But whoever comes to a Crown in this Manner, is obliged, if, and as far as it can be done, ⁷ to give those who would be his Co-heirs, if the Kingdom were divided, the Value of what their Portion would amount to.

XIV. In Case of
any Dispute,
the Kingdom
that is no oth-
erwise heredi-
tary than by
the People's
Consent must
not be divided.

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,

cious, ἀπὸ γενέσεως εἰς τὴν διαδοχὴν τῆς βασιλείας καλούμενος, Called by Birth-Right to the Succession of the Crown. And *Antipater*, in *JOSEPHUS*, said, that *The Kingdom* was *Hyrchanus'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.*

¹ unless the Laws or Custom of the Place be against it; <234> (as at *Thebes* in *Baeotia*, 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*, *Jalysus*, and *Lindus*, and the Kingdom of *Argos* ⁴ among *Per-*

XIV. (i) *Dardanus* and *Jasius* sat jointly on the Throne of *Troy*. *SERVIVS* upon this Passage of the third *Aeneid*: *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 *Phaeniss.* ver. 71. Concerning that Necklace, see *APOLLODORUS*, *Biblioth.* Lib. III. Cap. IV. § 2. And *STATIVS*, *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 *Frotho*, left the Empire of the Sea to the former, and the Kingdom to the latter. *Descript. Daniae.* p. 177. *apud. Elziv.* 1629.

2. *EURIPIDES*, *Hercul. furen.* (ver. 29, 30.)

Τῷ λευκοπώλῳ πρὶν τυραννῆσαι χθονὸς,
Ἀμφίον ἦδ' ἐ Ζήθον ἐκγόνω Δίος

Before *Amphion* and *Zethus*,
Jove's great Off-spring rul'd. *GROTIUS*.

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*, *Jalysus*, and *Lindus*, he undoubtedly alludes 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 *Mycenae*. Nothing is more uncertain or

seus'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 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.*

Cap. I. n. 1, 2.

XV. *Such Crowns continue hereditary no longer than there are Descendents 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 *Curcius*, 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 Nothus?*

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. Phaedrae ad Hippolyt. v. 121, 122.*

*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. *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 <235> 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.

XVII. *In such Kingdoms Males are preferred before Females in the same Degree of Blood.*

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,

XVIII. *Among Males the eldest to be preferred.*

a. *Hor. Lib. IV. Od. IV. ver. 40, &c.*

XVII. (1) See NICETAS CHONIATES, in his Life of *Manuel*, B. IV. GROTIUS.

Cap. IV. where *Andronicus* says, that if the Emperor *Manuel Commenus* 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. THOMASIIUS, 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 μὰν δ' ἀμφοτέροισιν Ἴον γένος, ἧδ' ἴα πάτρη.
Ἀλλὰ Ζεὺς πρότερος γεγόνει καὶ πλείονα ἧδη.

*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, *Τοῦ νόμου τῷ πρεσβυτέρῳ τῶν βασιλέως παίδων διδόντος τὴν τῶν ὧλων ἡγεμονίαν*, *The Law giving the entire Sovereignty to the elder of the King's*

that he will sooner have, more Judgment and Conduct than the younger. So *Cyrus* in *Xenophon*, *Τὸ προηγέισθαι*, &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, *ἐτύγχανε*, &c. ⁴ *For Cepheus had no male Issue.* And, *Having no Sons*, ἄπαις ὧν ἀρρένων, &c. as *Diodorus* informs us, *Teuthras* left the Crown of *Mysia* 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, οὐδὲ γὰρ ἐστὶ, &c. ⁶ *For*, says he, *I have no Son who is legitimate.* And *Virgil*, speaking of King *Latinus*,

Lib. iv.

Aen. l. 7. v. 50.

Sons, says *ZOSIMUS*, B. II. talking of a Law of the *Persians*. *Periander* succeeded his Father in the Kingdom of *Corinth*, Κατὰ πρεσβείον, 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. *THOMAS* makes Use of another Method for proving the Elder 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. II. p. 281.

2. *Cyropaed.* 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. *Cyropaed.* *Lib.* VIII. *Cap.* V. § 9.

Filius huic sato, &c:

*But this old peaceful Prince, as Heav'n decreed,
Was bless'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 *Heraclidae*, *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-nae*, as *Thucydides* observes. By the same Right, the Crown of *Athens* devolved ⁷ 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. Paus. l. 3.
Lib. ii.

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

7. See EURIPIDES, in his *Ione*, (v. 72, 73, 578). GROTIUS.

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. GROTIUS.

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*. Phaeniss. v. 1580, &c. See also v. 764, &c. I know not in Vertue 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.

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 is ¹ a Kind of an Inheritance itself, but distinct from that of the other Effects. Such peculiar Inheritances there are in ² some Fiefs in a ³ Copyhold Estate, in

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.* GROTIUS.

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 *CUJAS* 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.*

the <237> 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

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 Vertue 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, *Observ.* 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, 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 Vertue 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 adsignandis 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. *Jus praecipui*, 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

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.

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 CUJAS on this Law, in PAPINIAN. p. 481, &c. Tom. IV. Opp. Edit. Fabrott. and a Dissertation by the late Mr. HERTIUS, *De Praelegatis*, § 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. 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 <238> the same Manner as that of Freeholds did, at the first Establishment of the Kingdom.

XX. *It is to be presumed that the Succession to the Crown is such as was usual in Successions to other Effects, at the Time when that Kingdom first began; whether the Crown was Freehold.*

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 Succession ¹ 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*.

XXI. *Or held in Fee.*

XX. (i) *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 Historiae 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 burthensome 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 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. (i) 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. *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 call ¹ *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 has ³ to Things due from a conditional Stipulation, so that this very Right

XXII. (1) See Cardinal TUSCHUS, *Pract. Concl.* LXXXVIII. *Verb.* Regni Successio. WILLIAM DE MONTFERRAT, *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. Haered.* JOHN SERRAN. in *Lodov. Gross. super. contr.* BONON. ARGENTRAEUS, *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 Dutchies, 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 Con-

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 <239> 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 Majorasgo 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

dition, 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.

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.

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. *What
the lineal
Agnatic Suc-
cession is.*

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. *A Suc-
cession that
always regards
the nearest in*

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,

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 *Rehoboam*, though not the eldest of his Sons. See § 25. Note 3.

2. As in the Province of *Narbonne*. See SERRANUS in his Life of *Charles VI.* 'Twas by such a Law I presume that *Theuderick* dying without Issue, his Sister's Son *Athalarick* succeeded him. And I am apt to think, that this did formerly obtain in *Arragon*. GROTIUS.

XXIV. (1) In *Aethiopia* formerly Sisters Sons succeeded their Princes, as NICOLAUS DAMASCENUS reports. BEDA observes, that the same was customary with the *Picts*, 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.

he may so settle it, ² that they who are nearest related to himself, at any Time whatever, may suc-<240>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

Blood to the first King.

Liv. Lib. 29.

2. This by *Gizerich's* Will prevail'd in *Africa*. PROCOPIUS, *Vandal* I. *Χρόνον δε ὀλίγον Γιζερίχος, &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 UTICENS. *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 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 *Patzinacitae*, 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, Aeneas's* eldest Son, did not succeed *Aeneas* in *Alba*, but *Sylvius* another of *Aeneas'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, Aeneas'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 Romanae*, 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*.

tell us the same of *Taurica Chersonesus*; 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 Father's 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

5. LIVIUS, of Masinissa: *Whilst he was engaged in War for the Carthaginians in Spain, his Father dies. (his Name was Gala) The Crown went to Oesalces, 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.* THUANUS, *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. LXXVI. 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.

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 Disinheritance, 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 <241> *Reuben* for his Misdemeanor ³ deprived by *Jacob* of his Birth-Right, and *Adonijah* by *David* of the Crown. ⁴ Nay, whoever has done any enormous Crime against his Father, unless there shall be manifest Signs that he has forgiven him, ⁵ he shall

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.

3. He had defiled *Bilhah*, 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 *Solomon* 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 Feoffment 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?* SCAEVOLA, the Lawyer, answers in the Negative. Lib. XXXIV. Tit. IV. *De adimendis 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. Scaevolae*, 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, authorised 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 adim. 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 exhaeredatione liberorum.*

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 is ⁶ 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 <242> 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

XXVI. *Whether a Prince may for himself and his Children abdicate and renounce all Title to the Crown.*

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.

XXVI. (1) On Condition he does not take this Step at an unseasonable 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.

Chap. vi. § 10
of this Book.

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.

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

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 intituled, *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 GRONOVIVS 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.

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 trans-

3. But as PUFENDORF 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 (*Introduct. 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, 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 consider'd 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

ferred all their Right of Jurisdiction to <243> 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 *Epytidae* had

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 *Arragon*, according to MARIANA, *Hist. Lib. XX. GROTIUS.*

5. The *Latin* Translator hath *Regnum populi arbitrio permisit*. 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 Messenien.* [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: 'Ευφαεί δὲ οὐκ 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 CAESAR 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.

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 preferr'd 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 <244> 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

XXVIII. *The Son born before his Father's coming to the Crown to be preferred before one born after.* Hotom. III. *Quaest. ii. and Tiraquel. de primog. p. 31.*

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. (t) 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 consider'd 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.

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 *Arsica*; 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 *Oth* I. and *Henry*.

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 pleased, 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.* [[sic: reg.]] *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 WITTIKIND'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 *Eudisia* 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. Quaest. 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 *Receptae Sententiae*, 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. Annivers.* Lib. II. Cap. XXII.

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, owing 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 *Da-*

XXIX. Unless it appears that the Crown was conferred on some other Condition.

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 *Lacedemonia* 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. Graec.* 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 CHOMEDEY, 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 *Arsacides*, 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.

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.

rius and *Parisatis*, *Artaxerxes* as the elder, tho' born when his Father was a private Person, was yet declared King.

XXX. *Whether the Grand child by the elder Son is to be preferr'd 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.

XXX. I. 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 ^a 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.]

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

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, *Chronic.* *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, *Decis. 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 § II. Note 1. For which Reason formerly in the *Palatinate*, *Rupert* the younger Brother was preferred to another of the same Name, descended of an elder Brother. See REINKING, *Lib. I. Class IV. Cap. XVII. Num. 35.* GROTIUS.

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 πρεσβύτατος ἀεὶ τῶν ἐκγόνων*, *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 <246> younger Son was, on the Account of his greater Age, ⁶ preferred to the Eldest's Son. So in *Sicily*, *Robert*

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.*

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 *Gonzon's* younger Brother, not his Son, and died before him. Secondly, *Gondamond*, on the contrary, was *Gonzon's* Son.

^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 *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 Uncle⁷ *Cleonymus*. And so in the lineal cognatic Succession the Grandson shall be preferred.

Paus. l. 3.

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.

As in *England*,⁸ *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*.

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 Equity¹ 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 to³ the antient <247> *Roman Law*. Let us now run over the other Questions proposed by *Emanuel Costa*.

XXXI. So likewise whether the King's surviving younger Brother is to be preferred before his elder Brother's Son.

8. See DE SERRES, *Invent. de l'Hist. de France*, in the History of *Charles V.* sur-named *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 Choisie*, 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 only when there was no Brother nor Sister of the Deceased remaining. See *Code, De legitim. haeredib. Leg. III. and Leg. XIV. § 1.*

XXXII. *Whether the King's Brother's Son is to be preferr'd before the King's Uncle.* 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, ¹ not only in a lineal Succession, but even in an ^a 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. *Whether the Grandson by the Son is to be preferr'd before a Daughter.* 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. *Whether the younger Grandson by the Son is to be preferr'd before the elder by the Daughter.* XXXIV. He also adds, that the younger Grandchild by a Son, is to be preferred before the elder by a Daughter, ¹ 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. *Whether the Grand-daughter by the elder Son is to be preferr'd before the younger Son.* 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

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.

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 ¹ in the Kingdom of *Arragon*, the Sister's ² 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.

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.*

XXXVI. (i) ILLESCAS, *Hist. Pontif.* Lib. VI. Cap. XIX. *Afflict.* 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.

Of Such Properties as are commonly called Acquisitions by the Right of Nations.

I. *Many Things
are said to be
by the Right of
Nations which
properly speak-
ing are not so.*

I. 1. 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 <248> 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

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. 1. § 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.

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

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 Lightening 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 mutuum Gentium inter se Societatem.* The Author expresses himself in Terms still more clear and strong, at the Close of the Chapter, *Ab his (Juribus) quae Societatis humanae 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*

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 <249> 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 *Θηριοτροφεία*, *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. *Wild Beasts that get away cease not to be the first*

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

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. *Quae 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. § II.

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

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 *Γνωρίσματα*, *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*.

Owner's, if they can know them again.

See Ch. 4. § 5. of this Book.

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. possess. Leg. XIII.*

4. Which the *Grecians* call *Γνωρίσματα*, 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 quae Graeci dicunt. Γνωρίσματα, καὶ σπάργανα.* ON TERENCE'S *Eunuch*, Act. IV. Scen. VI. (ver. 15.) APULEIUS uses the Word *Crepundia* in the same Sense. *Apolog.* (p. 64. *Edit. Pricaei.*) 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.*

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*, that⁹ *It is one Thing to know where a Thing is, and another to find it.*

IV. Whether Possession may be gained by Instruments, and how.

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 <250> Circumstances go along with it. First, That those Instruments¹ 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 of² *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^a 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

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, aliae tua gaudia carpent,
Et lepus hic aliis exagitatis 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.*

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. Jason, cons. 119.*

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 ἰδιον 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. After the same manner as wild Beasts become our own, so do also ¹ other ἀδέσποτα, 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

VI. *How the Possession of other Things that have no Owner may be gained.*

V. (i) 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 *Aegypt*, but an Intendant of the *Roman* Emperors, established after that Country was reduced to the Form of a Province. The Geographer calls that Office, ἰδιος λόγος, and CASAUBON judiciously observes, he was the same as the *Digest.* calls *Procurator Caesaris*, or *Rationalis*. See that learned Man's Commentary on LAMPRIIDIUS, *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' ἐπιχωρίων ἄρχοντων, 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 ἰδιος λόγος, whose Business it was to demand such Things as had no Master, and consequently ought to fall to Caesar.* Lib. XVII. p. 1148. *Edit. Amst.* (797. *Paris.*) So that when *Aegypt* 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. (i) 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, *Quaest. Graec.* XXIX. p. 298. Tom. II.

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 Oracle 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

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 AELIAN, *Var. Hist.* Lib. III. Cap. XLVI. The same Author relates indeed, that the People of *Byblos*, a City of *Phenicia*, 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.*

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 judg'd 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.

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 ἀδέσποτα, 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

VIII. *That what is delivered us by the Roman Laws concerning Islands and Alluvions is neither natural, nor from the Right of Nations.*

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 cannot 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 *Tract. 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.

Decisions are built upon this Foundation, that ^a *The Banks of the River belong to him who possesses the adjoining Lands*; and ² 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 <252> 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; [[⁷]] but that it is so by natural Right, (as they seem to imagine) I can by no Means allow.

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. § I.*

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.

7. [[Footnote number missing from text; replaced from Latin edition.]] 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 proposed on Occasion of the frequent Inundations of the *Po*, and the Disputes occasioned by them among the Proprietors of the adjacent Lands; which he solved 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

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 Prusaeensis, 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*

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.

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 vices* (& non *per vices*). The Emendation here proposed by our Author, had been made by CURTIUS PICHENA, and receiv'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 morib. German.* Cap. XXVI. Num. 2.

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.

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6. This is practised in *France*. See the Book intituled, *Sanction des Eaux, & Forests*. 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 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

3. For the *Roman* Lawyers themselves do allow,⁸ that an Island⁹ which floats in a River, held up perhaps by some Shrubs growing there, belongs

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. Quaest.* 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.

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. <254>

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 ¹ tho' some of the Quality be changed, yet the Sub-

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 Agrariae*, 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 expresly 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 Agrariae*, where he has examined these Things better.] Concerning Rivers and Additions made by them in general consult ROSENTHAL. *De Jure Feudorum*, Cap. V. Coroll. XXIII. SIXTINUS, *De Regalibus*, Lib. II. Cap. III. CAEPOLLA, *De Servitutib. rusticor. praedior.* 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*

stance 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 *Roman* ² Lawyers with Reason acknowledge, is not changed. Nor is that by any Means natural which ³ they say, that Rivers, like the antient ⁴ 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 *Aegyptians* understand and manage this Matter, as *Strabo* reports of them, 'Εδέησε δε τῆς ἐπ' ἀκριβές, &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 Surveys.* ⁶

2. Hereunto agrees what the *Roman* Lawyers have delivered us, that ⁷ *what is ours, ceases not to be ours, but by our own Fact; add, or by Vertue*

fructus, &c. Leg. XXIX. § 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. See § 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, & aquae pluviae arcendae*, 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 Fluminib.* &c. Leg. I. § 5.

7. *Digest*. Lib. L. Tit. XVII. *De Divers. regul. Juris*, Leg. XI.

Ch. 4. of this
Book, § 5.

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 *Roman*^a 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. <255>

XI. *Improvements made by Floods, if in Dispute, belong to the Publick.*

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

a. *L. si ager. 23. D quibus modis ususfr. amitt.*

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 else-

to be supposed in a doubtful Case; if not, they belong to the prior Occupant.

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 Lands ¹ 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, or ² contained in a certain Measure, as most suitable to their Nature.

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

XII. *But they seem to be granted to those whose Lands have no other Bounds but the River.*

Ch. 3. of this Book, § 16, &c.

where: *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 Auct. 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.

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 *Issel* 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 also ³ mentioned in the *Roman* Laws, and generally practised.

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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

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 *Receptae Sententiae* 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 venditae. 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 Acres, or whether, knowing it did not, he design'd to deceive the Purchaser. But this is nothing to our Purpose. See CÚJAS, *Recit. in Digest. Tom. VI. Opp. p. 813.* As also ANTHONY FAURE, *Rational, Tom. V. p. 485.*

as are impowered by them, have assigned the Lands next adjoining, as extending to the River, without other Bounds.

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.

XIV. *What is to be reckoned a Flood-Addition only, and what an Island.*

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

XV. *When the Alluvions belong to Vassals.*

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.

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, <257> 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

XV. (i) *Digest*. Lib. VII. Tit. I. *De usu fructu*, &c. Leg. IX. § 4.

XVI. (i) This is indeed one of their Maxims, *Digest*. Lib. L. Tit. XVII. *De diversis Regulis 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.

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 o'erflow 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.

XVII. *A Highway naturally hinders any Advantage of Alluvions.*

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

XVIII. *That it is not natural that the Young should follow the Dam only.*

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 pignoratitiâ actione*. 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 GRYPHIANDER, *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.

Ch. 5. § 29. of
this Book.

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 μίγνυσι 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. *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.*

B. iii. Ch. 6.

XIX. 1. If any Body had formed a Thing out of another's Materials, ¹ the *Sabinians* 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 <258> 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 *Connanus* 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,

3. (*Conjugal. Praecept.* 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. Ephes.* *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. LONGOBARD. C. 14. Specul. SUEVIC. Part. I. C. 61, 62. Edict. 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.*

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

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 adquir. rerum dom.* Leg. XXVI. § 1. Lib. XXXIV. Tit. II. *De Auro, Argentio, 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 adfectionis 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 sparsio 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 Master. 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

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 Unskilful-*

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

on that Account to have a larger Share in the Work, or Composition resulting from the Matter and the Form, *Not. in CAJL. 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 *bonâ 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 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 antient 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*

forfeit all <259> 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.

*ness or Design
the Matter be
spoiled.*

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

*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*

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.

also other Mistakes of the Roman Lawyers are taken Notice of.

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 soldered together they must needs be confounded, as <260> ³ *Paulus*; or that there

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 unseasonably 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 consumi: & quod semel alienum (factum) sit, etiamsi inde abruptum sit, redire ad priorem dominum non posse. Non idem in eo, quod adplumbatum 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, 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 adquir. rerum dominio, Leg. XXVII. § 2.* But when two Pieces of Silver, for Example, are solder'd together with Lead, or two Pieces of different Metals are solder'd together, which was term'd *Plumbatura*; the Laws held that in the Case there was no Mixture; and that therefore the two Bodies thus solder'd together still belong'd each to its own Master, whether one was more or less considerable than the other. We see no solid

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. 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

XXII. *By Planting, Sowing, or Building upon another Man's Ground; two Parties are naturally admitted Sharers.*

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.

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.*

Foundation for this Distinction; for two Pieces of Silver solder'd together with Silver remain as really distinct one from the other, as if they were solder'd with Lead, or a Piece of Iron was solder'd to a Piece of Silver.

4. *Digest*. Lib. XLI. Tit. I. *De adquir. 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 adquir. 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. *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 Loss.*

XXV. *That an
actual Delivery
is not required
by Nature in
the transferring
of a Property.*

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 <261> the Law of Nature required ² in the transferring of a Property, which the *Roman* Lawyers themselves do own in

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 any thing 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 adquir. 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.*

2. It is not indeed requir'd. By the *Laws of the Wisgoths* 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 aes & libram*). See VARRO, *De Ling. Lat. Lib. VI. (p. 82. Ed. III H. Steph.)* FESTUS

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

POMPEIUS, in the Word *Rodus*: ULPIAN *Instit.* Tit. XIX. BOETHIUS, *Ad Top. Cicer.* GROTIUS.

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 perhaps 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 *Vindiciae pro recepta de Mutui alienatione sententiâ*, by the late Mr. VANDER 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 Emperor *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.*

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 <262> ¹⁰ in Consideration of a Main-

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.* Diss. 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 Surprise, 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 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

tenance, and ¹¹ Goods that we have agreed shall be shared and used in common.

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.

XXVI. *The Design and Use of what has been hitherto said.*

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.

II. *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.

When Jurisdiction and Property Cease.

1. *That Property and Jurisdiction cease when he who had the Right dies and leaves no Successor.*

I. How 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

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, because his Slave was afflicted

obstruct <263> 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 ⁴ the prior Occupant.

II. The same may be said, ¹ if a Family that had any Right, happens to be extinct.

II. *So does the Right of a Family cease, if that Family be extinct.*

III. I. 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

III. *So does that of a People too, if they cease to be a People.*

with violent Sickness; for then such a Slave was set at Liberty. *Digest*. Lib. XL. Tit. VIII. *Que sine manumissione*, &c. I know not why one of our Author's Commentators asserts 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 Derelicto*, 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. (i) 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 *Usanchanidae*, in *Persia*, Leunclav. XVI. Add to these *Leo*, Lib. II. of the *Africans* of *Tarodent*; and if you please, ERNEST COTHMAN, *Cons*. XLI. *Num*. I, &c.

III. (i) *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

Members, but are, however, united in Name, as having *ἐξ ἑνός*, *one* ⁴ *Constitution* only, according to *Plutarch*; *Spiritus 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 con-

Constellation at the Tail of *Leo*: *παρετήρησε δὲ Κόνων*, &c. CONON, *the Mathematician*, observed, that *Such Things are called Bodies, as are joined and kept entire, ὑπὸ μιᾷς ἔξεως*, by one Constitution, as Stone or Wood. Now this *ἐξ ἑνός* 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 *διεστώτα*, 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*, *ἐξ ἑνός ἐστὶ πνεῦμα ἀνάστροφον ἐφ' ἑαυτῷ*, *Constitution is a Spirit circulating in itself*, &c. And again, *ἐξ ἑνός ἐστὶ πνευματικὸς τὸνός, δεσμός οὐκ ἄρρηκτος, ἀλλὰ μόνον δυσδιάλυτος.* *Constitution is a spiritual Contexture, a Tie not altogether incapable of being broken, but not to be broken without Difficulty.* See also BOETHIUS, *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 EMPIRICUS, *Adversus Mathem.* Lib. VII. § 102. and Lib. IX. § 78. with the Notes of Mr. FABRICIUS.

4. *Ἐξ ἑνός*. Our Author doth not tell us where this occurs. I am much mistaken if he had not a Passage of the Treatise *De animae procreat.* p. 1025. Tom. II. *Edit. Wech.* in View; where we read *μορφὴ* instead of *Ἐξ ἑνός*.

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.

tinues to be still the same, ⁸ tho' its Particles are perpetually upon an insensible Flux <264> 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 only. ¹⁰ In the same Manner as ¹¹ *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 ἔξιν σώματος συνεκτικὴν, *The Habit of the Body*

8. ALFENUS, in the above cited Place, gives you an Instance in a Ship. And so does ULPIAN, in *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, § aream, D. de Solutionibus*. PLUTARCH in *Theseus*, τὸ δὲ 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. § Sacram. D. de verb. oblig.* And this is confirmed by what precedes in TERTULLIAN, and by what follows in PAULUS. PHILO, *De Mundo*, οὐ γὰρ δήπουθεν, &c. *Not that whose Parts do by Degrees perish and decay, it 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 DIOGENES LAERTIUS. GROTIUS.

See DIOGENES LAERTIUS, *Lib. III. § 11. Ed. Amst.*

11. See MENAGE, on DIOGENES LAERTIUS, *Lib. IX. § 8.*

12. Ἐξιν σώματος συνεκτικὴ. See the Passage at length in Note 3. on this Paragraph.

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, Μέχρις ἂν ἡ ποιοῦσα καὶ, &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 utterly extinct. And this may be done two Ways,

13. Πνευματικὸν συνέχον, says our Author. But I find in the *Jewish* Doctors two Treatises *of the Incorruptibility of the World*, only this Expression, Ἐξίς 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*.

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*, ³ 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.

IV. (i) *SERVIVS* in *Fulden. Excerpt. ad I. Aeneid. 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 entirely desart; 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. Quaest.* Lib. V. Cap. XXIII. XXXII. and in *Antholog.* GROTIUS.

a. *Epist. XCI. Lib. XVII. Rer. gest. Diod. XVI.*

3. That is inherit the Goods and Rights of all the private Persons who are lost. See *PUFENDORF, B. VII. Chap. XII. § 8.*

4. 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

V. *When the whole Body of the People is subverted.*

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.

VI. *When that Form is lost that makes them a People.*

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 *Mycenaeans*, 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 <266> dispense Justice among them. And therefore *Cicero*, in his first

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 ἐκ διεστηκότων, &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 *Praefectura*. VELLEIUS, *Lib. II. Their Rights were restored them about 152 Years after Capua, in the Punick 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.*

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 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, [[²]] 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.

VII. But not by only changing of Place.
Flor. 2. 15.

Plut. in Ages.

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'

VIII. Nor upon the Change of Government; where also of

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. *Class.* 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. [[Footnote number not in text, replaced from Latin edition.]] As the *Geloi* transported to *Phintias*. DIODORUS SICULUS, in *Frag. Peires*. 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.

*the Rank that
is due to a new
King, or a Peo-
ple lately
become free.*

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.

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, Μεταβαίνων ἐκ γένους εἰς γένος, Skipping from one Subject to another.*

Pol. 3. 3.

2. *A Dorico 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 LIPSIVS's Treatise, *De Militâ Romanâ*; and the fourth Volume of DOM. BERNARD DE MONTFAUCON's *Antiquity explain'd and illustrated with Figures.*

5. Thus GIFANIUS translates ἕτερος λόγος, *is another Question.* But BOECLER, in his Dissertation *De actis Civitatis.* Tom. I. Dissert. p. 860. pretends, but without alledging 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.

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 Sovereignty 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* ⁷ 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. I.) 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.

IX. What if two Nations be united?

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 *Persian* 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

X. What if the same People be divided?

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 *Celtae* 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.

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, 'Ου γὰρ ἐπὶ τῷ δοῦλοι, ἀλλ' ἐπὶ τῷ ὅμοιοι εἶναι ἐκπέμπονται, [Lib. 1.] *For they are not sent out to be Slaves, but ² to enjoy equal Privileges and Freedom*, says ³ *Thucydides*. And the same Author tells us, that a second Colony was dispatched by the *Corinthians* to *Epidamnus*, ἐπὶ τῇ ὕσῃ καὶ ὁμοίᾳ, *All upon the very same Foot*. And King *Tullius*, in *Dionysius Halicarnassensis*, [Lib. 3.] says, Τὸ δε ἄρχειν 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. *To whom
now do those
Things and
Dominions*

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

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 criticized 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 of 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

belong now to the Kingdom, <268> 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

belong which were once under Roman Jurisdiction, where it does not appear that they have been alienated.

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.

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.

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

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.* Not 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 *Novellae*, *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 *GRONOVIVS*, 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

<269> 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

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. XI. 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 *Maximum. duob.* Cap. XV. only says 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 determin'd 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 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

10. *Provinciae togatae*. 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. II. 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 GRONOVIUS 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 ὑπήκοα ἐκ προγόνων*, *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 ἑνὸς 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 quae 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 Encomiums, and all the Privileges of the *Old*, particularly the Consulship divided between one Consul at *Rome* and one at *Constantinople*, sufficiently shew

chose to keep their Court at *Constantinople*, rather than at *Rome*; for even then also the Election, which was made by <270> 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

that the Source of the Empire was from that Time no longer at *Rome*. See the learned JAMES GODEFROY 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.

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, Imperitemque 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 *Scythia*, gave the finishing Bow to the Empire of the West by taking *Rome*, and making himself Master of *Italy*? And that the same Prince was vanquished and dispossessed,

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

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 Praetorian Cohorts take an Oath to a Woman, a Thing that would disgrace both Senate and People*. *PRISCUS* in *Excerpt. Legat.* Οὐ γὰρ θηλειῶν, ἀλλ' ἀρρένων ἡ τῆς Ῥωμαϊκῆς βασιλείας ἀρχή, *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 *Herenianus*. *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 *Francs* 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 *Aistulphus*, 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.

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-<271>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

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 Princess's Successor. See EGINHART, *De vitâ Caroli Magni*, Cap. XXVIII. with the Notes of the Commentators, 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 Person 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 politick 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 AMILIUS, *Lib. III.* of *Charles the Great*. GROTIUS.

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 were²⁷ 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 Reserve²⁸ of a Right, either to

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 antient *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 *Francfort* 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.*

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 <272> 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

29. Thus the Pope, in his Excommunication of the Emperor *Henry IV.* names the Kingdom of the *Teutonics*, 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, 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.

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 Sickness 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
Conqueror.*

XIII. But how far the Conqueror may succeed to the Conquered, shall be explained below, when we treat of the Effects of War.

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.

Of the Obligation that arises from Property.

I. 1. 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 (under 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

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

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.

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 δε καὶ οἱ τῶν ἐξωθεν, &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,

by us, and to
do what we can
that the Owner
may have them
again.

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 ^a *Lacedemonians* had cleared themselves indeed of the Crime of breaking the Articles, by condemning *Phaebidas*, who, contrary to their Treaty with

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 *Wisigoths*, 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. Οἷμαι δ' ἔγωγε 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.

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 <274> 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

6. So thinks DIODORUS, *Lib. XV.* PLUTARCH, in his Life of *Agésilas*, *Τὴν πόλιν ἔπεισεν, &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 DIODORE of *Sicily*, to which we are here referred, and that quoted from PLUTARCH, that those Authors argue on a Supposition that *Phaebidas* 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 *Phaebidas*, 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. Graec. 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, they put down M. Crassus, and Q. Hortensius, Coheirs 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.

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 Seius's Hands, who knew nothing of the Fellow's Villany; now should Seius 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 detectable 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 *εὐρετρον*,

b. L. *Bona fides*. D. *Deposit*.

9. See what I have said on PUFENDORF, *ibid*.

c. L. *rerum*, D. *de act. rer. amot*.

10. *Condictio*. 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.

d. L. *Falsus*. D. *de furtis*.

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. 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, <275> 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*.

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.*

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

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 veniunt. D. de petit. Hered.*

b. *De Off. 3. L. Jure Naturae. 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.*

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.

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. Quaest. 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 Lawyers 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. Quaest. 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 BACHOVIVS, in his *Chilias Errorum, &c.* on this Place.

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 <276> 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 the ¹⁴ 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.

II. 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, *bonâ 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.

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.

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 borrow ¹⁵ 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, if ¹ the Thing be gone; because he neither enjoys the Substance, nor any Benefit by it.

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 burthensome 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. *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 own ¹ 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.

IV. *But he is obliged to restore the Fruits or Produce of it that remain or are in Being.*

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 Produce ¹ be spent and gone, if it appear that he must otherwise have spent and <277> 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.

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.*
Suet. c. 16.

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.

VI. *But not those which he neglected to take the Advantage of.*

IV. (i) 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. (i) 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 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. *That such a one is not obliged to make Restitution for what he has given away; this with a Distinction.*

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. *Nor if he only sells what he bought; this with a Distinction too.*

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. *When he who fairly bought what is another's, may*

IX. 1. *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

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 it self, 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 it self, 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, § II. *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.*

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 <278> 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

*claim all, or
part of what it
cost him.*

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 *Wisigoths*, Lib. I. Tit. IX. Cap. IX. and Cap. XV. *Alc.* III. *Praes.* XXIX. *Menoch.* V. *Praes.* 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 *ZYPAEUS*, *Not. Jur. Belgic.* Tit. *De rei vindic. verbo Jure Dominus*; as *HUBER* observes, *Praelect. in Pandect.* Tit. *De adquir. rerum Dominio*, *Num.* 2. See likewise *VOET.* in *Tit. De rei vindic.* *Num.* 1.

4. *Digest.* Lib. XVIII. Tit. I. *De contrahendâ emptione*, Leg. XVI.

5. *Ibid.* Leg. XXXIV. § 4.

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

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.*

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. *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

X. *If I buy what does not belong to him who sells it, I must not return it to him, but to the Owner.*

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, ¹ 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.

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. *Lastly*, That by the Law of Nature, whatever is taken either upon a dishonest Account, ¹ 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 <279> 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

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. (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.

2. St. AUSTIN, in his fifty-fourth Epistle, makes a very excellent Distinction in this Affair. GROTIUS.

extorted it by Threats, or by Violence: For this is another Principle of Obligation, not to our Purpose ^a now.

XIII. *The Opinion, that the Property of Things which consist of Weight, Number, or Measure, may pass without the Consent of the Owner, refuted.*

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

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.

Of Promises.

I. 1. We now come in the Order of our Subject ¹ to treat of Obligations arising from Promises; where we presently meet *Franciscus Connanus*, 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.

I. (1) See *Chap. I.* of this Book, § 2.

2. *Συνάλλαγμα*, 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. COCCEIUS, intituled, *De Jure circa Actus imperfectos*, printed at *Francfort* on the *Oder*, in 1699. in which he maintains, *Sect. 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 COCCEIUS, in his Dissertation, *De Jure paenitendi in Contractibus*, of what the *Roman* Law understands by *Συνάλλαγμα*, *Sect. II.* § 6. On Occasion of which he accuses our Author, § 7. *Of not knowing what he says* on that Subject.

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*, <280> 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 *Connanus*) 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,

4. See PUFENDORF, *B. III. Chap. V. § 9.* &c. with the Notes.

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.

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 trans-

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. [[This footnote and the next are reversed by mistake in the original text.]] *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.*

9. *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.*

10. Insomuch 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 Commentary 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

fer 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 Reason alleged 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.

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.*

14. *Digest. Lib. L. Tit. XVII. De diversis regulis Juris, Leg. LXXXIV. § 1.*

15. *Condictio 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.*

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, *Ἀλήθειαν, 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 <282> Civil Law, obliges either absolutely

III. *That an imperfect Promise does naturally oblige, but no Right arises*

17. *De Offic.* Lib. I. Cap. VII.

18. *Lib. I. Od.* XXIV. *ver.* 6, 7.

19. *De habitud. Doctrin. Platonis*, 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*, Quaest. 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,*

*from thence to
the Person who
receives it.*

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

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 Foenere & 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.

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 pactis. GROTIUS.

cannot be obliged by any Law imposed by another, would act contrary to his own Nature, not to perform what he promised, *Neh.* ix. 8. *Heb.* vi. 18. and x. 23. 1 *Cor.* i. 9. and x. 13. 1 *Thess.* v. 24. 2 *Thess.* 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, *Prom.* 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 כֶּסֶךְ, 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 καὶ κατέχει τὸν ὑποσχόμενον ὁ τῇν Ἐπαγγελίαν 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. 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 tuâ 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 ———

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 <283> in Form, an undoubted Sign of a deliberate

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 *Paraemiae Juris Germanici*, by the late Mr. HERTIUS, *Lib. I. Cap. VIII. § 2, 3.* To which add what Mr. BYNCKERSHOEK says in his 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 surprised; 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 rendring 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.*

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. <284>

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.

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 quae 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, 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.* DIOGEN. LAERT. Lib. V. § 39. But our Author here had his Eye on STOBAEUS, *Serm.* XXIV. Where there is an Extract taken probably from THEOPHRASTUS, *Treatise of Laws*; as appears from the Title, under which STOBAEUS has placed that Extract.

V. I. *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.

V. *First, to make a Promise compleat, 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) 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.

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 <285> 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 Praetorian, 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

6. See *Chap.* XIV. of this Book, § 2. *Num.* 3, 4.

VI. (1) See PUFENDORF, *B.* III. *Chap.* VI. § 6, &c.

2. See an Instance in L. *Mancipia*, C. *de Servis fugitivis*, in GAILIUS, *Lib.* I. *Obs.* XI. *Num.* 7. and in MOLINAEUS, *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.

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.

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. *A Promise
made thro'
Fear obliges;
but he who
caus'd that
Fear is bound
to disengage or
idemnify.*

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, <286> 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 Shipwrack, 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

VII. (1) See PUFENDORF, *B. III. Chap. VI. § 9. &c.*

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, 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.*

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

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.

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. <287>

VIII. *To make the Promise valid, it must be in the Power of the Promiser to perform it.*

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. *Agesilaus* ² being once challenged upon his Promise, answered, *Ναὶ δῆτα, εἰ δ' ἐστὶ δίκαιον· εἰ δὲ μὴ, ἔλεξα μὲν, ὡμολόγησα δ' οὐ, Very well, if it is just; but if not, I only said it, I did not promise 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,

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 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.

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

IX. *Whether a Promise made on an ill Account be valid; this explained by a Distinction.*

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. THOMASius 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 Scavans*: 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.

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, <288> 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 oc-

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 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,

casioned 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. 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.

X. *What we are to judge of a Promise that entitles us to something due before.*

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.

XI. *The Manner of making a firm Promise in our own Persons.*

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

XII. *The Manner of confirm-*

who were his Assistants, dismissed her Plea. Whereupon the Historian observes, that could *Aquilus* have given Sentence against both the Parties, he would certainly have done it, and punished the Lover for his criminal Conversation with the Courtezan. 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.

*ing a Promise
made by others,
and of Ambassadors
who go
beyond their
Commissions.*

Proxy³ 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, 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. <289>

*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.*

XIII. Hence we may understand, that an Action brought against¹ 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 belongs³ become wholly responsible for whatever the Master does. For this is neither agreeable to natural

3. SERVIUS, upon that Passage of the ninth *Aeneid*,

——— *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. (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.

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. Insomuch 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.

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

XIV. A Promise must be

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 adquirenda vel amitenda Possessione*, Leg. XXXVIII.

2. TERTULLIAN, speaking like a Man who was perfectly acquainted with the Laws, says, in his Book *De Jejuniis*, *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 Oc-

*accepted before
it can be
binding.*

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 <290> 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 signi-
fied to the Per-
sons 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

casion 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. L. 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 *Wisigoths*, Lib. V. Tit. II. Cap. VI. GROTIUS.

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. THOMASIVS, 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. THOMASIVS 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. THOMASIVS, I own it seems to me but little to the Purpose.

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 Imputation 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 trans-

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.

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.*

ferred 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

XVII. *Whether it may be revok'd upon the Death of the Person employ'd to signify it, explained by some Distinctions.*

2. And therefore, to avoid all Dispute, it was usually said, *To him and his Heirs*. *SERVIVS* upon the ninth *Aeneid*, ver. 302. See too the *Wisigothic 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 Angliae*, Cap. VII. *GROTIUS*.

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.

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 <292> 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.

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, nothing 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 changed 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 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.

About which particular Case the Author of *Lib. II.* to *Herennius* relates, that *Drusus*, the *Praetor*, decreed one Thing, and *Sextus Julius* another.

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

XVIII.
*Whether a
Promise
accepted by
Proxy, may be
revers'd,
explained by
some Distinc-
tions.*

XVIII. (i) 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.

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 <293> 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.

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 Acceptance 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, § III. 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 no Effect till after the Acceptance of him in whose Favour another signified his Will of doing something.

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, ¹ 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.

XIX. *Within what Time some Conditions may be tacked to a Promise.*

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, ¹ 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

XX. *An invalid Promise may become obliging.*

XIX. (1) *A perfect Donation admits of no Conditions after it is made.* Code, Lib. VIII. Tit. LVI. *De Donationibus quae 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.

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. *Promises made without any Motive, are not therefore naturally void.*

XXI. But, to avoid confounding the Civil Law with the Law of Nature, it must be observed, that neither those Promises, nor those Donations, ¹ in which the Reason for making them is not expressed, are therefore naturally invalid.

XXII. *How far he who promises for what another is to do stands himself naturally oblig'd.*

XXII. Nor is any Man by his Promise that he makes for what ¹ 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 Obligation. *He was discharged from his Engagement, (says Livy, Lib. 2.) ² since it was no Fault of his, that it was not performed.*

XXI. (1) *Quae 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.

2. Compare here what is below, B. III. Chap. XX. § 30. GROTIUS.

Of Contracts.

I. Among such human Acts as turn to other Mens Advantage, some are¹ single and uncompounded, others are mixed and compounded.

I. *Such human Acts as are advantageous to others are divided, first into simple and mixed.*

II. Those that are single, are either gratuitous, and done for nothing, or permutatory, and by Way of Exchange:¹ 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;

II. *Simple Acts are divided into such as are merely gratuitous, or that imply a mutual Obligation.*

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 δόσεως, *Of Giving*, these, πράσεως, *Of Selling*. GROTIUS.

Our Author undoubtedly had his Eye on that Passage of the Treatise of *Rhethoric*, 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

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. 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.

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 <295> 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 Praescript. Verb.*

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.

III. (1) *Digest. Lib. XIX. Tit. V. De praescriptis 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

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

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 praescriptionibus*, 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 Hebraeor. Disciplinam. Lib. VI. Cap. V.*

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;

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 contrahendâ 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, causâ datâ, causâ non secutâ*, 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. COCCEIUS, in an academical Discourse, *De Jure poenitendi 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 compleating 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. COCCEIUS, 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 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

because the Civil Law took away <296> 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

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. SERVIUS, 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 mutantur*, 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. § I.

Trial of Skill, to which there was appointed a Prize, what *Homer* terms ἄρνυσθαι, *to purchase*, he renders ἀντικαταλλάττεσθαι, *to exchange*, adding, συνάλλαγμα γάρ τι καὶ τὰ τοιαῦτα, *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 Κόλλυβος, *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 <297> 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 Advan-

10. See PROCOPIUS upon this Subject, in his *Secret History*, Chap. XXV. In *Italy* they brought Species formerly from *Sclavonia* 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.

tage 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, ¹ 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*, *σύμπλοια*, or *όμόπλοια*, 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. ¹ 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 Hiring. ² 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

V. Acts mixed, are either so essentially, and of themselves;

IV. (1) That is, such Acts as unite the Interests of the Contracters.

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.

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.

VI. *Or by Reason of some Accessory.*

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 Pawn.¹ 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 burthensome 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.

VII. *Which of the Acts are called Contracts.*

VII. Now all Acts, advantageous to others, except those which are of meer Generosity, are called *Contracts*.¹

VIII. *There is an Equality required in Contracts, and first in the Acts that are previous to them.*

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 consists partly in the Acts, and partly in the Subject itself of the Contract; and this Equality, and Dealing upon the Square,

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 Συνάλλαγμα; 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 antient 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.*

must be observed as well in those Acts that are previous to the Bargain, as those that are principal and essential in it.

IX. 1. One of these previous Acts is, that he we deal with ought to discover to us ¹ 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 Society ² and Engagement between Persons contracting, than what is common to all Mankind. And thus may we answer what *Diogenes*, the *Babylonian*, said upon this Topic, *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; for ⁴ 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*

IX. *One is to know every Thing that relates to what he is dealing about.*

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 found 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 Inconveniencies 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 formâ emendandi doli mali*, Cap. XIII.

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, ⁷ *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 there. ⁹

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 Gracidianus* sold to *C. Sergius Orata*, and which he had bought of him be-

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 I.* second Edition.

fore. For ¹¹ an equal Know-<299>ledge on both Sides, puts both Parties upon an equal Foot. Thus *Horace*,

*Ille feret pretium paenae securus, opinor
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 *Lacedemonians* made void the Purchase of some Land which the *Eleans* had by Fear extorted from the Owners, *Γνόντες μηδὲν δικαιοτέρον εἶναι βία πριαμένους*, &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.

II. THEODERIC's Edict, Cap. CXLI. GROTIUS.

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 express 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. Graec.* Lib. III. Cap. II. § 22. Edit. Oxon.

a. B. III. Chap. XIX. § 2.

XI. *There is, secondly, an Equality requir'd in the Bargain itself, if it be permutatory, or by Way of Exchange.*

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 Beneficence; ¹ 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.

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 ⁵ *Lev.* xxv. 14. and 17. *Ye shall not oppress one another.* <300>

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. Depositum 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. Juben.* GROTIUS.

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. ¹ 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.

XII. And, thirdly, in the Thing we are bargaining for; this explained.

XII. (1) *Cod. Lib. IV. Tit. XLIV. De rescindendâ 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 1.*

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. *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. I. 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; ¹ and so the Borrower is obliged to make good any Thing that is lost, ² 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, ³ 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, ⁴ 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 pawned ⁵ indeed, as well as in such as are let out, ⁵ a middle Way is to be observed, that the Receiver is not to be answerable for every Mischance, 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.

XIII. (i) 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.

a. See *Lex Wisigoth*, Lib. V. Tit. V. Cap. I. II. III.

3. See the same Place, § 7.

4. PUFENDORF treats of this Contract also in general, *B. V. Chap. X.* § 13, &c.

5. See the same Author, *Chap. VI.* of the Book already often quoted, § 2.

2. All which agree with the *Roman Laws*, ⁶ but were originally derived, not from them, but from natural Equity, and therefore are found in other Nations <301> also. And among the Rest, in Rabbi *Moses Maimonides*, Ductor Dubitant. *Lib. 3. Cap. 43.* ⁷ 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 ¹ *Aristotle* rightly observes, and this is what the least civilized People are altogether guided by; yet this is not the only Measure; ² for the Will of Men, which governs every Thing, covets many Things more

XIV. *How Things are to be valued in selling; and for what Reasons the Price may*

6. The Conformity is not compleat. For, to say nothing of Losses sustained in the Execution of 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. *Praecep. 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.

be raised or
lowered.

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, ἐν σιγμῇ, precisely, and to a Point, as *Aristotle* expresses it.

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

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.

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, <302> 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. 1. As to Buying and Selling, ¹ 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,

XV. *When a Sale is compleat by the Law of Nature, and when the Property of the Thing is transferred.*

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.

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

4. *Praestando 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. (*Mancipazione, vel cessione 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 *Probabilia 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

to him before the Property be actually 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 *Stobaeus*, 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 Prusaensis* too has observed, that among the *Rhodians*, a Sale was not compleated, nor other Contracts finished, till they were publickly registred.

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 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, Sermon. XLIV. GROTIUS.*

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 trans-ferred, either by Delivery or otherwise; for by

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,

this the moral Power of the Things goes from the Seller, which it does not by a bare Promise.

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 *Aegypt*: So also under the *Romans*, the *Alexandrians* had the Monopoly, ³ as *Strabo* tells us, of all Commodities brought from the *Indies* and *Aethiopia*. The like may be done by private Persons, provided they are contented with a reasonable Profit. But they, who, as the

XVI. *What Monopolies are against the Rights of Nature, or the Rules of Charity.*

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 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. (i) 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 PRO-COPUS, 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 *Ethiopia*, 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.

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 Denomination³ and Form, but from a more general Capacity of being compared⁴ 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.*

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*, Caus. XIV. Quaest. 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

v. Ὡς ἐπὶ τῆς χρείας τοῦτο ἐπὶ τοῦ, &c. *Money itself* <305> *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

XVIII. *By the Law of Nature nothing is to be abated of the Rent, or Hire, on Account of Barrenness, or*

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 intrinsick or extrinsick 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.*

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.*

the like Accidents, and what if the first Tenant being not able to use it, it be lett to another.

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.

XIX. How a just Salary may be increased or lessened.

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.

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. I. 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* ^a 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 <306> 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

XX. By what Law the taking Interest is forbidden.

XX. (1) Concerning this see PUFENDORF, *B. V. Chap. VII. § 8, &c.*

a. In *Cap. 25. Matt. qu. 171. & 172.*

2. For these two Loans (the *Commodatum* and the *Mutuum*) are very much alike, as *Locatio* and *Foeneratio* 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 foenore sumtos*, Money taken up at Interest, *conductos*, Money hired, *Lib. I. Sat. II.* where the Scholiast has *Merces*, for *Usura*. GROTIUS.

See Mr. NOODT's excellent Treatise, *De Foenore, & 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.*

3. Nor ought Money ever to be idle and unprofitable, L. *quid ergo, § Usuras*, D. *de contrar. & util. act. tutelae*, 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 φυσικὴ κατοχή.*) And this holds good in a Loan of Things consumable, as well as in that of Things not consumable, if we

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 Sig-

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, quae, &c.* Leg. I. II.

nification, 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 ἀντιχρήσει, in a Mortgage, the Profits of the Land answer the Use of the Money. But what ⁸ *Cato*, <307> *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

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. L. *De Usufructu*, &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 Usafructu*, 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 other in his Treatise *De Foenore & Usuris*, Lib. I. Cap. IV. VII. VIII. IX.

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 *Aegyptians*. 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 κανόνι*, 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

one *Jew* to <308> 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

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 blameable 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 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 Foenore & 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.

II. The *Hebrews* are of Opinion, that by the Word נשך, is meant Usury for Money; but that תרביח 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 Usurarum*, 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 Ad-

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 Caesar* 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.

vantage 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 Jejunio*, V. Ἐὰν νηστεύσης, 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 *Money 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 Lewdness 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. *Quaest.* 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 & Foenore*, 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 antient Fathers, in explaining the Holy Scripture by the Rules of Judicious Criticism.

16. SÜETONIUS *in Augusto*, Cap. XXXIX.

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 <309> 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 *Pantaenetus*, 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

XXI. *What Advantages do not come under the Name of Interest.*

XXI. (i) 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 foenore*. *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 Sense, and the Word *Interest* is substituted in the Room of it, in a good Sense. GROTIIUS.

What the oldest *Latin* Authors called *Foenus*, 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 Foenore & 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 Cases 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. § II.* see likewise Mr. NOODT, *De Foenore & Usuris*, Lib. I. Cap. XII.

3. PROCOPIUS, *Goth. III. (Cap. XL.)* speaking in the Praise of *Germanus, Justinian's* Relation, *Χρήματα 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.* GROTIIUS.

that he may preserve what he has got; and partly that he may oblige and accommodate some Body else.

XXII. *What Power the Civil Laws have in this Affair.*

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. *What Rules one must go by in a Contract for saving harmless, or of Insurance.*

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

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 Contracts; see also a Dissertation of the late Mr. HERTIUS, in his *Paroemiae 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. SÜETONIUS, in his Life of *Claudius*, said, that he took that Hazard upon himself. So CÍCERO took Security for the publick Money, that the People might run no Hazard in the Carriage of it. *Epist.* XII. 17. GROTIUS.

In what SÜETONIUS 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 CÍCERO, 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.

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 κοινωνίᾳ πλείω <310> λαμβάνουσιν οἱ πλείω 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

XXIV. *How one is to be regulated in a Company or Partnership; where also several Kinds of it are explain'd.*

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,

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.*

3. *Par pari datum hostimentum est, opera pro pecuniâ.* This is in *PLAUTUS*, *Asinar.* *Act. 1. 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.

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

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 *Jurisprudentia Anti-Justiniana.*

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 *Tuscans* and the *Carthaginians*, by Vertue of which they were obliged to defend each other, particularly in their trading Voyages, *Polit. Lib. III. Cap. IX.*

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. 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, <311> 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 over-reach 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.

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.*

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

p. 348. Tom. II. *Edit. Paris.* The Philosopher elsewhere calls such Alliances, Συμ-
πλοικὰὶ φιλίας. *Ethic. Nicom.* Lib. VIII. Cap. XIV.

2. See something like this in L. *Wisigoth*, Lib. V. Cap. V. GROTIUS.

XXVI. (1) That is, before Law II. of the Title of the *Code*, *De rescindenda Ven-
ditione*; concerning which see *Note* 1. on PUFENDORF, B. V. *Chap.* III. § 9.

2. Concerning this Question, see PUFENDORF, as last quoted, § 10, II. 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

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 ματαίους, *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 ἔμεναι, 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*, ἐπίκτητοι φύσεις τὰ ἔθνη, *Custom is an acquired or a second Nature*, (Lib. 3.) So likewise *Thucydides*, Τῶν νόμων κρατήσασα 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, Πεφυσιόμενα, *Naturalized*: And we read in *Diodorus Siculus*, τῆς φύσεως ὑπὸ τῆς ἀνάγκης

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 πεφυσιόμενα 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 φυσιόμενος, *in naturam versus*. Not. in Grammatic. CLENARDUS and ANTESIGNANUS, p. 564. Edit. Hanov. 1602. According to him it should be φυσιοόμενος, 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 ἄρα ἀναπόβλητον τὴν ἀρετὴν ἀσκήσει γνωστικῇ πεποιμένῳ, φυσιοῦται ἡ ἔξις. Strom. Lib. VII. Cap. VII. p. 859. Edit. Potter.

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 <312> Contradiction in these Things,

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 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 fell 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. (*Mancipatione 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 POMONIUS 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.

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 τοῖς ἐκου-*

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 etsi.* 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 Tediousness 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 hagling 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.

σίοις, &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, Ἄδικίαν ὑπὸ μὲν τοῦ νόμου ἀφειμένην τὸ δὲ δίκαιον <313> ἀνατρέπουσαν, *An Injustice*¹² *tolerated indeed by Law, but which in the Main is not the less an Injustice.*

11. This is an Extract from the *Bibliotheca* of PHOTIUS, already quoted at the End of § 11. of this Chapter, and from the same Page 1044.

12. So ANDRONICUS RHODIUS on *Nicomach.* V. Cap. V. in the End, Τούτων γὰρ ἄδειαν νόμος, *For the Law has granted an Impunity in such Cases.* GROTIUS.

Of an Oath.

I. *How great the Authority of an Oath is, even in the Opinion of the Heathens.*

I. 1. In every Nation, and in every Age, an ¹ Oath has always been of the greatest Weight and Consideration in Promises, Agreements, and Contracts. For, as *Sophocles* says in his *Hippodamia*,

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

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,

*Ὅρκου δὲ προστεθέντος ἐπιμελεστέρα
Ψυχὴ κατέστη· Δισσὰ γὰρ φυλάσσεται,
Φιλῶν τὲ μέμψιν, καὶ εἰς Θεοῦς ἀμαρτάνειν.
Florileg. Tit. XXVII.*

3. *De Offic. Lib. III. Cap. XXXI.*

4. *Ὅρκον θ' ὃς δὲ πλείστον ἐπιχθονίους ἀνθρώπους
Πημαίνει, ὅτε κέν τις ἐκὼν ἐπίορκον ὁμόσση.
Theogon. v. 231, 232.*

Insomuch 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 Priestess of *Apollo*, <314>

- 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*, ⁹ *and whatever is promised after such a Manner, calling GOD,*

5. See *SERVIVS*, in *Excerpt. Fuldens.* upon *I Aeneid.* *GROTIUS*.

I do not find any Remark to this Purpose in *SERVIVS*'s Commentary on the two first Books of the *Aeneid*, 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
Laomedontae luimus perjuriam Trojae.*
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. Ἀλλ' ὅρκου παῖς ἐστὶν ἀνώνυμος, οὐδ' ἐπὶ χεῖρες
"Οὐδε πόδες· Κραιπνὸς δὲ μετέρχεται εἴσοκε πᾶσαν
Συμμάρψας ἀλέσῃ γενεήν, καὶ οἶκον ἅπαντα.
Lib. VI. Cap. LXXXVI.

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.*

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,

Quae jurat mens est; nil conjuravimus illâ. Epist. 21. ver. 135.

² *It is the Mind that swears; with that we never swore.*

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.*

And immediately after,

*Sed si nil dedimus praeter sine pectore Vocem,
Verba suis frustra viribus orba tenes.
Non ego juravi: legi jurantia Verba, &c.*

*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.

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. 1. 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 <315> 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,

III. *The Words of an Oath oblige in that Sense in which he to whom we swear, is believed to understand them.*

² Ἀλλὰ τὰ μὲν νόεω καὶ φράζομαι.

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 Word ³ in that Sense wherein he thinks it is taken

3. 'H γλῶσσ' ὁμωμόχ', ἣ δὲ φρὴν ἀνώμοτος.

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.

III. (1) *De Offic.* Lib. III. Cap. XXIX.

2. *Odys.* 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 *Trosli*, Concil. *Tom.* III. *Edit. Sirmond.* And in HINC-

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 *Liquidò jurare, To swear with a safe Conscience.* And therefore *Me-*

MARUS's little Treatise *De divortio Lotharii & Tethbergae*, 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. Quaest. V. C. quacumque.* GROTIUS.

8. *DONATUS* upon that Passage in the *Fair Andrian*,

*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, purè & manifestè, openly and plainly. *NICETAS*, in his Life of *Alexius*, blaming *Andronicus Comnenus's* Deceit, says, *Χρεὼν μὴ ὑπονοθεύειν,*

tellus did well in refusing to give <316> 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 ad-

&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 τουτοις ἐγκαθίσας, ὡς αἱ μυῖαι τῷ μῶλωπι*, *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.

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* already quoted, which answers to this.

mitted; 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 $\Psi\acute{\epsilon}\delta\epsilon\sigma\theta\alpha\iota$ 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, *ἀνθρωποπαθῶς, 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. *Jonah* iii. 5. 11. In which Sense too GOD may improperly be said to deceive us. And it is usual for the Word $\Psi\acute{\epsilon}\delta\epsilon\sigma\theta\alpha\iota$, 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. *Hos.* 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, be-

11. Our Author thus explains himself on this Passage, in his Annotations, “We say improperly a Person *deceives* ($\Psi\acute{\epsilon}\delta\epsilon\tau\alpha\iota$) 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 *Jonah* 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. *Quaest.* IV. But pray explain it as in our Text. GROTIUS.

13. See SENECA, *Natur. Quaest.* XI. 37. GROTIUS.

14. Add *JOB* xli. 1. *HOSEA* ix. 2. GROTIUS.

cause 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. 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 <317> certain Fact which really is not as he supposed, and that unless he had believed so, he would not have sworn, that Oath shall

IV. *An Oath procured by Fraud, when binding.*

IV. (1) As *Hippolytus*, whom we spoke of just now; upon that of SOPHOCLES in *Oedipus Coloneus*,

Ἀπάτα δ' ἀπάταις
Ἑτέραις ἐτέραι παραβαλλόμενα
Πόνον οὐ χάριν ἀντίδοσιν ἔχει.
(*Ver.* 216, *ἔρ.*)

*One Imposition upon another
Is not with Thanks but with Ruin paid.*

The Scholiast delivers himself thus, καὶ αὐτοὶ οὐ 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', ἥ δὲ φρήν 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 ἀντίδωσιν 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.

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 Ex-

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 *Noah's* Sons, and pay Tribute. So MAIMONIDES and SAMSON MI-COSI, and MOSES DE KOTZI, in *Praecep. juben.* 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 *Palaestina*, Lib. I. Cap. XXVII.

ample 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 <318> 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. 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

V. *The Words of an Oath not to be extended beyond their usual Sense and Acceptation.*

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.

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.) οὔτε προτοεπομένων, οὔτε 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*

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 *Achaean*s made to the *Roman*s, ⁴ who did not approve of some Things which they had done, and confirmed by Oath, that the *Roman*s would be pleased to alter what they had a Mind to; but not to oblige the *Achaean*s 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, ὅστω δε 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*

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. *Quaest.* IV. And to the same Purpose is the seventh 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.

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 <319>

*Praestare 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*.

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.*

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. Or if it
hinders any
greater moral
Good.

VII. I. 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 Judaeus* I just mentioned, not impertinent to the Affair in Hand, and is very well worth our inserting here, εἰσὶ δ' οἱ τὴν φύσιν ἄμικτοι, &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 הנאח, that is, εὐχὴν ὠφελείας, *The Vow of Assistance, or Beneficence*: שבוע לחיוב, *An Oath to do Good*, Lev. v. 4. The Form of this, as the Rabbins tell us, ⁵ was כלל קדבן מני מהרתחנה קרבן, or שאתא נהנחלי 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. מני קרבני טרם רתתהנא, in Greek Δῶρον ὃ ἐὰν ἐξ ἐμοῦ ὠφελῇθῃς, that is, *It is a Gift consecrated to*

VII. (1) See Note 1. 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 Hebraeos*, Lib. VII. Cap. II.

GOD (for this is what is meant by קִרְבָּן, *korbân*) *by whatsoever thou mightest be profited by me.*

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. <320>

VIII. *Or if the Thing engaged for be impossible.*

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.

IX. *What if that Impossibility be only for a Time.*

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

X. *Men swear by the Name of GOD, and in what Sense they do it.*

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 *Charan*, 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.

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 ὄρκος εἰς κατάραν τελευτᾷ τῆς ἐπιρκίας*, *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*

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.

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 *Προπετώς κατὰ τῶν θεῶν ὀμνύειν ἀλλὰ κατὰ τῶν προστυγχανόντων*, *To swear precipitately by the Gods, but* ³ *by such Things as were at Hand*, as by the Scepter. And this Custom ⁴ *Porphyr*, 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 *Pharoah*, 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 <321> 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

2. EUSTATHIUS on *Iliad*. Lib. I. ver. 234.

3. APOLLONIUS, speaking of *Socrates*, in PHILOSTRATUS, VI. ὥμνυ τὰντα οὐχ' ὡς θεοὺς, ἀλλ' ὥα μὴ θεοὺς ὥμνυ. *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 SOC-RATES) 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.

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. *Quaest.* I. GROTIUS.

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, *Καρβανούς*,¹⁰ which Word we find in *Aeschylus*¹¹ and *Euripides*;¹² and *Καρβάνα δ' αὐδὰς*, in the same *Aeschylus*. CHRIST, in

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 *Βαρβαροφώνους*, *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 *Κάρβανου*, is found in AESCHYLUS, 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 φράζε καρβανῷ χερσί.

Ver. 1070. p. 208. *Edit. H. Steph.* The other in the *Suppliants*,

——— *Καρβάνα δ' αὐδὰν*

Ἐυακοεῖς ———

Ver. 124. p. 312. which the Scholiast explains thus, *Νοεῖς καὶ τὴν βάρβαρον 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.

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 that³ *Duarenus* should have allowed; yet, if they <322> 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*

XII. *It is an Oath, tho' sworn by false Gods.*

13. *Apolog.* Cap. XXXII.

XII. (1) *Wisdom*, Chap. XIV. Οὐ γὰρ ἡ τῶν ὀμνυμένων δύναμις, ἀλλ' ἡ τῶν ἀμαρτανόντων δίκη ἐπεξέρχεται, ἀεὶ τὴν τῶν ἀδίκων παράβασιν. Which the *Latin* Translator turns thus, *Non enim Juratorum virtus, sed Peccantium poena perambulat semper Injustorum praevaricationem*. 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 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*, Caus. XXII. Quaest. V. GROTIUS.

he who swears but by a Stone, if he swears falsely, is perjured: And then, The Stone does not hear 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 βεβαίωσιν 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 Ὁρκος μαρτυρία θεοῦ περὶ πράγματος ἀμφισβητουμένου, *An Oath is the Testimony of GOD in doubtful Cases*. And that of Dionysius Halicarnassensis, Τελευταία δε πίστις ἀπασίν ἐστιν, &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 Aegyptians, 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 εὖορκεῖν, *To swear well*; he who offends in the former Case is said, ⁶ ψευδορκεῖν, *To swear falsely*; he who in the latter, ἐπιορκεῖν, *To be perjured*, as the same Chrysippus nicely distinguishes them, tho' sometimes they are confounded.

XIV. *When an Oath lays us*

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 Per-

XIII. (1) *De Legis. Allegor.* Lib. II. p. 99. *Edit Paris.*

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. GROTIUS.

3. *Antiq. Rom.* Lib. VI. Cap. LXXXIV. p. 319. *Edit. Oxon.* (406. Sylburg.)

4. DIODORE of Sicily, *Bibliothec. Lib. I. Cap. LXXVII. p. 49. Edit. H. Steph.*

5. The Passage of CHRYSIPPUS is preserved by STOBÆUS, *Serm. 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. GROTIUS.

son, 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 reprov'd by the Prophets, and punished by GOD, ³ for break-<323>ing their Faith, which they had sworn to the Kings of *Babylon* to maintain inviolable. *Cicero* com-

under an Obligation both to GOD and Man, and when to GOD only.

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. GROTIUS.

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. GROTIUS.

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 rendred 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 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.

mends *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. *The Opinion that an Oath given to a Pyrate, or Tyrant, binds not before GOD, confuted.*

XV. I. 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 οὐδὲν πιστὸν ἐστὶ Ῥωμαίοις πρὸς τυράννους οὐδ' ἔνορκον, *The Romans think it no Point of Honour or Duty to observe either Faith or Oath to Tyrants*.

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 ἢ ἐπιορκία τὸ τῆς περιφρονήσεως ἀνατίθῃσιν ἔγκλημα. *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.*)

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, <324> and then went off again, did not, in the Judgment of the *Roman* Senate, satisfy his Oath of Returning. ¹⁰

5. PLUTARCH, in his *Lysander*, ὁ ὄρκῳ παρακρουόμενος, &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 *Prienenses* 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.*

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. Whether
an Oath given
to one who does
not regard his
Word be to be
kept; explained
by a Distinc-
tion.

XVI. 1. As to that of *Accius*, ¹ *T. Fregisti fidem. A. Quam neque 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

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 עלהרע, *To his Neighbour*, instead of להרע, he only says, others translate, *He who hath sworn to afflict himself;* (that is, has made a Vow to fast)

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.

XVII. *He who is bound to GOD alone does not oblige his Heir after him.*

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 <325> 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 *Caesar*, 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.

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.*

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 I. GROTIUS.

3. *De Bello Civil.* Lib. II. Cap. XXXII.

4. *Ibid.*

XIX. *When that which is done contrary to one's Oath becomes void.*

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 of 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. *How far the Prince's Power extends concerning what his Subjects have sworn to Strangers, or Strangers to them, explained by a Distinction.*

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* pro-

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. § II.*

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.

poses 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 <326> 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

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. SÜETONIUS, 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.

SÜETONIUS 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.

4. See Note 3. on PUFENDORF, B. IV. Chap. II. § 24. It is on *popish* 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.

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 ¹¹ if the Agreement were made, after that Dispute began.

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.

II. See PUFENDORF, *B. V. Chap. XI. § 6.*

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 ¹² 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 <327> 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. II. 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 un-

XXI. *What Manner of Oaths CHRIST forbids when he prohibits Swearing at all.*

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 Integre*, 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 praestitum*. 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 primae 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, § II. 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, teaches 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.

XXI. (1) Rom. i. 9. ix. 1. 2 Cor. i. 23. xi. 31. Phil. i. 8. 1 Thess. ii. 5. 1 Tim. ii. 7. GROTIUS.

certain. 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, *Μὴ εἰς ὑπόκρισιν πέσητε*, 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.

2. The same may be proved by our Saviour's Words, *ἔστω δε λόγος ὑμῶν, ναὶ, ναὶ; οὐ, οὐ;* Let your Communication be *Yea, yea; Nay, nay;* which St. James thus expounds, *ἔστω δε ὑμῶν τὸ ναὶ, ναὶ; καὶ τὸ οὐ, οὐ;* *Let your Yea be yea, and your Nay, nay;* where there is evidently the Figure which the Rhetoricians call *Πλοκῇ*, 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*, ܢܝܝܢ, answering to the *Rabbinical* ܢܝܝܢ, as does the *Arabick* نَعَمْ, 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

2. VIRGIL, *Eclog.* VII. v. 70.

3. Our Author has quoted this Example, either from AQUILA ROMANUS, an antient Rhetorician, who gives it in the very Words here set down, p. 19. *Antiq. Rhet. Lat. Edit. Pithaei.* or from MARTIANUS CAPELLA, p. 174.

4. Words used in replying to a Stipulation. See *Digest.* Lib. XXXII. *De Legatis & Fideicomm.* III. Leg. XXXIX. § 1. and *Lib. XLV. Tit. I. De verborum obligat.* Leg. I. § 2.

the *Jews*, *Justi Hominis*, ⁵ *Naì est vaì & 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 *Naì καὶ οὐ*, *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 ἐλαφρὰ χρήσασθαι, *Use Lightness*, he adds, his Word was not *Naì καὶ οὐ*, *Yea and Nay*. *Festus* relating the several Significations of the Word *Nauci*, writes thus, Some derive it from the *Greek*, ⁶ *Naì καὶ οὐχι*, *Nai cai ouchi*, and say that it imports a *fickle inconstant* Creature. Now if *Naì καὶ οὐ*, *Yea and Nay*, signifies *Fickleness* and *Inconstancy*, it will follow that *Naì*, *vaì*; *οὐ*, *οὐ*; *Yea*, *yea*, and *Nay*, *nay*, signify *Constancy*.

4. So that our Saviour's Words imply, what ⁷ *Philo* the *Jew* expresses, *Κάλλιστον καὶ βιωφέλεστατον καὶ ἄρμωστον, &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 τοῦ σπουδαῖς λόγος ὄρκος ἔστω βέβαιος, ἀκλινῆς, ἀψευδέστατος*. *The Word of a good Man ought to pass for a firm, unchangeable, and sincere Oath*. And, as *Josephus* says of the *Essenes*, ⁹ *Πάν τὸ ῥηθὲν ὑπ' αὐτῶν ἰσχυρώτερον ὄρκου, τὸ δὲ ὀμνύειν αὐτοῖς περιῖσται*, *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 ὀμνύναι θεοὺς, ἀσκεῖν*

5. See BUXTORF's *Florilegium Hebraicum*, p. 329.

6. You had better in this Passage of *FESTUS* write it *οὐκί*, as it is often in *HOMER*, for this comes nearer the Word *Nauci*. *GROTIUS*.

7. *De Decalogo*. *GROTIUS*.

8. *De specialibus legibus*. *GROTIUS*.

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 *ἰουδαίων*. 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

γὰρ αὐτὸν 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, [[¹³]] 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 *Καλοκαγαθίαν ὄρκου πιστοτέραν ἔχε, 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 τῆς ὁμολογίας ἐν*

of *Pythagoras* is printed in the same Volume; I mean PORPHYRY, who makes *Pythagoras* travel among the *Jews*, as well as the *Aegyptians*, *Arabians*, and *Chaldeans*, Num. II. *Edit. Kust.* Whereas JAMBlichus speaks only of his going into *Aegypt* and *Syria*, Lib. I. Cap. III. IV.

II. DIOGENES LAERTIUS, *Lib.* VIII. §22.

12. PHILO, *Ἡδὴ γὰρ ὅτε ὁμνὺς, &c.* *For he who is put to his Oath, is suspected of being false to his Word.* (De Decalog.) In SOPHOCLES's *Oedip. Colon.* *Oedipus* has expressed himself thus,

Οὔτοι σ' ὑφ' ὄρκου γ' ὡς κακὸν πιστώσομαι

I won't require your Oath, as I would a Rascal's.

(ver. 642.)

Theseus replies,

Οὔκουν πέρα γ' ἂν οὐδὲν ἢ λόγῳ 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 ὄρκου δέρμενος, 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. [[Footnote number missing in text, supplied from Latin edition.]] *Lib.* VII. Cap. VIII. Num. 28.

14. DIOGENES LAERTIUS, *Lib.* I. § 60.

ἀμεταπτώτῳ καὶ ἑδραίῳ δεικνύειν βίῳ τε καὶ λόγῳ,¹⁵ *To shew the Sincerity of his Promises by the Firmness and Uniformity of his Life and Conversation.* And Alexis the Comedian,

Ὅρκος βέβαιός ἐστιν ἂν νέυσω μόνον.

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 σέβου ὄρκον ἐν ἀρχῇ παραγγέλλας, &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 hazardous, and therefore it is neither decent nor safe <329> to swear about them at all.* And *Libanius* highly commends a Christian Emperor, because ἐπιρκίας τοσοῦτον ἀποστατῶν, ὥστε, &c. *he was so far from perjuring himself, that he dreaded even to swear the Truth.* And *Eustathius*, upon that of the fourteenth *Odys.* (v. 171.) Ἄλλ' ἤτοι ὄρκον μὲν ἐάσομεν, *But we will allow an oath*, says thus, Οὐ χρεία ὄρκου ἐν τοῖς ἀδήλοις, &c. *in doubtful Matters there is no Occasion for an Oath, by Way of Confirmation, but of Prayers for Success.*

15. *Stromat.* Lib. VII. Cap. VIII. p. 861. Edit. Potter.

16. St. CHRYSOSTOM very well animadverts upon this, in his twelfth *De Statuis*, Ὅτι καὶ μὴ συναρπασθεῖς μηδὲ ἄκων, &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 οὖν, &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.

XXII. *What
Circumstances
have by Custom,
without
Swearing, the
Force and
Obligation of
an Oath.*

XXII. And therefore in many Places, instead of an Oath, it is customary¹ to ratify a Promise by joining of the right Hands of the two Parties together, which was *πίστις βεβαιωτάτη παρὰ τοῖς Πέρσαις*, *the strongest Tye of Faith among the Persians*; [[²]] 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*, *Bonae fidei sum*,⁴

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 quae vi metusve causâ aequantur Juramentum & Fides interposita*. GROTIUS.

2. [[Footnote number missing in text, supplied from Latin edition.]] 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 *Lacedemonians* 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 *Menonites*, 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 *Praelect. Jur. Civil.* Tom. II. in Tit. *De Jurejurando*, p. 335. *Edit. Thomas.*

4. ISOCRATES speaking of *Evagoras*, King of *Salamis*, 'Ομοίως 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 παρὰ πᾶν, &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.

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 Caesar*, 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. <330>

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 *Fred-erick Barbarossa*.

7. *Politic. Lib. III. Cap. XIV. p. 357. Tom. II. Edit. Paris.*

*Of the Promises, Contracts, and Oaths
of those who have the Sovereign Power.*

I. *The Opinion
of those refuted,
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. The 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 Subjects. ¹ *Bodin* thinks

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

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 Resti-

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.*

tution, which receives ³ its Power only from the Civil <331> 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. *To what Acts of Kings the Laws extend, explained by several Distinctions.*

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.

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,

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.

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 Tutelâ Regiâ*, 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

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. [[³]] 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 com-

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. [[Footnote number missing in text, supplied from French edition.]] 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.

pelled be one Person, nor is it sufficient here to consider one and the same Person under different Respects.

III. *When a King is obliged by his Oath, and when not.*

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 <332> 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 with-

III. (1) See the foregoing Chapter, § 19.

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 rendring it invalid. See § 12. *Num.* 3. of this Chapter.

3. This is a false Supposition, which we have rejected several Times.

out 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. 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

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.*

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 CUJAS, on the Title of the *Code*, *De Jure Emphyteutico*, with FABROT's Notes, *Tom. II. Opp. p. 165.* and *Recit. in Cod. Tit. De Pactis*, *Tom. IX. p. 101.* As also VINNIUS 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 CUJAS. *Tom. X. Opp. p. 536, 537,* and ANTHONY

Creditor is incapacitated by the Law ³ to receive it, or to return a <333> 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 חסך Bounty, ⁵ which other Interpreters upon *Prov.* xx. 28. call פלגת הטובה, ⁶ the *excess or overplus of Goodness*; that what is due in Strictness and Rigour, is called

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 *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. § II. 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 חסך. 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 πλουσίας ἀπορρεῖ τῆς ἡμερότητος, *Generosity flows from the rich Fountain of Good Nature.* PLUTARCH in his *Cato Major*. GROTIUS.

in *Hebrew* משפט *Judgment*; and that they stile what proceeds from a Principle of Honesty, צדק *Justice*, that is Equity. The Translator of *Mat.* xxiii. 23. distinguishes between ἔλεος, 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.

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. *How a Right gained by Subjects may lawfully be taken away.*

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. ¹ 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. <334>

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*

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

VII. (1) See PUFENDORF, *B. VIII. Chap. V. § 7.*

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 GRONOVIVS on this Head.

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

when they are so.

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.

X. How by the Contracts of Kings they who inherit all their Goods stand obliged.

XI. 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

XI. How by those Contracts they who succeed in the Kingdom may be obliged.

IX. (i) 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. (i) See the Authors quoted by REINKINGIUS, *Lib. I. Clas. 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. (i) See AYMONIUS published by *Freber*, p. 373. GROTIUS.

2. Thus *Solomon* was not obliged by the Promise which *David* had made to *Shimei*. GROTIUS.

See I *Kings* ii. 9. and what PUFENDORF says, *B. IV. Chap. II. § 13.*

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 particular 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. *And how far.*

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 itself, to reduce the Prince to such Necessities. And therefore it is not to be supposed,

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 abovesaid Grandfather, and the Acquisition of the abovementioned Places were made in the Name of the Kingdom.* See too *TREUTL. Part I. Disp. VI. Thes. VII. Syr. de pace religionis, Concl. XIX. GROTIUS.*

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 *WŁADISLAUS, Lib. XXVII. GROTIUS.*

2. *Digest. Lib. II. Tit. XIV. De Pactis, Leg. XIV.*

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

3. *Code*, Lib. II. Tit. IV. *De Transactionibus*, Leg. XII. See Mr. NOODT's Treatise *De Pactis & Transact.* Cap. XXVI. and Mr. SCHULTING, on the Title *De Pactis*, § 25.

4. As the Law of *Cabades* King of *Persia* in PROCOPIUS and AGATHIAS. The Subject of this Law is applied to Alienations by *Petrus* the Ambassador of *Justin* the Second to *Chosroes*, speaking of some Things which *Justinian* seemed to have promised the *Saracens*, οὐ γὰρ ἐνὸς ἀνδρὸς, &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 Ambassador here quoted may be seen in the Embassies of MENANDER the Protector, 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 Ambassador 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. Caeterum 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.

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.

[[3.]] 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; <336> 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 ⁷ *Pliny*, speaks thus, *Let no Man imagine that what he has obtained from another Prince, either privately or publicly, 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*

6. The Story is in SÜETONIUS, *Chap.* VIII. in XIPHILINUS out of *Dion*, and in VICTOR. You have something like it, *C. Justitiae Caus.* XXV. Quaest. I. GAIL. *Obs.* II. 60. 15. See also RADEVICUS's History. GUNTERUS LIGURINUS, *Lib.* V.

*Neve 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 *Lib.* VIII.

*Tanta tamen clari fuit indulgentia Regis,
Ut quicumque bona, &c.*

*So Great the Indulgence of this famous Prince,
That whoe'er 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.

null and void, ⁸ *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 revoked ⁹ 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 also ¹⁰ 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

8. MARIANA XXIV. 16. quotes this and applies it to the extravagant Magnificence of *Frederic King of Naples*. *Galba* resumed *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, ἐψηφίστο παρὰ πάντων, *It was universally agreed on, that they who had received Money without just Reasons should refund, some all, some half.* See the same Author in his *Isaacius Comnenus* of Grants made by *Lewis XI.* See SERRANUS in *Charles VIII.* of some of his Grants made even to Churches, and yet resumed; see PHILIP COMINAEUS, *Lib.* IX. MARIANA, *Lib.* X. *Cap.* XVI. of some Grants repealed, which *Ramirus King of Aragon* had made. Of Grants of *Isabella* reversed even by her self, XXVII. II. 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 *Alfonsus* and *Sanctius* in MARIANA, *Lib.* XII. *Cap. ultimo:* In CAMDEN in the aforesaid Year 1595. and 1597. in *Controv. Hansiatic.* GROTIUS.

10. You have several Things relating to this Affair in *Conc. Gall.* Tom. III. GROTIUS.

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. *Which of the free Grants of Kings are revocable, and which not.*

XIII. Neither is that, ¹ 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 <337> 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. *Whether he whose the Crown really is, be bound by the Contracts of them who invade, or usurp the Kingdom.*

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.

XIII. (1) See those cited by REINKINGIUS, *Lib. II. Clas. II. Cap. VIII, Num. 26.* GROTIUS.

See likewise PUFENDORF, *B. VIII. Chap. X. § ult.*

2. See AFFLICT. *Dec. CXXVIII. Num. 10.* GROTIUS.

XIV. (1) Consult PUFENDORF, *B. VIII. Chap. XII. § 3.*

Of publick Treaties, as well those that are made by the Sovereign himself, as those that are concluded without his Order.

I. *Ulpian* 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.*

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. *The Difference between Leagues and Sponsions, and how far publick Engagements oblige.*

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 Spension 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 therefore⁵ that of *Seneca the Father*, (*since the Chief has made a League, the Roman People may <338> 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. Indeed⁶ in Monarchies the sole Power of making Leagues is in the King, according to *Euripides* in his *Supplices*.

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 Italiae*, 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 SCHULTING, Father to the famous Lawyer, whom I have quoted several Times, and who is now Professor at *Leyden*.

6. See what is below, B. III. Chap. II. § II, &c. SERVIVS upon that Passage of the Second *Aeneid*.

*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 *Aeneas* going to fight a Duel, first enters into a League with *Latinus*, *he does not*, says he, *bring in Turnus Swearing, because when the King is present, he has no Power to do it.* GROTIUS.

——— τόν δε δ' ὀμνύναι χρεὼν
 Ἄδραστον οὗτος κύριος τύραννος ὦν
 Πάσης ὑπὲρ γῆς Δαναΐδων ὀρκωμωτεῖν

*Adrastus 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, ὀρκωμωτεῖν and not ὀρκωμωτεῖ.

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

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 *Camillius* 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. *Camillius* 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 BUDAEUS, in his *Specimen Jurisprud. Historicae*, § 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 illustrious 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.*

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 what⁹ 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 <339> or such a Thing shall be confirmed and ratified¹¹ by a third Person, does oblige the Promiser to pay Damages and Interest.

IV. Menippus's
Division of
Leagues
rejected.

IV. *Menippus*, King *Antiochus*'s Ambassador to the *Romans*, as¹ *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

8. *Noct. Attic. Lib. XIII. Cap. XV.* from MESSALA, *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 savouring 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.*

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 ratihabitione. Leg. XIII.* See Mr. NOODT on the Title of the *Digest, De Procuratationibus, &c.* p. 130. and Mr. SCHULTING on the same, § 7.

IV. (1) *Lib. XXXIV.* Add DIODORUS SICULUS, *Exc. Leg. IV.* GROTIUS.

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 saying¹ 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

V. Leagues divided into those that injoin the same that the Law of Nature does; and from whence this arises.

V. (1) See PUFENDORF, B. VIII. Chap. X. &c.

2. See the Law quoted in the *Preliminary Discourse*, § 14.

3. CAESAR 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 *Tyrrhenians* by SERVIUS, upon the eighth and tenth *Aeneid*, and of other Nations upon the first *Aeneid*; and of the *Portuguese* by DIODORUS SICULUS, (Lib. V. Cap. XXXIV.) with whom agrees PLUTARCH in his *Marius*; τὸ ληστεύειν οὐπω τότε τῶν ἰβήρων οὐχὶ κάλλιστον ἡγουμένων, *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

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 com-
plaisant and inoffensive Inquiry, ⁵ which also *Thucydides* takes notice of;
and in the old Law of *Solon* you have the Companies ἐπὶ λείαν ἐρχο-
μένων of *free Booters*; ⁶ for as *Justin* says, Pyracy was to the Days of *Tar-*
quin 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 <340> any
Nation with whom the *Romans* have no Tye of Friendship or Hospi-
tality, 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 al-
lowed. 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
Sallust speaks of *Bocchus*, ¹⁰ *Nobis neque bello, neque pace cognitus, known*

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 THOMASIIUS, intituled *Historia Latrocinii gentis in gentem*, Tom. VII. *Observat.*
Hallens.

4. *Odyss. III.* Where the Scholiast says, οὐκ ἄδοξον ἦν παρὰ τοῖς παλαιοῖς τὸ
ληστεύειν, ἀλλ' ἐνδοξον, *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 οὐκ ἔχοντός πω αἰσχύνην
τούτου τοῦ ἔργου, φέροντος δὲ τι 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
SALMASIUS finding here οἰχόμενοι, 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.*

9. *Lib. I. Cap. XL. Edit. Oxon.*

10. *Bell. Jugurth. Cap. XXII. Edit. Wass.*

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 *Achaeans*, 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 σπονδαῖς, 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. I. The Conventions which add something to the Law of Nature, are concluded either on equal or unequal Terms. ¹ The equal are those, αἱ ἴσως καὶ κοινως ἐν ἀμφοτέροις ἔχουσι, which are alike on both Sides, as *Isocrates* speaks in his Panegyrick. To which that of *Virgil* alludes.

VI. And into those that add something to it; and these are either upon equal Terms:

II. 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 (σπονδαί). 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 *ANTIPHO* 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. (i) So *PLINY* says, that the *Parthians* lived with the *Scythians* upon one and

*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 ἐπὶ ἴσῃ καὶ ὁμοίᾳ*, *Alliances upon the square*; as you may find in *Appian* and *Xenophon*; and those upon unequal Conditions more properly, *σπονδὰς*, *Leagues*, and in respect to Inferiors, *προστάγματα*, *Injunctions*, or *συνθήκας ἐκ τῶν ἐπιταγμάτων*, *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. <341>

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

the same Foot. And *Pompey* in *LUCAN* speaking of the same Nation of the *Parthians* says:

———— *Solus*
Ex aequo 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.

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* call⁴ *Συμμαχίαν*, *A Conjunction of Arms*, which *Thucydides* thus explains, *Τοὺς αὐτοὺς ἐχθροὺς καὶ φίλους νομίζειν*, *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 *ἐπιμαχίαν*,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.

3. POLYBIUS, *Lib. III. Cap. XXII*, *Edit. Amstel.*

4. The Antients termed it *ὁμαχίαν*, *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 (*ἐπιμαχίαν*) with those of *Corcyra*, (*Corfu*) *Lib. I. Cap. XLIV*. It appears from what goes before, that the Term *ἐπιμαχία* 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, *Pers. 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. Or upon
unequal, which
are again
divided.

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 τοὺς ἐτέρους ἐλάττουντα παρὰ τὸ δίκαιον*, *Where one Side is depressed more than is just and reasonable*, are those which we said are called *Προστάγματα*, *Injunctions*, or *ἐπιτάγματα*, *Commands*. And these are such as do either lessen, or not lessen, the sovereign Jurisdiction of the inferior Power.

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 ἔνσπονδοι*, *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 lessening the sovereign Jurisdiction, as the perfect transferring of it to another, of which we have treated elsewhere. Yet is such an Agreement sometimes 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 lessen the Sovereignty, the Terms imposed, are either permanent or not. Those that are not per-

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 burthensome 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*.

manent, are such as oblige the Payment of the Forces employed in the present Service, ³ the demolishing Fortifications, the quitting some Places, ⁴ the giving Hostages, the delivering up Elephants and Ships. ⁵ The Conditions that are permanent are such as oblige all Reverence and Honour to the other's Power and Majesty. How far such an Alliance extends, we have elsewhere shewed. Next to this, is, that they account the Friends and Enemies of the other Party theirs, that they allow no Passage through their Country, nor Provisions, to any Troops that belong to those they are at War with; as also these less considerable Articles, as that they shall not fortify such and such Places, nor lead an Army thither, nor have above such a Number of Vessels, nor build any City, nor traffick, nor levy Soldiers in certain Places, nor fight against their Allies, nor supply their Enemies with Provisions, nor receive those who come from such and such Parts; that they renounce all former Treaties with others: Of all which you may see Instances in *Polybius*, *Livy*, and other Authors.

4. Unequal Leagues are made, not only between the Conquerors and Conquered, as *Menippus* supposed, but also between People of unequal Power, even such as never were at War with one another.

VIII. Concerning Leagues, it is often disputed whether they may be lawfully made with those who are not of the true Religion, which is not to be doubted in Respect to the Law of Nature only. For the Right of mak-

VIII. Alliances
made with
those who do
not profess the

3. Thus the *Samnites*, being subdued by *Lucius Papirius* the Dictator, sued 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.* II. The learned GRONOVIVS, from whom I have taken this Example, gives us some others.

4. Thus King *Antiochus*, being conquered by *Scipio Africanus*, bound himself 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.* XXVII.

5. This Stipulation was made by the *Romans*, in the Treaties of Peace, already mentioned, with King *Antiochus* and the *Carthaginians*, but in such a Manner that the burthensome Condition was attended with something permanent; for they obliged the Vanquished to keep no Elephants for the Use of War. *LIVY*, *Lib.* XXX. *Chap.* XXXVII. *Num.* 3. and *Lib.* XXXVIII. *Cap.* XXXVIII. *Num.* 8.

true Religion
are allowed by
the Law of
Nature.

ing Alliances is common to all Men, and admits of no Exception on the Account of Religion. The Question is then, whether by the Law of GOD it be lawful or not? which has been the Subject of frequent Controversy, ¹ not only among Divines, but among some Lawyers too, of which Number are *Oldradus* and *Decianus*.

IX. Nor uni-
versally forbid-
den by the
Hebrew Law.

IX. 1. Let us then first consider, what the Divine Right of the Old Testament directs in this Affair, and afterwards we will consult that of the New. We find that inoffensive Leagues, and such as tended to no one's Injury, might, before the Time of *Moses*, be contracted with People who were not of the true Religion. We have an Instance of this in ^a *Jacob's* Treaty with *Laban*, not to say any Thing of ^b *Abimelech*, because it does not fully appear that he was an Idolater. Nor did the *Mosaic* Law make any Alteration here: Let the *Aegyptians* be a Precedent, who doubtless were Idolaters, yet the *Hebrews* ^c were strictly forbid to abhor, or have any Aversion to them. But we must except the seven Nations, who were by the ALMIGHTY himself devoted to Death, and the *Israelites* ^d appointed to execute that Sentence; for they persisting in their Idolatry, and refusing Subjection, the *Jews* were commanded not to spare them: To whom also the *Amalekites* ^e were added by the Divine Decree. <343>

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 ^g *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.

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.

f. 2 *Sam.* v. 11.

g. 1 *Kings* v. 12.

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 Συγχρηῆσθαι, συνεσθίειν, κολλᾶσθαι, 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 παρέδέχοντο τοὺς ἄλλαις, &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*, Μόνους πάντων ἐθνῶν, &c. *That they are of all People the most unsociable to Strangers, and take them all for Foes*. And then there follows, Μηδὲν ἄλλω, &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*, Οἱ βίον ἄμικτον εὐρόντες, &c. *They have found out so unconvertible a Way of Living, that they will not so much as eat with*

^h. *Lev.* xix. 18. *Deut.* xxii. 1.

ⁱ. *John* iv. 9. *Acts* x. 28. xi. 3.

other People. And accordingly in *Josephus*, very frequently, the *Tὸ ἄμικτον, τὸ ἀσύμφυλον, ἢ διαίτης 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 τὴν φύσιν ἔσμεν οὐδὲ ἄλλοτρίως πρὸς τοὺς οὐχ ὁμοφύλους ἔχομεν*, *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 שלום, 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, <344> 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; nor ⁿ *David*, till provoked by intolerable Affronts. The remaining Question then is, whether it be lawful to enter into a confederate War with Infidels.

k. *John* iv. 7.

l. 1 *Sam.* xxvii. &c.

IX. (1) *Antiq. Jud.* Lib. VIII. Cap. II.

m. *Judges* xi. 16.

n. 2 *Sam.* x.

6. That this also was not unlawful before the Law, appears from the Example of ² *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 were ³ 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 Prophet ⁴ to *Jehosaphat*, for making a League with *Ahab*; ^q *Shouldst thou help the Wicked, and love them*

2. He also made a League with *Eshcol* and *Aner*, (Gen. xiv. 13.) As *David* did with *Achis* and *Naashan*; *Solomon* with the *Aegyptians*; *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*, *Palaeologus*, with the *Saracens*, *Alani*, *Gepidae*, *Franks*, *Suevi*, and *Vandals*; *Alfonsus Hispalensis*, *Ramirus*, *Alfonsus Castus*, *Sanctius Castellae*, *Ferdinand* the holy, Kings of *Spain* with the *Moors*; so *Peter* King of *Leon*; the wise *Alfinus*, King of *Castile*; *Rodolphus Habsburgenses* 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, Ἡτιῶτο τῆς πρὸς ἄχαβον συμμαχίας ἀνθρωπον ἀσεβῆ καὶ πορνῆρόν, He blamed him for entering into a League with *Ahab*, an irreligious and wicked Man. GROTIUS.

q. 2 Chron. xix. 2.

⁵ *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*. ^r *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 threaten ^s *Jehosaphat*, for entering into a Treaty of Commerce with *Ahazia* 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 reprov'd, but even commended. For as to that Clause, that *Ahazia* *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. <345>

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

5. GRATIAN returned this Answer to his Uncle *Valens*, who desired his Assistance against the *Scythians*, *Ὅς οὐ δεῖ τῷ ἐχθρῷ τοῦ θεοῦ συμμαχεῖν, One ought not to engage in any Treaty with a Man who is an Enemy to GOD.* GROTIUS.

r. ——— xx. 37.

s. ——— xx. 37.

6. Add *Joshua's* Example, Chap. xxii. GROTIUS.

t. 2 *Chron.* xvi. 2, 7.

u. ——— xvi. 12.

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 *Aegyptians* 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 bad 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*

X. Nor by the
Christian Law.

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.

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*, Πᾶσιν οὖν δίκαιον διδόναι ἐξ ὁκειῶν πόνων· προτιμητέον δὲ τοὺς ἁγίους. *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 ὁθνείων φροντίζειν, *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 <346> 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

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.*

d. 2 *Cor. x. 21.*

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 *Caesar*, and of the Tribune.

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 *Aegyptians*; for that of *Anaxandridas* is not without its just Grounds,

XI. *Cautions about such Leagues.*

Ὅυκ ἂν δυναίμεν 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

e. *Acts* xxv. 11. xxii. and xxiii.

XI. (1) See *Phartaza'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. ATHENAEUS 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.

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, Ἀνεπίφθονον δὲ ὅσοι ὥσπερ καὶ ἡμεῖς ὑπὸ τῶν, &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*,³ once gave to *Charles the Simple*, *Who would not tremble to consider, that you should*⁴ *seek the Friendship of GOD's Enemies, and make Use of the odious Arms and Alliances of Pagans, to the Ruin and* <347> *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 μεγάλα τοὺς στρατευομένους, &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

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.

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, "Because, 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. 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 whilst 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 refuse 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 used to arise, is, Whether of them, supposing several Nations engaged in War with another, we are obliged to

XIII. *If several of our Allies*

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 *Minister 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 status circa Foedera*, 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.

*are at War,
which of them
we ought to
assist; explained
by Distinctions.*

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 *Demosthenes*, in his Oration about *Megalopolis*, ³ shews, that the *Athenians* were <348> obliged to

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 Caudinâ*, (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 disturbing the Union of the Allies for a certain End, it implies a Contradiction, 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 insulted, 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. 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 intituled *Jurispruden-*

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 *Leuctric*, εἰ μὲν ἐπ' ἄλλους ἐκάλουν, &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

tiae Historicae 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

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.* <349>

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 *Nepesines*, ¹² that the Faith given upon their Surrender, was more

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 habeantur*, Leg. VIII.

7. See *Lib*. IV. *Cap*. XXXI. *De Feudis*. GROTIUS.

Our Author here quotes the *Feodal Law*, according to CUJAS'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. § II.

8. Not the *Acarnanians*, but the *Etolians*, make this Reflection by the Mouth of *Chlaeneas*, 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. Amsted*.

9. *Χρὴ φίλοις κατ' ἐχθρῶν συμμαχεῖν, οὐ κατὰ φίλων*, *Friends ought to join their Forces against Enemies, and not against Friends*, says *Ptolomy* 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.

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 *Nepesines* 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

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.

XIV. *Whether a League may be renewed tacitly.*

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*, Λύουσι τὰς σπονδὰς οὐχ 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 δ' ἂν τούτων παραβαίνωσιν, &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.

XV. *Whether a Violation on one Side frees the other from being obliged.*

should have been, whether the *Etrurians* would have thought themselves obliged to assist the *Nepesines*, 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 Pactis, 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 Foederum*, *Cap. III. § 14.*

2. *Lib. I. Cap. LXXI.* Edit. Oxon. See likewise *Cap. CXXIII.*

3. *Lib. IV. Cap. XXIII.*

XVI. *How far
the Sponsors
are obliged, if
what they
undertake for
be disallowed;
where also of
the Caudine
Engagement.*

XVI. 1. 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 <350> *Samnites* would have any Dealings with the People of *Rome*, ⁵ they should have kept their Army at the *Furcae Cau-*

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.*

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 *Osilius 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,

dinae, 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 Spon-

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 ap-

sors had made the Contract by their Order, ⁸ and in their Name; as we read that was which ⁹ *Hannibal* made with the *Macedonians*. But if the *Samnites* were contented with the Word and Honour of ¹⁰ the Sponsors, and ¹¹ the six hundred which they de-^{<351>}sired 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,

proved 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 Quaestors, 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, τὸν τε ἱππέων, &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 1. And as to what regards Hostages, Chap. XX. of the same Book, § 58.

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 *Sesterces*, 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.

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*, § II.

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 PEIRESC, but DION CASSIUS, to be seen *p. 597* of that Collection.

16. DION, *Excerpt. legat. V.* GROTIUS.

XVII. *Whether a Sponson 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.*

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 Sponson 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*. <352>

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

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*.

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*.

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

6. These are treated of in *Chap.* XXII. and XXIII. of the third *Book*. Mr. THOMASius, in his Dissertation *De Sponsione Romanorum Caudinâ*, § 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.

*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 *Τούτῳ νόμῳ Κοινῶ πάντες ἄνθρωποι διατελοῦμεν χρώμενοι*, (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

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.

not only the *Greeks*, but the *Barbarians* too, as the same Author had a little before expressed it. <353>

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 *Po-*

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 *Τοῦ χρόνου 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 *Boeotians*, who promising to restore a City, did restore it, not standing, but ruined and demolished. THUCYDIDES, V. And as Sultan *Mahomet*, who having taken *Euboea*, cut a Person asunder in the Middle, whose Head he had promised should be safe. GROTIUS.

lyænus, 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. *Terms of Art are to be explained according to the respective Art they belong to.*

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,

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 Infamiâ. Leg. II. § 1.* See Mr. NOODT's commentary on that Title, *p. 114.*

10000 Foot, and 2000 Horse. ⁶ And *Livy* makes a just Army 8000. ⁷ <354> 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. 1. Conjectures are necessary, when Words and Sentences are, *Πολύσημα*, *Of several Significations*, which the Rhetoricians call, *ἔξ ἀμφιβολίας*, *Doubtful*, and *Ambiguous*. But the Logicians are nicer in their Distinctions; for if a Word can have several Significations, they call it, *δμωνυμία*, *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, *ἔξ ἀντινομίας*, ² *A Contrariety of Laws*. In which Cases, the manifest Obscurity of the Words justifies our Recourse to Conjectures.

IV. We use Conjectures where Words are ambiguous, or seem contradictory, or because such Conjectures do naturally offer themselves to us.

2. And sometimes the Conjectures themselves are so plain, that they carry us to a Sense contrary to the more common Acceptation of the

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 *Cannae*, consisted only of 4000 Men, both Horse and Foot; as the same Historian had said, *Lib. XXII. Cap. LIV. Num. 1.*

8. *SERVIVS*, upon the first *Aeneid*, *Arces*, (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.*

Words. This the *Greek* Orators call *περὶ ῥήτου 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

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. (I) 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 CUJAS, *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,

taken for a Forbearance, <355> 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 *Plataeans* 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

VI. *From the Effect.*

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.*

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. *Strategemat. Lib. IV. Cap. VII. num. 17.*

6. See DIODORUS of *Sicily*, *Lib. XVII. Cap. LXXXIV.* POLYAENUS, *Stratag. Lib. IV. Cap. III. num. 20.* and PLUTARCH, *Vit. Alex.* all which Authors the learned GRONOVIUS 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, LIVY, *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.

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 *Boeotians*, said afterwards, that the Place where his Army was encamped, did not belong to the *Boeotians*, 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 *Boeotians*; in which Sense the Agreement itself had been vain and of no Effect.

VII. *From the Circumstances and Connexion.*

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 *οἱ δίκασται τῷ μηδεν, &c. Judges are guided by that which is plain, letting what is obscure and less evident quite alone.* ⁵

VIII. *To this belongs that*

VIII. Among the Circumstances of Place, the principal and most weighty ¹ is the Reason of the Law, which some confound with the Intent

2. Our Author here mistakes the Person. *Brasidas* was General of the *Lacedemonians*; nor doth he say this to the *Boeotians*. 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. (i) 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. Quaest. Lib. IX. Quest. XIII. p. 743. Edit. Wech.*

VIII. (i) CICERO in the behalf of *A. Caecina*: *There is no great Difference in the Reason of the Thing, but only in the Manner of it, whether I am dispossessed by your*

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 <356> 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.

Conjecture which is drawn from the Motive, and when and how this Conjecture is of Service.

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

IX. The Distinction of Significations into such as are loose and extensive, and such

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 uncontrolably 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 Dis-service 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*.

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.

XI. (1) See the Chapter of PUFENDORF, which answers to this, § II. *Notes 1, 2.* and for the following Example, *Note 3.*

as are strict
and precise.

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 Prom-*

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

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,

are those that <357> 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

*ises into
favourable,
odious and
mixt or middle
ones.*

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 Class of *odious* Things. I say, if we consider it as an Act burthensome 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. *Quae 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.

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 between Contracts due in Equity, and such as are due in strictness of Law, rejected, as to the Acts of States and Princes.* 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. *Out of these Distinc-* XII. I. These Things premised, we must observe these following Rules; in Cases not odious¹ we must understand the Words in their full Extent,

3. That is, something burthensome 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. Laws 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.

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 *Caecina*.

tions some Rules are formed, that may direct us in our Interpretations of the Meaning of Words and Promises.

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, <358> 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 of. ⁵ 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

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.

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.

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. I. 'Tis a remarkable Question, whether by Allies ¹ 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 Violaters 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,* ⁴ *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 Sig-

XIII. (1) See PUFENDORF, *B. VIII. Chap. IX. § 10.*

2. POLYBIUS, *Lib. III. Chap. XXVII.*

3. *Lib. XXI. Cap. XIX. num. 4, 5.*

4. Which Clause was added in the *Peloponnesian Treaty of Peace* made between the *Lacedemonians* and the *Athenians*, THUC. *Lib. V.* GROTIUS.

The Clause here meant by our Author relates to some Towns, given up by the *Lacedemonians* 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.

nification 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 *Carthagi-<359>nians* of their Liberty of bringing those by Force of Arms to Reason,⁶ who were believed to have

5. But, says Mr. BUDDEUS, 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 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.

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

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.* ἔφασκε τε ὡς αὐτὸς οὐ λύει, &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.*

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 *Halonesus*, 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 <360> invaded, help them if they would. This is an Instance drawn from an Alliance upon equal Terms.

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

XIV. *How it is to be understood, that one Party shall not make War without the other's leave.*

12. *Lib. I. Cap. XXXV. Edit. Oxon.*

13. Thus after the Times mentioned there, the *Corcyreans* decreed, Ἀθηναίους μὲν, &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.*

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.*

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 Independance 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*, αὐτόνομον,

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, χώραν, 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

to be governed by their own Laws, as *Appian* ³ says, was a manifest Sophistry.

XVI. 1. 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*, [[³]] 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 <361> ever, or that it is made for the good of the Kingdom, or with him and his Successors, for this Clause καὶ 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

XVI. What Treaties are to be esteemed Real and what Personal; this explained by Distinctions.

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. [[The footnote is wrongly numbered "2" in the original.]] *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.

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*.

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; *ἐνυμαχίαι*, or offensive, nearer the odious and burthensome. 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 *Ser-*

5. LIVY, *Lib. XLII. Cap. XXV. num. 10.*

6. As this Distinction is not very certain, it is better to say, with Mr. THOMASIVS, (*Jurisprud. 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 DIONYSIVS HALICARNASSENSIS, *Lib. III. GROTIVS.*

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*. GROTIVS.

vius, 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; <362> 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 Con-*

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.

struction 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 unquàm 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 ¹ 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*

^{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, *Decis. 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.*

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. '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 indeed ² 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 <363> Opinion is, that they

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.*

2. LIVY, *Lib. XXXIV. Cap. XXXII. num. 1.* 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 outruns 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 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

should share the Prize betwixt them. ⁴ *Scipio*, *Caesar* 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.

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. Digitius* 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. Peiresc.* 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 *Caesar* 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 Castrensian 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. 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.

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 ῥήτου 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. <364>

XX. A Conjecture freely offering itself may either enlarge the Sense; and when it may do so:

XX. (1) SENECA in his *excerp. controuv.* VI. 3. has very well observed, that a *Circumscription* always fobs a Piece of Roguery 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 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

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 *Caecina* 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 man-*

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 Graeco-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 legibus*, that Adultery is committed with a Woman, who is only betrothed to some Body else, and for this Reason; ἀλί γὰρ ὁμολογίαι τοῖς γάμοις 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

ifestly 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 Isaeus⁷ in the Affair of Pyrrhus's Estate, where because by the Law

under the Title of a Pit any Hole or Ditch, *Exod.* xxi. 28. 35. CHASSANAEUS, *Catalog. Glor. Mundi*, Part. V. Consid. 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 *Caedes*.

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 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

of *Athens* a Will could not be made without the Daughter's Consent, he infers, that no more could an Adoption without her Consent. <365>

XXI. *Where also of executing an Order in some other Manner than what was prescribed:*

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 *Scaevola*, 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

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, *Insciis 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, Ἐι δὲ τὴν θυγατέρα ἐδίδου, *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 *Isaeus*, 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. § I. See, on this Law ANTHONY FAURE's *Rationalia*, Tom. V. p. 133.

observe what *Gellius* alledges 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.

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 Reason² 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. <366> This Way of Interpretation too is placed by

XXIV. *Or from a Defect in the Matter.*

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.

the *Rhetoricians*, under the Head, *περὶ ῥητοῦ 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. I. 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. I. 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 ῥητοῦ 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

XXIV. (1) See CICERO, *De Inventione*, Lib. II. Cap. XLII. and MARIUS VICTORINUS, in *Rhetoric. Ciceron*. II. p. 221, 222. *Antiq. Rhetor. Edit. Pithaei*, Paris 1599.

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 Circum-
 spection; 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. 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 burthensome. And this, either in Respect of the Condition of human Nature absolutely considered, or in Regard to the Person and

XXVII. Or too Burthensome, all Circumstances considered.

XXVI. (i) 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.*

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 ^{<367>} 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*

XXVII. (1) See ROSENTHALIUS, *De feudis*, Cap. V. Concl. LXXXVI. Num. 2. HEIG. *Illustrium* XVIII. Num. 16. Part I. COTHMAN, *Cons.* 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 MOLINAEUS, *Consuet. Parisiens.* Tit. 1. § 2. gl. 4. Num. 3. FERD. VASQUEZ, *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.

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

XXVIII. *And from other Signs; as when the Parts of an Act clash and interfere.*

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.

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 τῇν ἐκ περιστάσεως μάχην, ¹ *circumstantial Disagreements*. <368>

XXIX. *What Rules are in such a Case to be observed.*

XXIX. I. 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*

XXVIII. (1) I find in HERMOGENES, κατὰ περίστασιν μάχη. Partit. Sect. IV. p. 16. Edit. Genev. 1614. QUINTILIAN calls this, *Collisio casu & eventu*. Instit. Orat. Lib. VII. Cap. VII. as the learned GRONOVIVS observes on this place.

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* 1. 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*

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 <369>

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*

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. *That upon a Scruple a Writing is not essential to the Validity of a Contract.*

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 *Muraena* 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 Con-

posterius lata sit, nam postrema quaeque 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.

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. si res gesta.* D. *de fide instrumentorum*, *L. pactum quod bona fide, C. de pactis.* So BARTOLUS, JOHANNES FABER and SALICETUS, whose Opinion prevailed in Court against *Baldus* and *Castrensis*, expound, *C. de fide Instrumentorum*, the *Law of Contract.* MYNSINGERUS, *Decad. X. Cons. XCI.* NEOSTAD, *De pact. antenuptial.* Observ. 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.

tract, 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.

XXXI. *That the Contracts of Kings are not to be interpreted by the Roman Law.*

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.

XXXII. *Whose Words are most to be observed, whether his who offers a Condition or his who accepts it; this explained by a Distinction.*

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. *Quaest.* XIII.

*Of the Damage done by an Injury,
and of the Obligation thence arising.*

I. *That an
Injury obliges
us to repair the
Damage.*

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 ¹ <370> or Trespass, whether of Commission 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 such a Fault or Trespass there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done.

II. *Damage is
that which is*

II. ¹ The Word *Damnum*, Damage, probably derived from *demo* to take away, is τὸ ἔλαττον, when a Man has less than his Right; whether that

I. (1) The Word *Fault* is here taken in a general Sense, which comprehends both Dishonesty and Imprudence.

2. That is, not only on the Account of a certain Relation, which a Man has to others, or some particular Employment, but also by Vertue of every Engagement he enters into of his own Accord.

3. Called by the *Greeks*, ἀμελίου δίκη, *An Action of Neglect*. See in *Decretal*. Tit. *De injuria & damno dato*, and *D. ad L. Aquilam & Vicinas rubricas*. GROTIUS.

It is in *Hesychius* that we find Ἀμελίου δίκη explained by ζημίου δίκη. See the Index to the *Treasury of the Greek Language*, by H. STEPHENS.

II. (1) So VARRO, *Lib. V. Damnum* from *demtio* an Abatement, *when there is less made of a Thing than it stood one in*. Others rather approve of its Derivation from the *Greek* δαπάνη an Expence, and will have it to be first *Dapnum*, afterwards *Dam-*

Right be merely from Nature, or some super-added human Act, such as the Establishment of Property, Contract, or Law. A Man's Life is his own by Nature (not indeed to destroy, but to preserve it) and so is his Body, his Limbs, his Reputation, his Honour, and his Actions. As to what belongs to every one in Consequence of the Establishment of Property, or by Vertue of any Agreement, we have shewn 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 invested by some Law; because the Law has an equal or greater Power over the Persons and Estates of those who are subject to it, than any private Man has over himself,² and what belongs to him. So an Orphan has a Right to require his Guardian to take strict Care of his Affairs,³ the same may the State require of a Magistrate, and not the State only, but any private Member of it, as often as the Law authorises him, either expressly, or by plain Consequence.⁴

*contrary to a
Man's Right
strictly so
called.*

num, as ὕπνος *Sopnus, Somnus*. Nor is it any Absurdity to deduce it from the Greek δάμνω, which signifies βιάζω to *offer Violence*, or from ζημία *damia, damnum*, as *regia, regnum*. GROTIUS.

The first of these Etymologies is that given by the Lawyers. DAMNUM & DAMNATIO, *ab ademptione & quasi 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 responsible, not only for Dishonesty, or gross Negligence, but also for what is termed a *slight Fault, levis Culpa*, that is, if he doth not do what a Master of a Family of moderate Prudence would have done. *Cod. Lib. V. Tit. L I. Arbitrium Tutelae*. Leg. VII.

4. And consequently they may require Amends for the Damage done by the Magistrate by Want of Exactness in the Exercise of his Trust. Our Author here probably had his Eye on the Subsidiary Action allowed by the *Roman Law* to an Orphan against the Magistrates of the Town, who either had not assigned him a Guardian, when required so to do; or had not taken due Care, in the Choice, or required good Security. See the Title *De Magistratibus conveniendis*, Digest. Lib. XXVII. Tit. VIII. and *Code*, Lib. V. Tit. LXXV. But, commonly speaking, private Persons are obliged to bear the Loss, which happens by an Effect of the Negligence or even bad Conduct of the Magistrate, without having any Remedy at Law against the Magistrate, especially one of a very exalted Station. Not that, according to the inviolable Rules of natural Equity, any Magistrate is in Conscience excused 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 Case. The Whole

III. A Fitness
for a Thing is
carefully to be
distinguished
from a Right
strictly so
called.

III. 1. But from a mere Aptitude or Fitness, which is improperly called a Right, and belongs to attributive Justice, arises no true Property, and consequently no Obligation to make Restitution; because a Man cannot call that his own, which he is only capable of, or fit for. *For, as Aristotle observes, He does not transgress the Rules of Justice, who out of Covetousness refuses to relieve a poor Man with his Riches.* ¹ And this, says *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 presently after subjoins, that it sometimes happens, that the People do what they will, not what they ought, the Word ought being taken in a larger Sense. ³

2. But we here must take care that we do not confound Things of a different Kind. For he, to whom the Power of making Magistrates is committed, is bound <371> 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 hindred, 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.

of the Matter is, that Magistrates being Men, we ought to make some Allowances on that Consideration; and consequently we are supposed to have before-hand cleared them of what happens by the Effect of a small Remissness, or such Negligence as human Frailty cannot always avoid, especially if, when they were guilty of it, there was no probable Reason for apprehending very bad Consequences, or at least that they were near.

III. (1) *Ethic. Nicom.* Lib. V. Cap. IV.

2. *Orat. pro Cn. Plancio*, Cap. IV.

3. *Ibid.*

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.

IV. *That Damage is to be extended even to the Fruits or Increase of any Thing.*

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. ¹

V. *And also to the ceasing of that Increase.*

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. ¹

VI. *Damage occasioned by doing what we ought not; Primarily.*

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. *And Secundarily.*

VII. *Secondarily*, He that advises the doing it, ¹ or ² commends and flatters him who does it. *For what Difference is there*, saith *Cicero, Philip. II.* ³ *between the Man that persuades us to do a Thing, and him that approves of it, when done?*

VIII. *Also by not doing what we ought: Primarily.*

VIII. *By not doing what he ought*, a Man is likewise bound to make Reparation, primarily, or secundarily. Primarily, when by his Station or Office he ought to hinder the doing it, by giving his Commands to the contrary, ¹ or to succour him that has the Wrong done him, and does it not; such a one is called by the *Chaldee Paraphrast* סער *a Strengthenr of Wickedness.* <372>

IX. *And secundarily.*

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

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, *Gotthic. III.* ὁ γὰρ ἐπαινέσας, &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 antient Doctors on that Place. GROTIUS.

VIII. (1) NICETAS CHONIATES. in his *Michael Comnenus*, ὁ ἐμπρησμὸς, &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.

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 סער, *Levit. xx. 3.* A Word which signifies *confirming* others in Evil. And the Rabbins think Persons of that Character mentioned *Levit. xxvi. 21.*

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. 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.

X. What those must contribute towards the Act, who are bound to repair the Damage.

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

XI. In what Order they are bound.

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. GROTIUS.

2. See this explained on the Chapter of PUFENDORF, on the Subject, § 5.

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, stopt 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 *Ephesian* well observes, upon *Aristot. Nicom.* 5. ἀλλὰ καὶ ὁ φονευθεὶς, &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 <373> Right to commit that Violence which was the Cause

XII. (1) See AQUINAS, *prim. secund. quaest.* XX. Art. V. and L. *si servus servum, § si quis insulam*, D. ad L. Aquiliam. GROTIUS.

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. GROTIUS.

4. STRABO, *Geograph.* Lib. XII. p. 813. *Edit. Amst.* (539. *Edit. Paris.*)

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 ¹ 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 valued. ² The same may be said of false Imprisonment.

XIV. *In one who maims another.*

XV. So an Adulterer and Adulteress 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.*

XIV. (1) *L. ult. D. de his qui eff. vel. des.* 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 praecipere quatenus & quodnam Mare liberum vel non liberum clausumque accipiendum dispicitur, &c.* The Fine, there mentioned, is, perhaps, the *Wergild*, or *Wergeld*, of the antient Saxons; on which see a Dissertation by the late Mr. HERTIUS, *De Haerede 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. *In a Thief, a Robber, and others.*

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. ¹ 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.

XVII. *In one who procures a Promise by Fraud or unjust Fear.*

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 Performance; ¹ 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 Bribe. ²

XVIII. *What if by Fear that is accounted just by the Law of Nature?*

XVIII. But he that hath given just Cause, ¹ 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 one. ²

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XVI. (i) See the Chapter of PUFENDORF so often quoted, § II.

XVII. (i) 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. (i) 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.* § II.

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

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

XIX. *What if by Fear accounted just by the Law of Nations?*

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 Naturae & Gentium*, Lib. II. Cap. XVII. § 14. explains 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.*

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 publick Command.*

XX. I. 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 happened ³ 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.

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 *Vitâ 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*.

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 <375> 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

XXI. *That by the Law of*

4. See too *Constitut.* Tom. III. Tit. II. in the Constitution of the Year 1543. *Cap.* XLIV. GROTIUS.

XXI. (i) See the Titles of the *Digest. Si quadrupes 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 PURY, 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 Juridicae*, which he published, and defended, at *Basil*, in 1714, for taking his Degree of Licentiate in Law, we have one (VII. *de noxâ Bestiae*) 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 Establish-

Master that <376> 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.

Nature no Man is bound to repair Damages done by his Beast or Vessel without his Fault.

XXII. But, as aforesaid, we may suffer Damage, even in our Honour and Reputation, as by Blows, ill Language, Curses, 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.

XXII. That we may do a Man Damage in his Reputation and Honour; and how this is to be repaired.

ment of Property of Goods implies this Dispensation; and there is the less Reason to presume it, as 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.

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 Embassy.* ¹ For in all Authors Mention is made of *The sacred Rights of Embassies, of* ² *the sacred Character <377> of Embassadors, of the Right*

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. POMPONIUS, L. si quis. D. de legationibus, *If any one shall strike an Ambassador, 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 Ambassador, ought to be delivered up to the Enemy that employed him.* By the Julian Law against publick Violence, not only those who insult an Ambassador, 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 Ambassadors 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, τῶν πρεσβευτῶν ασυλίας, *A Privilege of Security, that the Sacredness of Ambassadors intitles them to.* In STATIUS,

*An Ambassador,
Whene'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, καὶ οὐδὲ τῇ κοινῶν, &c. *Without any Manner of Regard to the common Law of Mankind, that never suffers an Ambassador to be insulted.* SERVIUS, upon *Aeneid* 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 PRO-COPIUS, *Goth.* III. Πασι μὲν, &c. *To speak in general, it is an established Custom, even with all the Barbarians in the World, to reverence the Character of Ambassadors.* 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 Ambassadors; 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 Ambassadors are sacred.* The Transcriber took these for the very Words of the *Latin* Author; and in Order

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 unjust* ³ *but impious, as it is acknowledged by all,* says Philip, in his Epistle to the Athenians.

II. Among
whom this
takes Place.

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

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 Ambassador 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. "Ἐργον ἄσεβες, *A wicked irreligious Thing,* says PLUTARCH, in his Life of *Aemilius*, relating what *Gentius* had done. JOSEPHUS, *Antiq. Hist. Lib. XV.* Τοῦτο τὸ ὄνομα, &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.

Nations, which is common to different Nations, but by the Civil Law. An Ambassador, 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 Embassadors 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 are⁵ 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

II. (1) *Lib. I. Cap. XXXII. Num. 6.*

2. *Lib. VI. Cap. XVII. Num. 8.*

3. *Orat. Philip. V. Cap. X.* See BOECLER'S NOTE ON VELLEIUS PATERCULUS, *Lib. II. Cap. VII.*

4. *Aeneid. Lib. VII. ver. 369, 370.*

5. CROMERUS XXX. GROTIUS.

6. As the *Carthaginians*, mentioned *Chap. XV. § 7. Num. 5.* To this Article are referred feudatary Princes, as those of *Germany* are in Regard to the Emperor.

7. 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 *Oxienstiern*, 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*.

8. 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

Paulus Aemilius 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

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.

9. 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 Aemilius* contented himself with returning *Perseus* no Answer by their Mouth. I find, however, that *Perseus* sending afterwards three Embassadors with Letters, *Paulus Aemilius* 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.

10. 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*.

11. And *Magnentius*, in *ZOSIMUS, Lib. II. Μαγνέντιος δε, &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*.

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 presume 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 *Pyrenaean Mountains*.¹³

III. I. 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 Ad-

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 THOMASIIUS, 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. Jurisprudentiae Divinae*, 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.

mittance 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. So ⁶ 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 *Urbini* to those of *Belisarius*. ⁹ And *Polybius* tells us, that the Embassadors of the *Cynethians* were driven

5. *Pericles* was of Opinion, that no Herald or Ambassador should be received from the *Lacedemonians*, while they remained in Arms. THUCYDIDES, *Lib. III. Cap. XII. Edit. Oxon.* The *Lacedemonians* 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 *Lacedemonians* 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 Country, by Persons who had Orders to see he spoke to nobody in his Journey. See an Example of the like Sort in APPIAN, *Bell. Mithr. p. 311. Edit. Amst. (181. Edit. H. Steph.)* and in ARISTIDES, the Rhetorician, *Orat. Panathen. Thom. 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 *Aeneid*, 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.

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 *Lysimachus* denied 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 Place ¹² when either the Design of the Embassy is suspected, as was deservedly that of *Rhabshakeh*, the *Assyrian*, 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 forbade the *Aetolians* to send any Embassy without their General's Permission; nor was *Persaeus* permitted to send any Ambassadors to *Rome*, but only to *Licinius*; ¹⁵ and, in like Manner, when *Jugurtha* sent his Ambassadors to *Rome*, they ordered ¹⁶ that they should depart out of *Italy* within ten

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.*

11. *Lysimachus* 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 Caesar'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 Ambassadors 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 *SALLUST, Bell. Jugurth. Cap. XXX. Edit. Wass.* The Example produced in the Note is not to the Purpose. The Question there turns on Ambassadors, who were actually with *Charles*

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 Ages. ¹⁷

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.

V. whom he put under an Arrest, till he had Advice, that his Embassadors in *England* and *France* were safe.

17. See Mr. THOMASIVS's *Jurisprud. Divina*, Lib. III. Cap. IX. § 25, &c.

IV. (1) MENANDER PROTECTOR, speaking of the Emperor *Justin the Second*, 'Ο δὲ παρὰ τὸν κοινὸν τῶν πρεσβυτέρων θεσμὸν εἶκεν 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. 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

2. In Reality, if the Consent of Nations was the only sure Foundation of the Rights of Embassadors, it would be hard to prove the Maxim in 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 *Jurisprudentia 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 Ambassador 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 Ambassador 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 Ambassador 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 Ambassador 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 Ambassador of the former, do not make the Right change Sides; unless the Aggressor sent his Ambassador 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 Ambassador 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

have provided for the absolute Security <381> 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 Of-

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.

fenders; 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. <382>

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 Hostilities.⁴ 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*

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. COCCEIUS, *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. *Sect. III. § 2, &c.*

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 common. ⁶ 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

5. *Bell. Jugurth.* Cap. XXXIX. *Edit. Wass.* (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 aequo 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. COCCÆUS, 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.

he came ⁷ 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 <383> 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 Em-

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.

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 COCCÆUS 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.

bassador'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,

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 Security 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 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 Ambassador 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 <384> Crime be great, and tending to endanger the publick Safety, ¹⁶ the Ambassador 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 Ambassadors 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. Where-

12. *Stephen*, King of *Poland*, did so to the *Muscovites*, THUANUS, *Lib.* LXXIII. *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 Ambassador of the Duke of *Milan*, as his Subject, not to stir from his Court. GUICCIARDIN, *Lib.* XVIII. GROTIUS.

16. DION in excerpt. *legat.* ὅτι νεανίσκοι τινὲς, &c. When certain young Gentlemen of the Carthaginians were come Ambassadors 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 Ambassadors 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.

fore, to prevent any imminent Danger, ¹⁹ an Ambassador may be both arrested and examined. ²⁰ As were *Tarquin's* Ambassadors 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 Ambassador 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,

19. Mr. COCCEIUS, in the Dissertation so often quoted, makes his Advantage of this against our Author, as if he had thereby acknowledged that an Ambassador 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 Ambassador. A just Self-Defence authorises us to do all that, without which we cannot shelter ourselves from Danger. And the Prince, who orders an Ambassador 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 Pheraeus*, because when he was Ambassador he excited the *Thessalians* to assert their Liberty. PLUTARCH and the *Latin* Writer of *Pelopidas's* Life. GROTIUS.

Pelopidas was not Ambassador to *Alexander*, but to the *Thessalians*. 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* Ambassador, 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.

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 <385> by the People of *Athens*, as *Philostratus* ²⁵ records in the

23. This Objection is made by the *Chorus* in our Editions; and I know not by Virtue of what Authority it is attributed to the Herald, both here and in his *Excerpta ex Tragoed, & Com. Graec.* p. 317.

24. And in this Sense must we take what *Theodahatus* 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 Ambassador, 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 without a Guard, they very prudently subjoin, τοὺς λόγους δὲ ὅσους, &c. *As for what the Ambassador 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 Ambassador 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 Ambassador 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 sees 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

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 Country. ²⁶ 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. *That he to whom the Ambassador is not sent is not bound to observe the Rights of Embassy.*

V. I. But this Law, which we have been speaking of concerning the Protection of Ambassadors 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 Ambassadors to be sent; or treat them as Enemies, if they come without his Permission. So were the *Aetolians* threatned by the *Romans*; ¹ and at another Time they ordered the *Veientine* Ambassadors, ² to depart immediately out of their City, otherwise

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 considered 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 Ambassadors 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, & olim *Veientibus edictum*, &c. that published in 1632. reads, & olim à Romanis *Veientibus edictum*, &c. because our Author afterwards added another Example: & Romanis à Samnitibus, si quod, &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 Re-

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 Safety. ³ This Law therefore doth not oblige those, thro' whose Territories Embassadors presume to pass without their Passport. For ⁴ 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* serve the Embassadors, ⁵ that were going between the *Perians* and *Spartans*, and so did the *Illyrians* those between the *Issians* 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

mark 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 *Aetolian* Embassadors going 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 *PARUTA*, *Lib. XI.* and of *BEZAR*, *Lib. XXI.* about the *French* Embassadors to the *Turk*, whom the *Spaniards* took upon the *Po*, 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.*

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*

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 *Thessalians* 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. LXXV. p. 235, 236. *Edit. H. Steph.*

Men. ³ *If any one strike an Enemy's Ambassador, he shall be adjudged guilty of a Breach of the Law of Nations, saith Pomponius, because Ambassadors 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 Ambassadors 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 Ambassadors 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 Ambassadors 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 <387> 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 Ambassadors, and Peace can scarce ever be made without them. ¹¹

VII. Another Question is commonly started, *viz.* whether an Ambassador 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 Ambassador 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

VII. *Embassadors not subject to the Law of Retaliation.*

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.

10. *Lib.* IV. *Cap.* II. Num. 15.

11. This Remark is made by PHILO the Jew, *De Legat. ad Caium*, p. 1006. *Edit. Paris.*

is made by the Law of Nations, not only for the Honour of the Potentate who sends the Ambassador, but for the Safety of him who is sent: So that there is a Sort of tacit Covenant also between the Ambassador, 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* Ambassadors were brought before him, and he was asked what should be done to them (soon after the *Roman* Ambassadors had been very hardly used at *Carthage*) answered, ¹ *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*.

VIII. *That the Rights of Embassy are to be extended even to the Attendants of Ambassadors, if the Ambassadors please.*

VIII. 1. The Attendants likewise and Baggage of Ambassadors 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: ¹ *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 Ambassador himself, but even those that

VII. (1) *DIODORUS SICULUS*, in *Excerpt. Peiresc.* Σκιπίων, οὐκ, ἔφη, δεῖν πράττειν ὁ τοῖς καρχηδονίοις ἔγκαλονσιν, *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 Ambassadors 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.

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 Ambassador 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* Ambassador'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 Ambassador shall refuse to deliver him up, then are we to proceed in the same Manner as is prescribed against the Ambassador himself.

2. But whether the Ambassador himself shall have Jurisdiction over his own Family, ⁶ or may make his House a Sanctuary for all such as fly thither for Refuge, <388> depends upon the Concession of the Prince, in whose Dominions he resides. For the Law of Nations does not give him these Privileges. ⁷

3. See FRAXINUS CANAEUS'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 Ambassadors 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 Ambassadors, to take by Force those who had retired thither. The Ambassadors 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. Graec. 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.

7. On this Subject see an excellent Dissertation by Mr. THOMASIIUS, *De Jure Azyli Legatorum aedibus competente*, which is the Sixteenth of those printed at *Leipsic*.

IX. *And to their
moveable Goods.*

IX. That the Moveables or Furniture of an Ambassador, 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 Obligation
without the
Right of Com-
pulsion.*

X. 1. Neither is there any Reason to fear (as some may imagine) that if Ambassadors 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 GOD*, 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*

IX. (1) That is, an Ambassador'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.* Sermon. XLIV.

2. *De beneficiis* III. 15. *GROTIUS.*

hated τὸ κυχράσθαι, &c. ³ *The lending and borrowing of Money, accounting it an Inlet to a thousand Frauds and Falshoods.*

2. *Aelian* 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' ἐνόιis δὲ, &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, ⁷ ἐνιαχοῦ τ' εἰσὶν, &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

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 Purpose. 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. *How great
this Right of
Embassy is.*

XI. Profane Histories ¹ are full of Instances of Wars, undertaken for the ill <389> 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

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 *Issians*; 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 AIMONIUS, *Lib.* III. *Cap.* LXI. and LXVIII. and in WITHKIND, *Lib.* II. GROTIUS.

In the Instance here produced from DION CASSIUS, our Author has changed the Persons. The *Issians* 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 Favour of the Island of *Issos*. 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.

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 Pelusiota*, *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

1. From the same Law of Nations arises the Right of Burying the Dead.

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.*

Aelian, 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*. *Lysias the Orator*, ¹⁵ *The common Hope of all*. He that hinders it, is said by *Claudian*, ¹⁶ *To divest*

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 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.

himself of Humanity. And <390> by the Emperor *Leo*,¹⁷ *To disgrace his Nature.* And by *Isidore of Pelusium*, τὴν ὅσιαν ὑβρίζειν, *To violate all that is sacred.*¹⁸

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 δαιμόνων*, *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*

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 νόμους. GROTIUS.

20. *Supplic.* v. 563.

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 *Lysias*. *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 *LACTAN-*

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 *ὕπὸ τῆς πόλεως*, 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 *κτανταῦθα* 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 that Commentator explaining the Words *tralatitia 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.* II. 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

<391>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; *Ul-*

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 sown 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 & Clementiâ*, 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 *Declamations* 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.*

pian,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. *Op-tatus Milevitanus*³⁷ accuses the *Donatists* of Impiety, for denying Burial to the Bodies of Catholicks. <392>

———— Creon *must be beat*

By Dint of Arms, to Manners and to Man. Statius.³⁸

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

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," &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.* Cathemerin. *Hymn* X. v. 61, &c. *Edit. Cellar.*

37. *Lib.* VI.

38. *Theb.* Lib. XII. v. 165, 166.

39. *Vita Caracallae*, 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.

Revenge should hurry him; and ⁴¹ *Homer*, ἀεικέα ἔργα, *An indecent Thing*. ⁴² *Lactantius* condemns the Wisdom of those Men, as savouring 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. 1. From whence this Custom of Burying the Dead took its Rise, whether they were first embalmed, as among the *Aegyptians*; 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

II. From
whence this
Custom comes.

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 *Sepelire*, 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,

Κἄκτοῦδε τοὺς, θανόντας ὥριζε νόμος
Τύμβοις καλύπτειν κάπμιουράσθαι κόνιν,
Νεκροὺς ἀθάπτους μὴδ' ἐν ὀφθαλμοῖς ἔαν,
Τῆς πρόσθε θοίνης μνημόνευμα δυσσεβές
Eclog. Tit. XI.

*Henceforth the Law ordain'd
The Dead in Graves should be deposited,
Not lye unburied to the View of Men:
Dismal 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 Body⁴ 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 Hypsipyle*: <393>

———— *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.*

4. JOB x. 9. And PHILO against FLACCUS, Ἀνθρώποις ἢ 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. Quaest.* Lib. III. Cap. XXV. The Original of this Fragment is preserved by PLUTARCH, *Consul. ad Apol.* 110, 111.

6. *Supplic.* v. 531, &c.

*To Heav'n soars up the pure aethereal 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 de-

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 remembered 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.

cently 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 preserved¹² from the

II. *Cathemerin*. Hymn X. ver. 53, &c. *Edit. Cellar*.

12. *Declam*. VI. See the Prophecy about *Jeroboam's* Posterity, for the Punishment of his Sins, I *Kings* xiv. II. And *TERTULLIAN*, on the Resurrection. *HOMER*, in his third *Odys*.

Τῷ κέ οἱ οὐδὲ θανόντι, &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 *Aegysthus*, 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*, of *Ajax*,

Ἀλλ' ἀμφὶ χλωρὰν, &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,

Ἥτις τῇν ἀντάδελφον, &c.

*Nor would she let her murther'd Brother lye
Unburied, a Prey to voracious Dogs
Or Birds.*

APPIAN, *Civil*. I. of some People slain by *Marius's* Order, Ταφὴν τε οὐδενὶ, &c. *Nor was any one permitted to give any of the Persons killed, common Burial, but such Men*

Depredations of Birds and Beasts. So *Cicero*, <394> *Being torn by wild Beasts, he wanted even the common Honour of Burial*.¹³ And *Virgil*,¹⁴

*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

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 *Hyrcanians* 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. Quaest. 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. *Aeneid*, Lib. X. v. 557, &c.

15. *Lib. VI. Cap. XII. Num. 30*.

16. *Lib. De Tobia, Cap. I*.

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 *Letoius*, *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, <395> 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 sully all
That you have spoke, by injuring the Dead.*

17. Upon the same Account *AGATHIAS* says, it is a Custom, Τὰ ἀισχυνητὰ τῶν ὠδίνων ἐπικαλύπτειν, *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. *SERVIUS*, upon the eleventh *Aeneid.* *For Sepulture is a Benefit that all Mankind is intitled to.* *GROTIUS.*

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. IIIO, IIIL. *Ulysses's* Speech comes in *Ver.* 1349, &c.

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

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.

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. *It is due,
even to Enemies.*

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<396>sostom*, 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 *Issus*, ⁷ *Hannibal*

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.

6. *JOSEPHUS* in *legibus*; *Θαπτέσθωσαν δὲ καὶ οἱ πολέμιοι*, *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.*

made a Search for the *Romans*,⁸ *C. Flaminius*, *P. Emilius*,⁹ *T. Gracchus*,¹⁰ and¹¹ *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 of¹⁸ a *Suspension of*

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 *Ptolomy*. 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 τοὺς ἐν τῇ μάχῃ τελευτήσαντας τῶν συμμάχων πάντας θάψω καὶ κρατήσας τῷ πολέμῳ τῶν Βαρβάρων οὐδεμίαν τῶν ἀγωνισαμένων πόλεων ἀνάστατον 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 κρατήσας τῷ πολέμῳ τοὺς 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.*

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. <397>

²³ *O save me from this Rage, 'tis all I ask!*

Is in *Virgil*.

*Stript of the Man, the cruel Wretch deny'd
The Slain a little Dust:*

19. *Lib. I. Cap. XXXII. p. 31.* Edit. Wech.

20. See LEVITICUS, xxi. 1, &c.

21. SERVIUS observes the same out of the *Roman Pontifical Law*. GROTIUS.

In his Comment on the Sixth Book of the *Aeneid*, 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 GUTHIER, *De Jure Manium*, Lib. II. Cap. VIII. In which Piece, however, this remarkable Passage of SERVIUS is not inserted.

22. "No one can complain that Captives are redeemed: 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. SERVIUS interprets this, *the Fury of his Enemies, which would even after his Death desire to insult him.* GROTIUS.

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 *Odyssey* relates, that *Aegysthus*,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

IV. *Whether even to notorious Malefactors.*

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. *Bell. Jud.* *Lib.* IV. *Cap.* XV.

2. HOMER says that *Orestes* having killed *Aegysthus*, 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 *Odys.* *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 *Philo* against *Flaccus*. GROTIUS.

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 Mal-factors 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 *Aegina* to retaliate the Barbarity of the *Persians* towards *Leonidas*, rejected their Counsel, as unworthy of himself and the *Grecian* Honour. ⁷ *The-seus* 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 Jannaeus*, who had used the Bodies of their dead Countrymen very barbarously. And tho' GOD hath sometimes punished some Persons with the Loss of Burial, yet this he did by his own peculiar Right, <398> 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.

6. This *Josephus* in his Account of the Death of *Alexander* King of the *Jews*, has termed ἀταφία, ὑβρίζειν τὴν νεκρὸν, *to insult the Dead by Non-Interment*. Add QUINTILIAN, *Declam.* IV. GROTIUS.

7. We learn this from HERODOTUS. See how he makes *Pausanias* answer *Lampo*, one of the considerable Men in the Island of *Aegina*: "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.

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

V. Whether
also to those
who kill them-
selves.

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. SERVIUS upon the twelfth *Aeneid*: *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 Hemina 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 BYNCKERSHOEK, Lib. IV. Cap. IV. where that great Lawyer alledges several Reason 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 *Aeschines's* Days, if a Man had murdered himself, his Hand was buried separate from his Body. *Aeschin. in Ctesiphon.* Add to this, *Hegesip.* Lib. III. Cap. XVII. GROTIUS.

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*, *Aeschylus*, *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

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 *DIONYSIUS* of *Halicarnassus*, is good Security of its Reality. Quoting the Verses mentioned in *Note 12.* on Paragraph II, he says: "And when *Aegysthus* was killed he (the Poet) says he would not have been buried, had *Menelaus* been present; for such was the Law concerning Tyrants," 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*, *Gothic.* IV. Βίαιος καταστροφή, &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.*

<399> 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 ἀπολύεσθαι *to be let go*, or, *to be dismiss*, 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 dismiss*, and *Death they call a Dismission*. 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 ἐξαγωγὴν,

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.* 11.

14. Our Author, in his Notes on the Gospels, adds that MARCUS ANTONINUS uses the Word Ἀπολείτουργεῖν 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: Ἀπιθὶ οὖν ἔλεως καὶ γὰρ ὁ ἀπολύων, ἔλεως, I believe his Memory failed him. It is probable he had the following Words in his Mind: Ἀπιθὶ οὖν ἐκ τοῦ ζῆν εὐμενῆς ἦ (as GATAKER rightly reads, instead of ἦ) καὶ ὁ ἐνεργῶν ἀποθνήσκει ἅμα ἔλεως τοῖς ἐνισταμένοις. That is, *Depart therefore out of Life chearfully, 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 τοῦ 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 ἀπόλυσις and ἀπολύεσθαι 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

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 *Razes* 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 <400>

Judges xvi.

1 Sam. xxxi. 4.

2 Macc. xiv. 37.

JOSEPHUS, where he treats of the Death of *Phasael* and *Herod's* Intention to kill himself. And PHILO introduces the *Jews* speaking thus to PETRONIUS; ἀνακερασόμεθα 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.

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

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.

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 ὠχόμεθ' ὧ Μίλητε. 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 LAETUS, 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 *Capitulare Francicum*, *Lib. VI. 70.* *It has been debated and resolved in Relation to him who hangs or murders himself, that is, 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*

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 Prusaensis* 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 [[to]] 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 <401> natural Reason might perhaps suggest; as we have already shewn when we treated of the Law of Nature.¹

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. Rhodiac.* Concerning sacrilegious Persons and Traitors, see MEURSIIUS'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 δε 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 *Archaeolog. Graec.* Lib. IV. Cap. I.

VI. (1) But we have also shewn on those Places, or at least referred to our Notes on PUFENDORF for Proofs, that our Author has no Reason to ground the Things there mentioned on the arbitrary Law of Nations.

Of Punishments.

I. 1. When 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 Uncleaness (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.

I. *The Definition and Original of Punishment.*

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

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.

have said elsewhere. To the same Purpose is that Saying of *Plutarch*, Τῷ Θεῷ ἔπεται δίκη, &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.* <402>

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

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. IRENAEUS'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 *PROCOPIUS's* *Vandal.* I. Πρῶτον δ' αὖ τοῦ, &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.*

7. *Retract.* Lib. I. Cap. IX. *De Lib. Arbitrio*, Lib. III. Cap. XVIII.

by GOD himself, tho' sometimes thro' our Ignorance, *The Offence is concealed where the Punishment is evident*, as the same Author speaks.

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.

II. *That Punishment belongs to expletive Justice and how.*

^a See B. i. Ch.

I. § 8.

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 ¹ an Equality between the Offence and the Punishment; whereof *Horace* thus, ²

^b *Ibid.*

*Why doth not Reason poise and mend the Thoughts,
And see our Rage proportion'd to the Faults?* Creech.

II. (I) 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 a great variety of 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. § I. GROTIUS.

2. *Lib.* I. *Serm.* III. *Ver.* 78, 79.

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.*

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, <403> that a Debt is due upon a Contract. ⁷ The vulgar Expression, whereby we say, that *Punishment is due to a*

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.

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 poenas*, and the Person punished, *dare, luere, pendere, solvere poenas*. See our Author's Note on *Acts* vii. 60. and some Passages by him quoted in

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, forasmuch 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 Thing ⁸ 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

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 *Aeneid*, 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 *Aeneid*, *Luant peccata.* Luant, *that is, absolvant, Let them pay off their Crimes.* And we say too, *Luo poenam, 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 poenam 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 terrae motu*, in Tom. V. talking of that rich Man who is opposed to *Lazarus*, and explaining the Word ἀπέλαβες, *received*, a Word used in that Passage of the Gospel, has the following Observation, Ἐχρεωστοῦντο αὐτῷ τιμωρίαι, ἐχρεωστοῦντο αὐτῷ ὀδύναι. *Punishments were owing him, Pains were owing him.* And in his second *De poenitentia*, Τὰ ἀμαρτήματα εἰς ὀφειλήματα ἀναγράφεται, *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.*

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 Princes ¹⁰ have pronounced Sentence upon a Malefactor thus, ¹¹ *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 such. ¹³ <404>

4. *Michael Ephesius*, upon the fifth of *Aristotle's Nicomachia*, tells us, *Γέγονε τρόπον τίνα, &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, *συναλλάγματα οί, &c.* *Under the Name of Contracts the Antients comprehended,*

Tit. I. *De Evictionibus & duplae 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 Mosis*, *Ἀυτοὶ γὰρ τοὶ σπένδοντες ἁμαρτάνειν, σπένδετε καὶ 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 quae refertur ad Patres de poenâ foeminarum, quae 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 RYCQUIUS, *Ut ignaro domino ad id prolapsa, in servitute; sine onsensisset, 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 Freedwoman.* And thus the Passage is nothing to the present Purpose. See the *Receptae Sententiae* of JULIUS PAULUS, *Lib.* II. *Tit.* XXI. § 1. with CUJAS's Comment, and the Notes of Mr. SCHULTING.

not only such as were made by mutual Agreement, but those Actions also that were forbidden by the Laws.

III. I. 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 detrude 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

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.*

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*

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.

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 him² *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-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

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 tuae Domine*, a Passage cited *Caus.* III. *Quaest.* 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.

3. THUCYDIDES, *Lib.* III. Cap. XLIV. *Edit. Oxon.*

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

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. Considering 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 rectae esse possunt etiamsi 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.

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 *Ἐαυτοφύης*, *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 <406> punish any Man with Death, or Banishment, or a Fine, *Do not do it purely for the Sake of Punishment, but of some Good*, *Μὴ βούλεσθαι ἀπλῶς, ἀλλ' ἐνεκα τοῦ ἀγαθοῦ*. ⁸ And ⁹ *Seneca*, *That Men ought to affect Revenge, not as it is sweet, but as it is*

^a *Prov.* xiv. 4.

^b *Deut.* xxviii.
63.
Isa. i. 24.
Prov. i. 26.

^c *Thom.*
Summ. Theol.
ii. 2 qu. 108.
Sylvest. verb.
vindicta.

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*.

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 Resentment, but because it is what I ought to do*. GROTIUS.

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. 1. What therefore was said by the comick Writer,¹

Th' Offender's Pain is to th' Offended Ease.

V. *In what Sense Revenge is naturally unlawful.*

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, is⁵ *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

10. *Politic*. Lib. VII. Cap. XIII. p. 440, 441.

V. (I) *PUBLIUS SYRUS*, v. 340.

2. *Orat. pro A. Cocinâ*.

3. *Vita Arati*, Tom. I. p. 1048. *Edit. Wech*.

4. Hence that of *HOMER*, *Χόλος δὲ μιν ἄγριος ἦρει*, *But him had savage Anger seized*. (*Iliad* IV. v. 23.) And again,

Ἄγριον ἐν στήθεσσι, &c.

His haughty Breast with brutish Passion rag'd.

(*Iliad* IX. v. 625.)

And again,

Ἄλλ' Ἀχιλλεὺ δάμασον θυμὸν μέγαν.

But tame, Achilles, that great Spirit of yours.

(*Ibid*. v. 492.)

5. Hence in *HOMER*, *Σβέσσαι χόλον*, *To 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.

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, 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 therefore the weaker any one's Reason is, the more prone he will be to Revenge. *Juvenal*, ¹²

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 *STOBAEUS, Sermon. 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.*

12. *Sat. XIII. v. 180, &c.*

- 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 them.* ¹⁵

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. I. 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

VI. *The Benefit of Punishment threefold.*

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, antient People than young ones, and the unfortunate than the happy.* GROTIUS.

15. *Lib. VI. Cap. XVIII. Num. 22.*

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 *Clemens 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* <408> 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*.

^a *Rhet.* I. c. 10.

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 *Νουθεσία, κολάσις*, or *παραίνεσις*, 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 offended, 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 *παράδειγμα*, 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 *Νουθεσίαν, τιμωρίαν, κολάσιν*, *Reformation, Satisfaction, Example*. *GROTIUS*.

3. The Passage from *CLEMENT* of *Alexandria*, runs thus, *Τιμωρία* δὲ ἐστὶν ἀνταπόδοσις κακοῦ, ἐπὶ τὸ τοῦ τιμωροῦντος συμφέρον ἀναπεμπομένη. 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.

5. See *Ethic. ad Nicomach.* Lib. V. Cap. VII. VIII.

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. 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*.

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.*

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 Pun-

^a *Thom. Summ. Theol. ii. 2. quaest. 33. art. 3.*

VII. (1) See the Passage quoted from AULUS GELLIUS, 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 future Advantage.* GROTIVS.

6. *De Habitud. Doctrin. Platonic. p. 21. Edit Elmenhorst.*

7. *Annal. Lib. III. Cap. LIV. Num. 2.*

ishment, 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*
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, εἰ μὲν ἐπ' ἀγαθῶ, &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 Patients, when they cannot cure them by gentler Means.* And *Lactantius*, 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

8. *Trinum.* Act I. Scen. I. v. I.

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.*

11. *Institut. Divin.* Lib. VI. Cap. XIX. Num. 8. *Edit. Cellar.*

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 *[[sic: c]]* 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.*

^b *[[sic: c]]*
Mark xiv. 21.

4. Some there are, who think, that St. *John* speaks of such Men, when he said, ¹⁶ *There* ^c *[[sic: d]]* *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.

^c *[[sic: d]]*
¹ *John v. 16.*

12. *De Irâ. Lib. I. Cap. V.* See also *Chap. XVI.*

13. *Protrepitic. 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, τοὺς ἀνίατα νοσοῦντες, *incurably sick.* And JULIAN in his second Book of Constantius: διττῶν δὲ 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. *For the Benefit also of the Person offended: where of Revenge allowable by the Law of Nations.*

VIII. 1. ¹ 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 <410> 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

VIII. (1) There is some Resemblance of this to be found even among the Beasts. *The Lion avenges himself of his Adulteress.* *PLINY'S Natur. Hist.* VIII. 16. *GROTIUS.*

2. These are the Words of *Poppaea*, 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. When, for Example, says the learned *GRONOVIVS*, 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 mis-applied 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.

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.*

3. Sampson, making his Defence against the Philistines, ^a does ⁶ by ^a Judges xv. 3. 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.* ^b — ver. II. Thus the Plataeans 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 Atherbal lay 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

5. Lib. XXXVIII. Cap. IV. Num. 2.

6. Romulus in PLUTARCH speaking of Tatius, murdered by the Laurentes, says, φόνον φόνῳ λελύσθαι, *That Blood was expiated by Blood.* And the same PLUTARCH of the Mantinenses ill used by the Achaeans; καὶ ταῦτα μὲν ἔσχε τὸν τῆς 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. Wass.

9. Orat. Platon. II. pro Quatuorviris. Tom. III. p. 259. Edit. P. Steph.

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*, where¹¹ 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; <411>
The World grew weary of that brutal Strife,
Where Force the Limits gave to each precarious Life.*¹³ Lucret.

Thus *Demosthenes* against *Conon*,¹⁴ *προεώραται 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*

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.

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' ἀγὼν τις ἦκε τῆς σοφίας πέρι;
Εἰ τὰ καλὰ πᾶσι φάνερα, &c.* (V. 491, &c.)

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*

*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 barb'rous 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 Philisophers 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 ἀμύνεται, &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 GOD! 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 τῶν ἐλλήνων, &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 *Leuctrica*. GROTIUS.

16. *Declam.* XIII.

17. *Cod Lib. I. Tit. IX. De Judaeis & Coelicolis, Leg. XIV.*

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 *Moscovy* 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

18. CASSIODORUS, *Lib. IV. Ep. X.*

19. VELLEIUS PATERCULUS, *Lib. II. Cap. XLII.* PLUTARCH *in Caes.* 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 Teijeuta*, and in other Passages. GROTIUS.

See the Note of HENRY DE VALOIS on the Passage of NICHOLAS DAMASCENUS, p. 513. of his *Peiresciana*.

22. King Theuderick 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 Trachonitae in the East, νόμος πάντα τρόπον ἐπεξίεναι τοὺς τῶν οἰκείων φονεῖς. It is an established Rule to pursue by any Method a Revenge upon the Murderers of ones Family or Relations.* GROTIUS.

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,

amongst the *Germans* before the Christian Religion <412> 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.

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 revenged.* ²⁶ And *Plato* approves of carrying on a warlike Contest so long, *Till the Offender shall be compelled to make the innocent Person, who has suffered by him, just Satisfaction.* ²⁷

^c *Numb.*
xxxv. 19.

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 Clementiâ, 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. *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 else ¹ 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 παραδείγματα, 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. Jul.*
repet. leg. 1.
Ibid. tit. 20.
Ad Leg.
Fabiam de
plagiar. leg. 7.
^b *Orat. in*
Neaeram.

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*, <413> *and indeed a perpetual one; for, by the Law of Nature*

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*. ὁ γὰρ πρῶτος, &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*: τοὺς ἑαυτοῦ πολίτας, &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: καὶ πρὸ τῆς χειραγωγίας, &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 doest thou say? Thou seest his Deeds, and doest 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 impatiently 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 third Chapter to the *Ephesians*: ἡ ἀδίκη, ἡ σὴ ὠμότης, φήσιν, αὐτὴ μὲ κατέστησεν ἄρχοντα καὶ δικαστήν, *your Injustice, your Barbarity, says he, made me your Ruler and your Judge.* GROTIUS.

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*, [[⁵]] 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, κατὰ δὲ ζώων, &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, Κτείνειν 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 Men⁷ before the Flood observed this Maxim, till GOD revealed to the Rest of the World, that he intended the brute

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. Praecept. 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. [[Footnote number missing in text, supplied from Latin edition.]] *Lib. IV. Od. IX.*

6. *Apud. STOBAEUM, Serm. XLIV.* See PLUTARCH, *De solertiâ Animalium*, Tom. II. p. 964. *Edit. Wech.*

7. And some were afterwards observant of this primitive Custom, as DICAERARCHUS, and others whom St. JEROME cites as Evidences against JOVINIAN. GROTIUS.

Creation for their Food and Sustenance. Again, *Ὅπως περὶ κιναδέων τε καὶ ἐρπετέων, &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, *Κιξάλλην καὶ ληστήν, &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.* <414>

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

8. *De Irâ, Lib. I. Cap. XVI.*

9. *Καθάπερ οὖν 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, οὐκ ἔστι γὰρ ὅστις, &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, *ὄφιν 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. ὥσπερ γὰρ, &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.*

*Whate'er attempts our Life, without a Crime
May itself to Death be doom'd.* GROTIVS.

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*,^c who was polluting himself with the Superstitions of the *Graecian* 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,^d 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. 13.

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. BUDDÉUS, *De jure Zelotarum in gente Hebraeâ*, § 34, &c.

14. Whose Opinion of this Matter is this, in his Book *De Sacrificantibus*, Κολασ-

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 <415> we may plainly see, what the Law of Nature was concerning Punishments, and how long it continued.

τέον 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 *Helotae*, 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 *Helotae*; 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 *Helotae*, or publick Slaves. He is speaking of the Populace, or common People, in Opposition to the most considerable Persons among the *Lacedemonians*, *πλήθος δῆμος*. 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' ἀποστερησάντας αὐτοὺς, ὃν προσήκε μετέχειν*, &c. He is speaking of Persons, whose Minds were become as servile, as if they had been real Slaves: *Τὸν δὲ δῆμιον περιόικους ποιήσασθαι, καταδουλωσαμένους αὐτῶν τὰς ψυχὰς, οὐδὲν ἦττον, ἢ τὰς τῶν οἰκετῶν*, &c. They were not therefore really Slaves. In the Passage last quoted, they are termed *περιοίκοι*, *Persons, who live near*, that is, in the Neighbourhood of *Lacedemon*. But XENOPHON distinguishes these *περιοίκοι*, from the *Helotae*, *Hist. Graec. 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 *Helotae* in that Manner, only in the greatest Extremities, as after the Battle of *Leuctra*, or that of *Plataeae*. 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 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

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.

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,*

X. *What the Gospel has enjoined in this Case.*

^a See B. i. Ch. 2. § 6. B. ii. Ch. i. § 10.

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.

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 <416> 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*

2. An Eye for an Eye, which, if we may so say, is the Justice of the Unjust. *St. AUSTIN* in his Exposition of *Psalms* cviii. quoted, *C. sed differentiae XXIII. Quaest. 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. διὰ τοῦτο ὁφθαλμὸν, &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, *Συγγνώσκει ὁ Θεὸς, &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.*

4. This Passage of *ZECHARIAH*, 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

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*

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.

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, οὐκ ἐφηδόμεθα, ὦ δέσποτα, τιμωρίας ἐχθροῦ, δεδιδαγμένοι πρὸς τῶν ἱερῶν νόμων ἀνθρωπαθεῖν, *We <417> 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.* ⁵ 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,

5. See ORIGEN against CELSUS. GROTIUS.

——— *Ferus est Legumque videtur
Vindictam praestare 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

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.

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 <418> 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*

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 *STOBAEUS*, 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 CAECILIUS*, *Noct. Attic.* Lib. XX. Cap. I. p. 868. *Edit. Jac. Gronov.*

16. *St. AUSTIN*, *Lib. II.* De adulterinis Conjugiis. *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 *HINCMARUS*, *De divortio ad Interrog.* V. in fine. C. laicos. II. *Quaest.* IV. and *PANORMITANUS* there. *GAIL*, *De pace publica*, VIII. 3. Add C. *accusasti de accusationibus*, as it is in *BROCARD.* *GROTIUS*.

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.

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 ΤΡΥΦΟ, μηδὲ μικρὸν 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, *Quaest. Evang.* Lib. I. *Quaest.* X. GROTIUS.

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. <419>

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

XI. (1) In the Original we read *Legem primaevam*. In the first Edition it was *contra Naturae 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 poenitentia*. St. AMBROSE, upon *Psalms* xxxvii. St. CHRYSOSTOM, upon *1 Cor.* Hom. XXVIII. and upon *Matt.* Hom. XLII. Add *2 Cor.* vii. 9, 10. GROTIUS.

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, ἐπειδὴν οὐχ οἶον, *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.*

4. St. JEROME, upon the first Chapter of NAHUM, which Passage is inserted *Caus. XXIII. Quaest. V.* AGATHIAS, *Lib. V.* out of PLATO. GROTIUS.

XII. (1) St. JEROME, *Ad Damasum*, cited in C. *Importuna de poenitentia*, 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.

^a B. i. Ch. 2.
§ 7.

^b Rom. xiii. 4.

^c 1 Tim. ii. 1,
&c.

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.

^d Lib. I. c. 65.

3. Nor will it be impertinent to propose to the Imitation of Christian Governors, in some Respects, ⁴ the Example of *Sabakon* the *Aegyptian* 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 <420> 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*

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*.

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.*

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 Tediousness of their Punishment, to make it the more exemplary.

XIII. I. 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*

XIII. *Imperfect Divisions of Punishment rejected.*

7. See what is below in this Book, *Chap. XXIV: § II.* 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. Quaest. 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."

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 <421>

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 ^a us of, in judging others, (be-

XVI. *Or to affect the Office of a Judge in capital Crimes.*

^a Matt. vi. 1.

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 Poenitentia* VIII. Καλὸν μὲν οὖν, &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.

cause, as we judge others we must expect to be judged ourselves in like Cases, by GOD) is altogether as true in this Affair.

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.

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.

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*

XVII. (1) See St. AUSTIN, *De Civitate Dei*, cited C. *quicunque*, Caus. XXIII. Quaest. VIII. And C. *inter* with the following C. *Caus. XXXIII. Quaest. 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 Murther."

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.

late to punish by a Course of Law, we suppress by this Edict; hereby commanding, 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, ⁵ 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. 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, be-

XVIII. *That internal Acts are not punishable by Men.*

3. *Ibid.* Leg. II.

4. (*Apolog.* II.) AGATHIAS, *Lib.* IV. *Ὁὐ γὰρ στρατηγοῖς, &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. [[Footnote number missing in text, supplied from Latin edition.]] 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. Quaest. XC. ANT. MATTHAEVS, *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.

^a B. 2. Chap.
4. § 3. Num. 2.
and Chap. 6.
§ 1. num. 1.

cause, 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 Poenam 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 *Se-<423>neca*;

XVIII. (1) The Words are *Cogitationis poenam nemo patitur*; *No Man suffers Punishment for his Thoughts*. Digest. Lib. XLVIII. Tit. XIX. *De Poenis*. 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) Σύμφυτον εἶναι ἀνθρώποις τὸ ἀμαρτάνειν. 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. Graec.* 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*

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

justify himself. In his ninth Chapter he had said, *Among many other Inconveniences of Mortality, the Darkness 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 οὖν, &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, ὑποθήκαι βασιλικῆς ἀγωγῆς. 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 Graeca*. The Reason of our Author's Mistake is, that BASIL, the *Macedonian*, has written Precepts of Morality, addressed to his Son, Κεφάλαια παραινετικὰ, 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 publick 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.

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. <424>

8. *Apud* STOBÆUM. Serm. XLVI.

9. And in his Fragments he says, *Μὴ συκοφαντεῖν ἀνθρωπίνης φύσεως τὴν ἀσθένειαν*, *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. Quaest. I. GROTIUS.

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,* ¹ *unless we might be ungrateful with Impunity*. And to these Kinds of Vices may be referred that of *Seneca* the Father in his Controversies, ² *I do not desire that the Criminal should be commended, but only acquitted*.

XX. *Nor those Acts that are neither directly nor indirectly hurtful to human Society; the Reason of which is assigned.*

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 Punish-*

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 *Stobaeus*, entitled, *De Magistratu*, in *Cicero's* Oration for *Muraena*, 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 shewn 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* <425> Case is, when an Offence is

ment. Excerpt. *Contr.* VI. 8. For as PLUTARCH, in his *Cimon* says, some Things are ἑλλείματα μᾶλλον ἀρετῆς τίνος ἢ κακίας πονηρέματα, *Rather the Defects of some Virtue than the Effects of Vice.* GROTIUS.

XXI. (1) DIODORUS SICULUS, in his Fragments, argues very well against them that Συγγνώμη τιμωρίας αἰρετωτέρα, *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, οὐδὲ γὰρ εἰ σφόδρα, &c. *For tho' there are some who*

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 over-balanced, 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.

^a Add Q. Fr. i. II.

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*

^b *Wisd.* xli. 19.

deserve ill Treatment and Correction, there is no Necessity that they should be quite destroyed. GROTIUS.

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 Magistratu.*

quibusdam in Rebus, ut nihil sit Loci Gratiae. 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 Prusaensis* thus: χρηστοῦ ἡγεμόνος, 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. *But not always.*

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, spares, 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. *And also after the*

XXIV. I. 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;

4. *Epist. ad Quintum Fratrem*, Lib. I. Epist. II.

5. *Oratio ad Alexandrinos*.

XXIII. (1) JOSEPHUS, Πατροκτονία κοινὸν, &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

but this <426> 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.

penal Law is made.

^a See *B. I. C.*
I. § 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*

in his *Sparsio florum ad Jus Justinianum*. Tit. *De poenis*, 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 *Locrians*; but that *Zalecus* (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 Irâ 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

*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.*⁵

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 intrinsic Causes justify the doing 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.¹

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 ARNISAËUS, *De Republica*, p. 271, 272. by DIONYS, GODEFROY, on the *Justinian Code*, Tit. *De Poenis*, Leg. XV. by JAMES GODEFROY, his Son, in *Cod. Theodos.* 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 THEMISTIVS, here referred to, the Reader may see it at Length in PUFENDORF, *B.* VIII. *Chap.* III. § 17. *Note* 1.

5. *De Clementiâ*, 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,

XXVI. Extrinsical is from a Man's former Merit, ¹ or some other Thing that <427> 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. ² For tho' the general Reason ³ 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

XXVI. *What extrinsic ones.*

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 Poenis temperandis*, Caus. L. and COVARRUVIAS, *Var. Resolut.* II. 9. 5, 6.

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. Quaest. VII.* GROTIUS.

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. *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.*

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 Place ² 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. *The Punishment is to be proportioned to the Crime.*

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 Punishment. ¹ No Body is to be punished above his Desert, according to those Passages of *Horace*, ^a which we have before quoted,

^a § 2. n. 2.

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.

and that of *Cicero*, ² *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.* ³ *Aristides* saith, *Leuctr.* 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 <428> 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. 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. ^a *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.

XXIX. *Regard is to be had here to the Motives which we are to compare with one another.*

^a *Jam.* i. 15.

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*

2. *Epist. ad Brutum* XV.

3. *Digest. Lib. XLVIII. Tit. XIX. De Poenis, Leg. XLI.*

XXIX. (1) *CHRYSOSTOM X. De Statutis: οὐ γὰρ διὰ 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.

no tolerable Pretence to urge in their Favour. Thus does *Polybius* excuse the *Acarnanians*, who to avoid the imminent Danger, that threatned them, ³ broke the Articles of the Treaty concluded with the *Greeks* against the *Aetolians*. 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,* ⁵ *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* ⁶ *more voluntary Vice.*

3. This is not exactly related. The Historian says on the contrary, that tho' the *Acarnanians* had been excusable, as well as any other People in the same Case, to have used Delays, and endeavoured to avoid War with the *Aetolians*, 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. Thes. & Rom. (p. 38. Vol. I. Edit. Wech.) GROTIVS.*

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. Lugd. 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. GROTIVS.*

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

To the same Purpose there is a famous Passage in *Porphyrus*, 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 (ἀντακολουθοῦσι 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-<429>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 *Επιθυμία σαρκὸς, ἐπιθυμία τῶν ὀφθαλμῶν, ἀλαζονεία τοῦ βίου. 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.

^b 1 *John* ii. 16.

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 con-

XXX. *And Causes too which ought to restrain us: Whereof the Degrees of the Precepts in the*

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.*

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.*

*Decalogue with
Respect to our
Neighbour and
some other
Things.*

summated 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, ¹ there is sometimes annexed some other Vice, as for Instance,

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 Lucae 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 *Lucae* 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 Mistake, 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

want of Affection <430> 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

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 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 Resentment, 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.) GROTIUS.*

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. 89I. Edit. Scip. Gentil.*

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 the⁷ 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 for-*

^b Rom. vii. 13.

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. ὅθεν μαθάνομεν, &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*: οὐ γὰρ ἀπλῶν, &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*. GROTIUS.

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. GROTIUS.

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.

bidden: But if you transgress in Things actually prohibited, with Impunity, there is neither Fear nor Shame remaining to restrain you.

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 Disposition, 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.*

XXXI. *The Capacity also of the Offender either for one or the other, which Capacity is variously considered.*

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-

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.*

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. *That the Punishment may exceed the Proportion of the Damage done and why.*

XXXII. 1. But here we must observe, that what the *Pythagoreans* assert, that Justice is ¹ τὸ ἀντιπεπονθὸς, 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 ^a 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, ² besides the Penalty

^a *Exod. xxii. 1, &c.*

4. *Cap. VI. p. 90.*

5. This Sentence, which our Author cites only in two *Latin* Verses of his own, is taken from *STOBAEUS*, and is in the Original thus,

*"Ὅταν ἐνπορῶν τις αἰσχροῦ πράττει πραγματὰ,
Τί τοῦτον ἀπορήσαντα πράξειν 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 ταυτοπάθεια, (*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

of double Damage, was imprisoned for some Days, as *Demosthenes* against *Timocrates* shews. *Laws*, says *St. Ambrose*, ^b *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* <432> in *Leuctr.* 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,

^b (*Offic. Lib.*
III. Cap. III.)

^c (*Tom. II.*
p. 133.)

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,

^d *Lib. II. De*
Special Legib.
p. 789, &c.

Thebans, *Hercules* obliged them to return them double the Value of it. *Bibliothec.* Lib. II. (Cap. III. § II. *Edit. Th. Gal.*) GROTIUS.

3. ——— *Scelera taxantur modo*
Majore nostra ———

This Passage, which is taken from the *Hercules furiosus*, Ver. 746. is wrong applied, as the learned GRONOVIVS 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 Mr. PEIRESC, and which may be seen in his Letters, *Part I. Epist. CCLXIV.*

5. *Lib. I. Cap. XXXIV. p. 166. Vol. II. Edit. Paris.*

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.

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. *Deuteron.* xxii. 19. and also by another Law against him, who unjustly prosecutes a Person in order to possess himself 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. *BYNCKERSHOECK*, Lib. I. Cap. X.

9. *De Legib. Special.* Lib. II. p. 789.

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* <433> Law this is not done *ἀνευ προσωποληψίας*, that is, without too ¹ 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 intrinsick Valuation and proportioning of a Punishment.

XXXIII. *The Opinion of harmonical Proportions in Punishments rejected.*

^a *De repub.*
Lib. VI. Cap. ult.

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 intrinsick 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.

XXXIV. *That a Punishment is to be alleviated out of Charity, unless a greater Charity opposes it.*

XXXV. Upon account of this easiness the Law of GOD given to the *Jews* punishes Theft ¹ committed in a Field more severely than that which is committed in a House, *Exod.* xxii. 1. 7. 9. ² *Justin* says of the

XXXV. *How the easiness of offending inclines to Pun-*

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.

ishment, and
how the Custom
of offending
either excites us
to punish, or
dissuades us
from punishing.

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-giver³ considering that it was impossible for the Owners to have always an Eye on their Goods⁴ in

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 balneariis*, 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) *plectebantur apud Athenienses fures balnearii, si rei furtivae aestimatio erat, ὑπὲρ δέκα δραχμὰς, 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 CUJAS 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 *ὑφέλοιτο*, there is *ἐκ 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 WOLFIUS, 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 *ἐκ 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 Sparsio 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 *ἐκ βαλανείου*, 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,

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,* ⁵ *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* ⁶ says, *When Offenders grow too numerous, there is a Necessity 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. 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 *Aegyptian King* is ¹ commended for inflicting

XXXVI. *The use of Clemency in mitigating Punishments.*

^a *Senec. De Clement. Lib. 1. Cap. 2. in fin.*

^b *Ibid. Cap. 20.*

or other Works for the Use of the Publick. But the Punishment was sometimes less and sometimes also extended even to Death. See CUJAS 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 Sparsio*, &c. before referred to. *Capitale enim crimen apud majores fuit* [Furtum] ante poenam quadrupli. *In Aen.* VIII. 205.

5. [*Epist. Lib. IV. Ep. IX. Num. 17. Edit. Cellar.*]

6. *Nonnunquam evenit, ut,* &c. *Digest. Lib. XLVIII. Tit. XIX. De Poenis. Leg. XVI. § 10.* See the *Variae Lectiones* of WILLIAM DE RANCHIN, *Lib. I. Cap. XI.* where he had collected several Authorities upon this Head.

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

^c Cap. 24. 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.* Isaeus 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*

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 ISAEUS in *Latin* only, and I find nothing like them in the Writings of that antient 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 ISAEUS, without saying from whence he took it, in these Words; *χρή τοῦς νόμους μὲν τίθεσθαι σφοδρῶς πραοτέρως δὲ κολάζειν, 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.)*

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.* <435>

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

XXXVII. *What the Hebrews and the Romans had regard to in Punishments, may be referred to the Places above-mentioned.*

6. *Unde mihi sollicitudo maxima incussa est, &c.* Ad Marcellin. Comit. *Epist.* CLIX. which Passage is cited in the *Canon Law*, Caus. XXIII. Quaest. 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. (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 haec quatuor consideranda sunt septem modis: Causâ, personâ, loco, tempore, qualitate, quantitate, & eventu.* Digest. Lib. XLVIII. Tit. XIX. *De Poenis*, 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*

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. *Of War made for the exacting of Punishment.*

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 vicious 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. *Whether a War on the Account of Offences just begun is lawful; explained by a Distinction.*

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

atrocior—nam populi Romani. [Our Author reads it thus, with Reason, instead of *Praetoris*, 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.

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, <436> 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 pun-

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 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 stuprosae mentis acer punitor extitit*, &c. (Lib. VI. Cap. I. Num. 8.) *GROTIUS*.

5. *DIOGENES 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.

ished, 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 *Tὸ πνευματικὸν*, 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 *ἐντολὴν σαρκικὴν*, 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 ἀποστερήσης, 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

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.* vii. GROTIUS.

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 <437> 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 *Antaeus*, *Busiris*, *Diomedes*, and such like Tyrants, *Whose Countries*, says *Seneca* ^a 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 ² *Lysias* shews, the Author of great Good to Mankind, by punishing the Unjust. ³ *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, ^b *He travelled over the World to punish the Wickedness of Men*. Of the same Person is that of *Dion Prusaeensis*, *He punished bad Men, and either de-*

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.

^a *De Benef.* l. 1. c. 13. See *Isocr. Hel. Enc.*

^b *Lib.* 5. c. 76. p. 236. *Ed. H. Steph.*

XL. (1) And the Seas too, PHILO, *De legat.* 'Ηρακλῆς ἐκάθηρε 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 Funebr.* Cap. V.

3. *Lib.* IV. *Cap.* XVII. p. 157.

stroyed the Dominions of proud Tyrants, or transferred them upon others. And for the general Care he took of all Mankind, *Aristides*, in his *Pan-athenaic* Oration, says, he deserved to be taken into the Number of the Gods. In like Manner is ⁴ *Theseus* commended for having destroyed the Robbers *Sciron*, *Sinis*, and *Procustes*, and is therefore introduced by *Euripides*, speaking thus of himself, *In his Suppliants*, ⁵

*My Acts of old have spread my Fame thro' Greece,
Where I, The Scourge of Villainies, am stiled.*

^c Lib. 5. c. 3. *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.*
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

4. See PLUTARCH, in his Life. *Tom. I. p. 4, 5.*

5. (*Ver. 339, 340.*) When the Herald says there,

Ἡ πᾶσιν οὖν σ' ἔφυσεν ἀρκήσιεν πατήρ.

*Did you from your Father this Vigour gain,
Was't he who made you thus a Match for all?*

Theseus replies,

Ὅσοι γ' ὕβρισται· χρηστὰ δ' οὐ κολάζομεν.

*For all who are injurious. But we ne'er
Molest the Good.*

PLUTARCH, in his Life, *Ἀπήλαττε τὴν Ἑλλάδα δεινῶν τυράννων*, *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 Alexander.* *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

⁹ *Hercules* compelled the antient *Gauls* to desist, <438> 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*

vii. De
Beneficiis.

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 Dianae 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. Alexand.* 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. I. crys up the no less Merit of the *Romans*, for the Good they did Mankind, *It cannot 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 DIODORUS 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 CAESAR, 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,*

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, ^d Such abominable Crimes do they allow of in their publick Decrees, that if any City upon Earth should injoin, or had injoined, 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

&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 CAESAR.

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 *Politicks*, 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 ὑπελάμβανον*, &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.

^d This he says in Regard to the Maxims of judicial Astrology. *De civit. Dei, l. 5. c. I.*

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 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.

^c Ch 2. § 1. &
§ 5. n. 3.

XLI. 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*,

XLI. *The Law of Nature is to be distinguished from civil Customs generally received.*

13. *Etiam post susceptum bellum ex causâ non punitivâ.* 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 it had been necessary to say, *saltem*, at least, and not *etiam*, even. 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*.

¹ *They disguise their Ambition and Covetousness, under a Pretence of civilizing barbarous Nations.*

XLII. *And from the voluntary divine Law not known to all Nations.*

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.

XLIII. *What is manifest in the Law of Nature is to be distinguished from that which is not so.*

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

XLI. (1) It is where, censuring the unbounded Ambition of *Caesar* 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 τοῦ βίου, &c. *Those who regard only the Legislators 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. L. 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 praecepto, &c.* Epitom. Institut. Divin. (*Cap. V. Num. 15.*) GROTIUS.

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.

2. As therefore, with Respect to the Civil Laws, the Ignorance of them, or of their true Meaning ^a 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 <440> 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*.

^a Matt. x. 15.
Luke xii 47, 48.

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. 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;

XLIV. *Whether War may be made for Offences against GOD only.*

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 unaquaque gens*,—&c. Lib. II. *Advers. Jovinian*. (Vol. II. p. 75. B Edit. Basil.) GROTIUS.

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.*

which Opinion we rejected before. Whence it follows, that, as in Ecclesiastical Affairs, Bishops are said, in some Measure, *Τὴν καθολικὴν πεπιστεῦσθαι*, 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*

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 contemta 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

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* <441> *Kindness and Friendship*. Irreligion is attended with all the contrary Effects,

————— 'Twas⁷ Ignorance of GOD
That first plunged wretched Men in Wickedness.

Every⁸ Error, says *Plutarch*, in Matters of Religion, is pernicious, and if accompanied with Passion, it is so in the highest Degree. In *Jamblichus* we find this Sentence of *Pythagoras*, *The Knowledge of GOD is Virtue*,

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 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.) GROTIUS.

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 GROTIUS.

8. *De Superstit.* init. p. 164. E. Vol. II. *Edit. Wech.*

^a *Pol.* l. 7. c. 3. 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*.

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

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, justī atque injustī 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. GROTIUS.

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.* GROTIUS.

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 EPI-CURO, &c.* Epist. XCVII. GROTIUS.

Fear of Punishment. His very Words to this Purpose, which are very remarkable, are extant in ¹⁶ *Diogenes 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 <442> 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.*

^b Lib. 36. c. 2. n. 16.

^c *Geogr.* l. 16. p. 1104. *Ed. Amst.* 761. *Ed. Paris.*

^d *Inst. Divin.* l. 5. c. 14. n. 12.

^e *De Ira Dei,* c. 7. n. 23.

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, that ¹⁸ *The Corruption of Religion was an Injury to all the World.*

16. *Lib. X.* § 150, 151.

17. *Politic.* Lib. V. Cap. XI. p. 409. E.

18. *Quia quod in Religionem divinam, &c.* Cod. *Lib. I. Tit. V. De Haereticis, &c.* Leg. IV. But the bare Inscription of this Title shews, that ARCADIVS and HONORIUS

XLV. Which
are the most
common
Notions of a
GOD, and how
they are con-
tained 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.* as ¹ *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*. And ² *Philo*, *It is a profane Thing to represent the Image of him that is invisible, by any Picture or Statue*. *Diodorus Si-*

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. Quaest. 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*.

culus, ^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 <443> *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

^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.

3. The Author of the Answers to the orthodox Christians, at the sixty-ninth Question, ἵνα οὖν φυλαχθῇ, &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.

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

6. DIODORUS SICULUS says, that there is a natural Piety or Religion, *φυσικὴ εὐλάβεια*, 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 Artist. 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, *Animae enim a primordio, conscientia DEI, dos 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 haec 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, *Quae consensio——satis ostendit, aut lucem aliquam animis insitam, quae vi suapte animum feriat, aut traditionem a primis hominibus, &c. quorum utrumvis 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 FAELEX, 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

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 Prusaensis*, when he says, that *The Persuasion of a GOD is partly* <444> *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*. And⁹ *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. 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.

XLVI. *That those who first violate these Notions are punishable.*

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.

7. Ὑπόληψις ἐπίκρητος. 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 Coelo*, Lib. I. Cap. III. p. 434. E. Vol. I. *Edit. Paris.*

10. *Lib. X.* p. 887. *Edit. Steph.*

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 Aelian 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

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

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 <445> 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 stiles 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

the Mysteries of the *Aegyptian*, 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.)

8. Our Author here cites CICERO's first Book, *De Natur. Deor.* and his second, *De inventione*. The first Passage is, *Quae 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, *Ὀῖον ἀθέους*, *As Athiests*, because they neither acknowledged nor worshipped any GOD. NICOLAUS DAMASCENUS, in *Excerpt. Peires*. GROTIUS.

If a People, tho' Athiests, lived morally well, their Athiesm would be no Reason for extirpating them, whilst they did not endeavor to infect others with the bad Principles wherewith they are imbued. See above, Note 9.

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. *But not others which is shewn by an Argument drawn from the Mosaick Law.*

XLVII. I. 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 Remisness 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.

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 incontestated 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. xii. 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

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 AELIAN, *Var. Hist. IX. 12.* and the Commentators upon that Place.

13. HIMERIUS, *Action. 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.

Heaven, ² hereby cancelling the whole Law, and entirely relinquishing the Wor-<446>ship of the true GOD, *Deut.* xvii. 2. (which by St. *Paul* is interpreted to be, *Worshipping the Creature, and not the Creator*: For *παρὰ*, 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, before ⁴ they are in a Capacity of distinguishing betwixt Truth and Falshood.

2. PHILO, upon the *Decalogue*, speaking of such Persons, εἰσὶ δ' οἱ καὶ πρόσυπερ βάλλουσιν, &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 *παρὰ*, with an Accusative, when a Comparison is 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. *Quaest. Academic.* Lib. IV. Cap. III.

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 Inventors 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 by ⁷ *Darius* the *Persian* King, and *Gelo* ⁸ King of *Syracuse*, which Action of theirs gained them much Credit and Ap-

5. Thus the *Jews* admitted into their Temple, the Sacrifices sent them by the Kings of *Aegypt*, 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 whatsoever 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 Poeni, &c.* *JUSTIN*, *Lib. XIX.* (*Cap. I. Num. 10.*) This was *Darius*, the Son of *Hystaspes*, 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.

plause. We have an Account in *Plutarch*, ⁹ that the *Romans* thought to have punished some barbarous People for <447> 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*,

XLVIII. *That War cannot be justly made upon those who refuse to embrace the Christian Religion.*

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, διὰ τὸ τοὺς καλουμένους βλετονησίους, &c. *Quaest. 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.*

XLVIII. (1) Besides the Prejudices of Education, and the Attachment of all People to the Principles of Religion they have once imbibed.

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. [[³]]

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

2. *De Judaeis autem praecipit sancta Synodus nemini deinceps ad credendum vim inferri*. Cui enim vult Deus, miseretur, & quem vult, indurat. *In Jure Canonic*. 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 *Trachonitis*, to be circumcised. *Vit. Joseph.* p. 1007. C.

3. [[Footnote number missing in text, supplied from Latin edition.]] SERVIVS 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 *Aeneid* 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.* TERENT. *Act. V. Scen. II.* (v. 36.) The Rabbi ABARBANEL says the Word מַצֵּחַ 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*

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* <448> *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, that¹¹ the Proceedings of *Justinian* were by wise Men censured, because in proselyting the *Samaritans* to Christianity, he made

oculo eruebat, & vindictam injuriae retribuebat. Nova autem Lex clementiam designabat. Advers. Judaeos, Cap. III.

6. Τὸ αὐτεξούσιον τῶν ἀνθρώπων, &c.

7. *Epist. ad solitar. vit. agent.* Vol. I. p. 855. A. Edit. Colon. seu Lips. 1686.

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. Ἐρωτᾷ 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.

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. 1. 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 Religion² *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

XLIX. (1) *Seque sacramento non in scelus aliquod, &c.* Lib. X. Epist. XCVII. Num. 7. *Edit. Cellar.*

2. He says this in Regard to *George*, Bishop of *Alexandria*, a turbulent Man, and a great Accuser, *Professionisque suae oblitus, quae nihil nisi justum suadet & lene, ad delatorum ausa feralia desciscebatur.* (Lib. XXII. Cap. XI. p. 353. *Edit. Vales. Gron.*) The same Historian stiles Christianity, a plain and sincere Religion. *Christianam Religionem absolutam & simplicem, anili superstitione confundens* (Constantius, &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. Cellar.*) The Pagans generally termed it, a harmless and inoffensive Sect. *Secta 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.

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 *Au*-<449>*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. *Quaest.* 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 Chris-

L. But not against those who are mistaken in the Interpretation

4. Our Author might very appositely have quoted here this Passage of TERTULIAN, *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 Sacrificat.* (p. 856, & 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. *Quaest. 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 Lan-

*of the Divine
Law; this illus-
trated by
Authorities and
Examples.*

tians, 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.

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*, *Ἐυχερεστερόν γε ἄνθρωπος, &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*

guages, 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 Haereticus est, ut mea fert opinio, &c.* Cap. I. These Words are inserted in the *Canon Law*, Caus. XXIV. Quaest. 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 Haereticis ministeriorum locus, nulla ad exercendam animi obstinatoris 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;

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 <450> 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;

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, *Quest. IV.* says, *Ἀηλοὶ εἶσιν, &c.* It is evident, that either the Ambition or Jealousy of the Broachers 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. Paris.* 1645.

7. AGATHIAS, in the first Book of his Histories, relating the ridiculous Superstitions of the *Almaines*, subjoins *Ἐλεῖσθαι 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.

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

9. *Contra Epist. Manichaei*, 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 praedicatio, quae verberibus exigit fidem.* GROTIUS.

The *Arians* were, without Doubt, highly in the Wrong to persecute; but as we

of the secular Power <451> 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*

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. Eccl.* 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 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 arbitraretur, seu quod Episcopi laborem quotidianae 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

^a See St. Jerome upon it, as cited in Canon Law, caus. 63. qu. 4. cap. 13.

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.*
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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 umquam 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*

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

LI. But justly against those who are impious towards such as they believe to be Gods.

^a *Thucyd.* l. 1. c. 126. & seq. Ed. Oxon.

^b *Diod. Sicul.* l. 11. c. 60. & seq.

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. (§ II.) 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. (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*, CHRYSTOPHER 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

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 is for inflicting Death upon all who despise Religion. <453>

^d *De legib.* 1.
10. n. 907, &c.
tom. 2. *Ed.*
Steph.

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 valemus, qui, vitiis impunitis, volunt stare Rempublicam, quam primi Romani constituerunt, auxeruntque virtutibus: & si non habentes veram pietatem erga DEUM verum, quae illos etiam in aeternam civitatem posset salubri religione perducere, custodientes tamen quandam sui generis PROBITATEM, quae posset TERRENAE CIVITATI CONSTITUENDAE, AUGENDAE, CONSERVANDAEQUE sufficere. DEUS enim sic ostendit in opulentissimo & praeclaro 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 sapientiae retinent, & HABERE VENIAM possunt, quia summum hominis officium, etsi non re ipsâ, tamen proposito tenent.* *Instit. Divin. Lib. II. Cap. III. Num. 14. Edit. Cellar.*

6. *Injuriam sacrilegus DEO, &c.* *De benefic. 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 alledged this Passage, thus misapplied, in his Notes upon *The Wisdom of SOLOMON, ver. 31.* where, upon the Word *Opinio*, he says, *adde, aut professio.*

7. *Et homicidii, veneficii, &c.* *Ibid. Lib. III. Cap. VI.*

Of the Communication of Punishments.

I. 1. Our 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

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. AUSTIN 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,

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 accessory to it, either ⁶ in advising, ⁷ commending, or encour-

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, quae ex delicto nascuntur*. § II. 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* οὐ γὰρ οἱ ἐπιορκούντες, &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 οὗτος 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. 1. 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. 1. Tit. IX. § 25*. See the Passages cited hereafter from PHILO and JOSEPHUS in the Note upon § 17. GROTIUS.

See upon all this, PUFENDORF's *Law of Nature and Nations*, B. I. Chap. V. § ult.

aging the Fact; they ⁸ who prevent it not, <454> 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. 1. This I shall illustrate by particular Instances. No civil Society, or other publick Body, is 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 ¹ *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 *Magne-sians* did with Tears beseech *T. Quintius*, and the other Embassadors,

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 *Quaest. 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.*

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 Judaeos*, Orat. I. ὥσπερ οὖν, &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. CHRY-SOSTOM, 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, quae ferebant*, &c. Lib. XXX. (Cap. VI.) St. CHRYSTOM, 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.

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

^e *Idem*, Lib. 45. Cap. 23. n. 7, 8.

^f *Paraenet.* Cap. 28.

^g *Adversus*

Gentes. Lib. 4. p. 149 *Edit. Lugd.* 1651.

^h *De Gubernat. Dei*. Lib. 7. p. 266. *Edit. Paris* 1645.

2. *Nondum quae feceris, sed quae fieri passus sis, &c.* (Cap. V.)

3. *Alienae igitur, inquires, culpa me reum facies? Prorsus alienae; 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. Quaest. 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.

if a Slave with his Master's Knowledge commits Murder, ⁶ the Master is wholly accountable for it, be-^{<455>}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

6. *Si servus, sciente domino, occidit*, &c. Digest. Lib. IX. Tit. IV. *De noxalib. Actionibus*, Leg. II. *Princip.* See the Treatise of Mr. NOODT, *Ad Leg. Aquil.* Cap. X.

7. *Si servus, sciente domino, alienum*, &c. JUL. PAUL. *Rec. Sentent.* Lib. V. Tit. XXX. *Ad Legem Fabiam*, § 2.

8. *Scientiam heic 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, quae habet & voluntatem*, Lib. XLVII. Tit. VI. *Si Familia Furtum fecisse dicatur*, Leg. I. § 1. See also Lib. XLVII. Tit. VII. *Arborum furtum caesarum*, 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 contemnat 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 alledged 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 Aquilianam*, 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

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 Πολλάκι καὶ ξύμπασα πόλις κακοῦ 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

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* [infamiâ notatur]—[quae intra id tempus, quo elugere virum moris est, in matrimonium collocata est.] &c. *Digest. Lib. III. Tit. II. De his, qui notantur infamiâ, 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 praeceperit, &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 *The People suffer, when the Prince offends.* Creech. <456>

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.

15. *Quidquid delirant Reges, plectuntur Achivi.* HOR. *Lib. I. Epist. II. Ver. 14.*

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. *Aen. I. 39. & seq.*

Naryciusque heros, a virgine, virgine raptâ,

Quam meruit solus, poenam digessit in omnes.

OVID. *Metam. Lib. XIV. (Ver. 468.)*

EURIPIDES in his *Troades*, introduces *Neptune* speaking thus, *Ver. 69. & seq.*

Οἱ δ' ἥνικ' Αἴας εἴλακε Κασσάνδραν βία,

I know it, when Ajax forc'd Cassandra.

And MINERVA replying,

Κ' οὐδέν γ' Ἀχαιῶν ἔπαθεν, οὐ δ' ἥκοὺς ὕπο.

——— *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*: ἰδοὺ τὸ ἀμάρτημα, &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 οὖν, &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.

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 byassed 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 δυνάμενος, &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

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, &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

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. <457>

ⁱ *Polyb.* Lib. 2. Cap. 8.

^k *Plut.* in vit. Cimon. p. 483. C. Vol. 2.

6. Now it is rational to conclude, that one must of Necessity know Things that are publicly and frequently transacted; for as *Dion Prusaensis* says, ²² *the Practice of considerable Numbers no Man can plead Ignorance of.* *Polybius* smartly reprehends the ²³ *Aetolians*, 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.

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.

2. But the Right of punishing Offences against human Society is not so exclusively theirs, but that other publick Bodies, or their Governours

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 *Vejentes* joined them: But that State gave no Aid to the *Sabines*, to avoid breaking the Truce: At which the Historian expresses Surprize; 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.

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. *Unless
they punish
or deliver
them up.*

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

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, ἀκρίτους ἐκδιδόναι, *to give up Persons untried*. PLUTARCH in his *Romulus*. And the King of *Scotland*, in CAMBDEN, at the Year MDLXXXV. tells Queen *Elizabeth*, That he would send *Fernihurst* 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 *Russel* 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 *Salgae*, 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.

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 defloured some Virgins sent to Sacrifice. And *Cato* was for having ^c *Caesar* surrendered to the *Germans* for the unjust War he had <458> brought upon them. The *Gauls* likewise insisted ^d upon having the *Fabii* delivered to them, because they had invaded them. Thus did the *Romans* ^e 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, ^f and afterwards *Hannibal*; and of *Bocchus* they required ^g *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* ^h *Embassadors*, and them likewise who had used the *Embassadors* of ⁱ *Apollonia* in the same Manner. The ^j *Achaeans* demanded, that the *Lacedemonians* should deliver to them those who had laid Siege to *Lanvicius*, 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, ^k should be immediately delivered up; and thus did the *Boeotians* demand of the *Hippotenses* the ^l *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,

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. Wass.*

6. DIOD. SIC. *Lib. XVI. Cap. XCIII. p. 557. Edit. H. Steph.*

^a *Pausanias*.
Lib. 4. Cap. 4.

^b *Strab. Geogr.*
Lib. 8. p. 556.
Edit Amstel. p.
362. Edit.
Paris. Casaub.

^c *Sueton in Jul.*
Caes. Cap. 24.
See above *Lib.*
2. *Cap. 3. § 5.*
n. 4.

^d *Plutarch in*
Camill. p. 136,
137. *Appian*
Exc. Legat. 9.
Lib. 5. 36.

^e *Liv. xxxi. 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.

that the ⁷ *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.

^k See the
Treaty between
England and
Denmark, in
Is. Pontanus de
Mari.

4. Sometimes indeed the Persons demanding are indulged the ^k Choice in Order to give them a more ample Satisfaction. We find in ⁸ *Livy*, that the *Caerites* 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*

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 *Hellanodicae* (or Judges at the *Olympick Games*) had caused a *Lacedemonian* named *Lichas*, to be scourged. *Cap. II. p. 178. Edit. Graec. 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. Graec. 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: *Haec belli causa Eleos inter & Lacedaemonios: Quod Lacedaemonius vir ab Eleis habitus male.*

8. *Transuentes agmine infesto, &c.* *Lib. VII. Cap. XX. Num. 6, 7.*

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 *Aeschines* in his Defence to the Accusation of Misconduct in his Embassy preferred against him by <459> *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 *Nicomedians* 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 Scaevola* ¹² was for the Negative, because such a Surrender is in some Manner a Banishment, just as if they had been solemnly interdicted the

9. He represented to that Prince, as he had also done in the Assembly of the *Amphictyons*, 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.

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 *Corsairs*, 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.

¹ *De Orator.*
 Lib. 1. Cap.
 40. and Lib. 2.
 Cap. 32. *Topic.*
 Chap. 8. *Orat.*
pro Caecin.
 Chap. 34.

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 *Corsians*) 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

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 *Corsians*, 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 Corsis*, &c. *VALERIUS MAXIMUS, Lib. VI. Cap. III. Num. 3.*

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.
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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. I. 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 par-

V. *The Privilege of Suppliants or Refugees belong not to Offenders but to the unfortu-*

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 *Jurisprudentia Muciana*, p. 48. ANTHONY FAURE, *Jurisprud. Papinian.* Tit. XI. Princip. VIII. Illat. I. p. 612. And JULIUS PACIUS in the 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 Praetor, as we find in the last Law of the Title *De Legationibus*, cited before: *De quo* [*Hostilio Mancino*] &c. It appears from thence, that *Scaevola'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 Praetor, 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) Κοινὸι ἱκεσίας 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.

nate, with an
Exception.

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 Ἀτύχημα καὶ ἀδίκημα διαφορὰν ἔχει;
Τὸ γὰρ διὰ τύχην γίγεται τό 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*, δίκαιον, &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*

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.)

Ἐκτεινας τὸν ἑταῖρον ἀμύνων· οὐ σ' ἐμίανεν
Αἶμα. πέλεις δὲ χέρας καθαρώταρας ἢ πάρος ἦσθα,

*Endeav'ring to assist, you've kill'd your Friend,
Not tainted with his Blood at all: Your Hands,
Much cleaner than they were before.* GROTIVS.

This Oracle is in AELIAN. *Var. Histor. Lib. III. Cap. XLIV.*

4. In *Aphob. Orat. II. (sub fin. p. 556.)* Which CÍCERO expresses in *Latin*: *Eorum misereri oportere, qui propter fortunam, non propter malitiam, in miseriis sint.* *De Invent. Lib. II. (Cap. XXXVI.)* GROTIVS.

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 <461> 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. ⁶ *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 ⁷ the Delivery of *Nauplius* to the *Grecians*; the Reason assigned

^b *Deut.* xix. 1, &c.

^c *Ibid.* xxiii. 15.

^d *Exod.* xxi. 14.

¹ *Kings* ii. 29.

² *Kings* xi. 13, &c.

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 what with premeditated Design. *Gotthic.* 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 αἰδικαίως ἀποθνῆσκοντες, ἀλλ' οἱ ἀδίκως, ἄξιοι εἶσιν ἐλεεῖσθαι. *Contr. Andocid.* Orat. V. *in fine*. The last Words of this Passage of MARCUS ANTONINUS are misunderstood by our Author, & simul ea consideres, quae his cohaerent; 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 Monsieur 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.

6. *De legib. Specialib.* p. 790. D. *Edit. Paris.*

7. PLUTARCH, *Quaest. Graec.* 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*. AYMONTIUS, *Lib.* V. Cap. XXXIV. *Constantine Mono-*

was, because he had proved himself innocent of the Crimes laid to his Charge.

2. *Cicero*, ⁸ *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

⁹ *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 ¹⁰ 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*

machus 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*.

8. *Lib. I. Cap. XVI.* *SERVIVS* upon the eighth Book of the *Aeneid*, (Ver. 342.) *THEOPHYLUS* in his *Greek* Paraphrase upon the *Institutes*, Lib. I. Tit. II. § 1. *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, Misericordiae 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.

9. *Urbe fuit media nulli concessa potentum
Ara Deûm: Mitis posuit Clementia sedem,
Et miseri fecere sacram. ———
Huc victi bellis, &c. ———*

STAT. Theb. XII. 481. & seqq. 507. & seqq.

10. *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 *Gepidae* declared that they would all perish, rather than give up *Ildigial* to the *Romans* or the *Lombards*, *PROCOPIUS. Gothic.* Lib. IV. (Seu *Hist. Miscell.* Cap. XXVII.) *GROTIUS*.

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* ¹¹ 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: <462>

*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

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

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.*

^e Ver. 558. See the whole Passage which is very well worth reading.

^f *Euripid.* *Heraclid.* v. 330, &c.

^g See *Eurip.* in his *Heraclid.* and *Apollo-dorus* in his *Biblioth.* Lib. 2 Cap. 8. § 1.

11. (*Hist. Graec.* Lib. VI. Cap. V. § 38. *Edit. Oxon.*)

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

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 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 *CALISTHENES* 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 *Heraclidae*. De Expedit. 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 volvitur supplex Deum,
Trahere ad Tribunal, nulla religio mihi;
Mala semper aequum ferre, qui fecit malè.*

Before this he only says: *De maleficus hoc habes in eadem Tragoedia*. Now he had quoted *SOPHOCLES* first, *Oedip. Colon.* Ver. 512. & seqq. and afterwards *EURIPIDES* in his *Heraclidae*, 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 *STOBAEUS*, where however the Edition even of our Author only refers us to *EURIPIDES* without mentioning the Tragedy. He believed it to be the *Heraclidae*, because *STOBAEUS* cites it just before; and from thence it was that he omitted the Verses in Question, in his *Excerpta ex Frag. & Comoed. Graec.* 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 *STOBAEUS* 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.

*Ἐγὼ γὰρ ὅστις μὴ δίκαιος ὢν ἀνὴρ
Βωμὸν προσίξει, τὸν νόμον χαίρειν ἔῶν
Πρὸς τὴν δίκην ἄγοιμι' ἂν οὐ τρέσας Θεούς.
Κακὸν γὰρ ἄνδρα χρὴ κακῶς πάσχειν 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 *STOBAEUS* of my Author.

*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. <463>*

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*, *τέυξεσθαι 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. Adversus Leocrat. (p. 156. Edit. Wech.)

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 *Pactyes* the ¹⁵

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 βουλόμενοι [οἱ Κυμαῖοι] οὔτε ἐκδόντες ἀπολῆσθαι, οὔτε παρ' ἐωϋτοῖσι ἔχοντες; πολιορκέεσθαι, ἐς Μυτιλήνην αὐτὸν ἐκπέμπουσι. Lib. I. Cap. CLX.*

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 *Samothracians* 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 perni-

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 Lacedemonians. 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 *Gepidae* in PROCOPIUS, *Goth.* III. dismiss *Ildigis the Lombard*. Add to this *Theuderick'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 *Alphonsus* 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 *Switzers* 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 Deserters should be delivered up; and by others of theirs with the *Burgundians*, that they should be expelled. CAMDEN at the Year 1600. GROTIUS.

cious Course of Life by <464> 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. 1. Here likewise it is observed that Refugees are, whilst their Case is depending, entitled to Protection. Thus *Demophoon* to the Ambassador of *Eurystheus*: ¹

*If you've any Crime to charge those Strangers with
We'll hear your Allegations, but you mustn't
Expect to take 'em hence by Force.*

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.*

And *Theseus* to *Creon*. [[²]]

*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 whate'er 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 hears this odd Relation,
Approve your Actions; when it hears that you
The Rights of Heav'n break thro' no less than ours,
By tearing from us the unhappy Wretches*

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. [[Footnote number missing in text, supplied from Latin edition.]] In one of SOPHOCLES's Tragedies. *Oed. Colon.* Ver. 904. & seq.

*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 *Aeschylus* in his *Supplices*, where the King of *Argos* is introduced thus addressing himself to the Daughters of *Danaus* coming from *Aegypt*:³

*If Aegyptus' 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 accessory 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-^{<465>}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.

3. *Supplic.* p. 321. *Edit. H. Steph.*
 VII. (1) In *LEVITIC. Quaest. XXVI.*

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*.

2. In the Original it is *Distinctae enim sunt poenae, &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

VIII. *How long after the Commission of a Fault may a Community be punished for it.*

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, [[¹]] That *in his Judgment, when none of the actual Offenders are yet in Being, no farther Satisfaction should be sought after.*

2. We must therefore conclude *Arrianus* in the right, when he condemned <466> *Alexander* for punishing ² the *Persians*, ³ when not one

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*.

[[Footnote number missing in text, supplied from Latin edition.]] VIII. (1) *Orat. De Sedit. Antioch.*

2. This is the Reason that Conqueror employed, when *Parmenio* would have dissuaded him from burning the Royal Palace of *Persepolis*: 'Ο δὲ τιμωρήσασθαι, &c. After which follows the Historian's Reflection: Ἀλλ' οὐδ' ἐμοὶ 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

^a *Ch. 9. § 3.*

^b See *Aristot. Pol. Lib. 7. Cap. 13.*

^c *In the preceding Chapter.*

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 μὲν οὐδεὶς—τῶν ἐνδοκησάντων* (for so it should be read instead of *ἀδικησάντων*) *ἀπογόνους*. *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 *ἐνδοκησάντων* relates, and which our Author judiciously substitutes instead of *ἀδικησάντων*. Therefore what he ascribes to the *Greeks* and *Macedonians* must relate to *Constantius*; and the whole Passage be thus translated: *Everyone 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

of them who had injured the *Greeks* was then surviving. The Opinion of *Curtius* concerning the Extirpation of the *Branchidae* 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' οὐδ' 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 <467> 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 [[sic: d]] by and by. Nor does the ⁷ 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.

^c [[sic: d]] § 14.

has very happily corrected a manifest Corruption at the End of the Passage, in the Word ἀδικησάντων. 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. malignit.* p. 859, 860. *Vol. II. Edit. Wech.*

7. This is a false Consequence drawn by *PLUTARCH. De sera numinis vindicta*, p. 558. *B. C.*

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.

IX. *Whether one free from the Fault may be liable to the Punishment.*

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.*

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*

X. (1) *Item videamus, quando damnum, &c.* Digest. Lib. XXXIX. Tit. II. De damno infecto, 8cc. Leg. XXIV. § 12.

2. *Multumque interesse, &c.* Ibid. Leg. XXVI.

3. *Esse autem praeposterum, &c.* Lib. XXXV. Tit. II. Ad Leg. Falcid. Leg. LXIII. Princ.

4. *Eum, qui civitatem amitteret, &c.* Digest. Lib. XLVIII. Tit. XXII. De Interdictis & Relegatis, &c. Leg. III.

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. *The Difference between a Crime's being the Occasion of Punishment, and its being the real Cause of it.*

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, ἐγγύα παρὰ 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. <468>

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 an-

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 *Stobaeus*, *Florileg.* Tit. III. See *ERASM.* *Adag.*

other 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 *Ausonius*, 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.

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 *Ἀντίψυχοι* (such as engaged their Life for that of another) by EUTROPIUS, in *Caligula*: And *Ἐγγυηταὶ θανάτου*, *Sureties of Death*, by DIODORUS SICULUS, in *Excerpt. Peiresk.* [p. 245, where speaking of *Damon*, who was bound for *Phintias*, he says, *Ἐγγυος εὐθὺς ἐγενήθη 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, *Ἀντίψυχοι*. Our Author however had not in View the *Greek* Translation which we have of that Writer by PAEANIUS; 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 Potitus*, 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 promised 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 poenam capitali judicio?* VAS. *Technopaegnon 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.

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. Dubi-
tant. 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. 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 <469> 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 *αὐτεξούσιον*, *something entirely at our own Disposal.*

5. See PUFENDORF, *B. V. Chap. IV. § 6. Law of Nature and Nations.*

XII. (1) *Si poena alicui irrogatur, &c.* Digest, Lib. XLVIII. Tit. XIX. *De Poenis*, 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. WAECHTLER, in the *Acta Eruditorum* of *Leipsick*, Ann. 1714. p. 555.

XIII. I. 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

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 poenam, ubi & noxia est. Propinquos, notos, familiares, procul calumnia submovemus—Nec ulterius progrediatur metus, quam reperiatur delictum*. Cod. Lib. IX. Tit. XLVII. *De Poenis*, 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, (*Deuteron. xxiv. 16*. De special Legib. Lib. II. p. 802. E. 803. A. B.) The same Author observes elsewhere, that there is no Establishment more pernicious to a State than not to punish a wicked Person, because descended 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

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*, <470>

^a *Lib.* 28. c. 2.
in fin. *Edit.*
Vales. Gron.

^b See *Victoria.*
De Jure belli.
Num. 38.

says, in regard to *Alexander*, King of the *Jews*, who followed 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 Punishment exceeded all Bounds of Humanity (*Antiq. Jud.* Lib. XIII. Cap. XXII.) *OVID* insinuates, that *Jupiter Ammon* was unjust in ordering *Andromeda* 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 maternae pendere linguae
Andromedan poenas 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 *PUFENDORF*, that this is not exactly related. The Historian, 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. Sylburg.)

7. *Cod.* Lib. IX. Tit. VIII. *Ad Leg. Jul. Majestatis*, Leg. V. § 1. See the whole Dissertation of *JAMES GODEFROY*, upon this Law in his *Opuscula*, 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.*

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?*

[[⁹]] *Herodot.*
I. 9. c. 87.

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

XIV. *The Objection from God's Proceedings in Relation to the Children of Offenders answered.*

^a *This is the Opinion of the Rabbi Simeon Barsema, and a very just one.*

^b *As in the Examples of Zimri and Jehu.*

8. ARISTOT. *Rhetoric*. Lib. I. Cap. XV. See *Adag.* ERASM. at the Proverb, Stultus, qui, patre caeso, liberis pepercit.

9. *De Ira*, Lib. II. Cap. XXXIV.

10. See also VULCATUS 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 παῖδα, &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.

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 *Aelian* 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.* <471>

XIV. (1) *Homil. XXIX*. In Cap. IX. Genes. PLUTARCH had said the same before him: Αἱ δὲ διὰ τῶν παίδων, &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. § 1*. 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.

^c *Geogr.* l. 4. p. 286. 287. *Edit. Amst.*

^d *Noct. Attic.* l. 3. c. 9.

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 threatning 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 *Amasiah*, even with respect [[to]] treasonable Practices. This Law is highly commended by *Josephus* and *Philo*, as one like it among the *Aegyptians* is by ^f *Isocrates*, and one ^f among the *Romans*

^e *Deut.* xxiv. 16. See *Joseph.* l. 4. c. 8. p. 129. and *Philo de Legib. sp. l.* 2. p. 801. & seq. ^f See also *Lex Wisigoth. l. 6. t. 1. c. 8.*

5. TERTULLIAN, *De Monogamia*. *The sour 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 Busiris*, 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

by ⁷ *Dionysius Halicarnassensis*. *Callistratus* the *Civilian* translates a Passage out of *Plato* ⁸ to this Effect, that *neither the Crime, nor the Punishment of the Father, does any way attain the Son*, and assigns this Reason, ⁹ *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 ¹⁰ *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 ¹¹ *Aegyptian*, ¹² *Grecian*, and ¹³ *Roman Laws*. ¹⁴ <472>

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. 'Ενὶ δὲ λόγῳ, πατρός οὐκ εἶδη καὶ τιμωρίας παίδων μηδενὶ ξυνέπεσθαι. *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 πατήρ, &c. *Ibid.*

9. *Crimen vel poena paterna nullam maculam filio infligere potest. Namque unusquisque ex suo admissio 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 rescripsit, liberam, quae praegnans ultimo supplicio damnata est, liberum parere: & solitum esse servari eam, dum parum 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. 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 *Am-mianus Marcellinus* reports to be without a Parallel severe.

XV. *Much less should other Relations be punished.*

XVI. 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

XVI. *But yet may Children and Relations of Offenders be denied what they would otherwise have enjoyed.*

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 *Antiphon*. 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.

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.

^a § 13. n. 2.

^b Ch. 5. § 29.
of this Book.

XVII. *Nor are Subjects properly punishable for the Prince's Crimes.*

^a § 2.

XVII. I. 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 Communi-

2. See VELLEIUS PATERCULUS, *Lib. II. Cap. XXVIII*. PLUTARCH in *Sylla*, p. 472. C. Vol. I. But *Julius Caesar* abolished this: *Admisit ad honores & proscriptorum liberos*. SUTTON. *Cap. XLI*.

XVII. (I) PHILO, *De Abraham*. (p. 363. D.) speaking of the *Aegyptian* King's Subjects in *Abraham's Days*, παραπλήλυσσε, &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*, μετέξει δέ, &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 care-

cation 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 <473> 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.

XVIII. *Nor particular Persons for the Faults of the Whole, if they refused their Consent.*

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

XIX. *The Heir not liable to Punishment, as such; and why.*

fully, before he undertook it, I do not say, to criticize, but to read a Work like this, in order to understand it.

3. *Quaest. 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 sera numinis vindicta*, p. 559. E. Vol. II.

XIX. (1) MAIMONIDES, *Tit. כרלה* 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 *Receswinthus*'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.

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 Prusaeensis* in his *Rhodiaca*: ἅπαντα ὀφείλουσι, &c. *what was due from Predecessors is no less due from their Posterity. For you cannot say, that we have renounced our Succession.*

XX. *But he is liable if the Punishment pass into an Obligation of another Nature.*

XX. 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

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 Poenaliurum Juris Romani in foris Germaniae*, 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 poenales actiones post Litem inchoatam, & ad Haeredes 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 persecutionem continet. Item haeredi & in haeredem 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.

be liable to the Fine; the Case is the same, if the Deceased in treating about any Thing, ⁵ submitted himself to a pecuniary Forfeit; for then, there was a new Cause of Obligation, distinct from the Punishment.

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5. *Ut & ea quae 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.

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,
 I. 37. c. 54. n. 13.

I. 1. In ^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*.

I. (1) This Distinction is made also by *PLUTARCH*, in his *Galba*; and *DION*, in the Affairs of *Caesar* 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 Caesar*, *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 *Πρόφασιν* the *Pretence*, and *Τὸ ἀληθές*, the *Truth*, as in the *Athenians* Descent upon *Sicily*, where the Pretence was to assist the People of *Egesta*, 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 *Πρόφασιν* calls *Σκῆψην καὶ προκάλυμμα*, *Fiction and Disguise*, to which he opposes *αἰτίαν*, *In Hist. Hunn. Zamergan*. Add to this what we said above, in *Chap. I. § 1.* of this Book. *PROCOPIUS*, *Persic. 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

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 *Agesilaus*. 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

^c Lib. 3. c. 6,
7, 8, 9.

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 *Πατροκλος*, 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.

Speech of the *Campanians* ⁶ to the *Romans*, where they profess that it was in <475> 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 *Caesar*, who was already determined for the War, with a plausible Pretence for it.

6. *Quanquam pugnativimus, &c.* *Livy*, *Lib. VII. Cap. XXX. Numb. 12.*

7. Our Author by not attending to the Construction of the Terms, attributes to King *Antiochus*, what the *Latin* Historian says of the *Boeotians*: *In Boeotiam 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 Caesar*, whereas the Passage relates to *Julius Caesar*. *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 *Caesar*, who was before irresolute, Fortune supplying him thereby with Pretexts to justify the War wherein he engaged himself.

*Ecce faces belli, dubiaeque in proelia menti
Urgentes addunt stimulos, cunctasque pudoris
Rumpunt fata moras: justos Fortuna laborat
Esse ducis motus, & causas invenit armis.*

Pharsal. Lib. I. ver. 262, &c seq.

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*, *Δόξαι 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 Prusaensis* ^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. I. 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*

III. *A War without a just Reason is no better than Robbery.*

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 praemiis periculorum, quam ipsis periculis, laetus*. *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*. *Quaest. 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. *Θηριότης* (*Ethic. Nicomed. Lib. VII. Cap. I.*) *GROTIUS.*

4. *Possumus dicere, non esse hanc crudelitatem, sed feritatem cui, voluptati saevitia 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 saevium, & sanguine humano gaudent, &c.* *De Ira, Lib. II. Cap. V. GROTIUS.*

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 <476> Aristotle
^a *Rhet.* 1. 1. says of the common Instigators to War, that ^a *They seldom consider the*
^{c. 3.} *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 o'ercome is Argument of Guilt.*

III. (1) *Sed enim & bonarum possessor, &c.* Digest. Lib. V. Tit. III. *De haereditatis 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 stiles it, *De bello Gothico*. Lib. II. Cap. XIV.) GROTIUS.

2. *Romanis quaerentibus, & 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 foedere, 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 praelii 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,

——— *Quaeritur 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 *Caesar*, whom the Poet introduces speaking in this

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 Provocation, but only for the Advantage that is expected from them.* And we read in Cicero, ⁹ *That Elevation of Soul which discovers its self in Hazards and Fatigues, unless contending for Justice, is so far from being a Principle of Virtue, that it is indeed the greatest Inhumanity.* They, says ¹⁰ *Andronicus Rhodius, who for some great Interest*

^b Lib. 2. c. 3.

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

*Haec, fato quae teste probet, quis justius arma
Sumserit, haec 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 fn.*

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 *Bagan*, 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.

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 some Reasons which upon first Appearance seem justifiable, but will not bear the Test of Examination.*

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 <477> 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. *Such as an uncertain Fear.*

^a Ch. I. § 17. of this Book.

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.

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

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 quaeri, 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.

Romans against ^b Philip King of Macedon, and of ¹ Lysimachus 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.

VI. An Advantage without a Necessity.

V. (1) PAUSANIAS, cited in the Margin by our Author, says, that Lysimachus was for preventing Demetrius, whom he knew to be as ambitious as his Father, *Lib. I. Cap. X. p. 9. Edit. Graec. Wech.* But we find immediately after, that Lysimachus 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 Fortress 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. *Refusal of Marriages, when there is Plenty of Women.* 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 <478> *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.* 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.
- ^a *Franc. Victor. de Indis, Relect. I. n. 31.*

VII. (1) See above, *Chap. II.* of this Book, § 21.

2. If we follow APOLLONORUS, 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.*

3. Our Author has, no Doubt, taken this from JUSTIN. That Epitomiser says, that *Jancyres* (a Name very differently expressed by Authors) I say, that *Jancyres*, *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. Gotth. (Cap. X.)* and of PAULUS OROSIUS, *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. I. 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 ¹ 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*.

X. *But what if the first Possessors are Fools.*

^a *Idem, de bello*, n. 5, 6, 7, 8. & l. 2. n. 18.

^b Ch. 3. § 6. of this Book.

^c Ch. 20. § 40. of this Book.

XI. 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

XI. *The Desire of Liberty in a People who are subject, is also an unjust Reason.*

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*.

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 *Νόμω τὸν μὲν δοῦλον εἶναι τὸν δ' 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*. 1 Cor. vii. 21. <479>

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. i. c. 2. n. 29.*

XIII. *The Emperor has no Claim to universal Monarchy, tho' some give him that Title.*

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

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. (1) Mr. BARBEYRAC adds, *And Idiots, (les Insensez)* because, says he, it is highly probable, that the Printers skipt over & *amentium*, from the Resemblance of the Word *infantium* which preceded. In § 10. our Author joins together Infants and Madmen.

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 τῆς οἰκουμένης, 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,*

^a See Covar. in Cap. peccatum. part 2.

[§] 9. n. 5.

^b Ad Leg. 24.

Dig. De captiv.

& postlim. &c.

^c See also the Council of Calcedon, Act. 11.

and 12.

^d Luke ii. 1.

and many such other Expressions, by Way of *Hyperbole* or Eminence; especially if we consider, that in the same Sacred Pages, ⁵ *Judaea* 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 *Judaea*: 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 Em-

^e See Joseph. de bello Jud. 1. 3. c. 4.

XIII. (i) *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 *BAR-TOLUS*, 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, § II. See Mr. *BYNKERS-HOEK's* Dissertation upon the Law of *Rhodes*, Cap. VI. p. 52. & 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 ALIGHERI, De Monarchia*, printed at *Basil* in the Year 1559, by *John Oporin*.

peror, 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.

^f See Aristot.
Politic. l. 7.
c. 4.

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 <480> 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.

^g Sylvest. *verbo*
Bellum, p. 1. n.
21. Covar. *ubi*
supra.

XIV. *Nor the*
Church as oth-
ers 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

9. *Spain*, for Instance: Upon which see GOMEZ, in § *Fuerat*, Num. 5. *De Actionibus*. PANORMITAN, in Cap. *Venerabilem*, Col. 9. *De Electione*. JASON, in Leg. I. Cod. *De Summa Trin.* Col. 2. MENOCHIVS, *Consil.* II. Num. 102. Cardinal TUSCHUS, *Prætic. Concl.* CCCXLV. § *Rex Hispan.* DU MOULIN, *Cons. 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.

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, Hymenaeus*, and others.

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 forementioned 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.*

^b John xviii. 36. See Petr. Damian, l. 4. epist. 9. and Bernard. epist. 220.

^c As Tostatus admirably explains it, on Matt. ix.

2. *Audite erga Judaei & Gentes, &c.* In JOANN. XVIII. 36. (Tractat. CXV.) St. HILLARIUS Arelatensis 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 terrestre praeiperet, sed ut coeleste conferret. GROTIUS.

^d In Act.
Apost. hom. 3.
In Epist. ad
Tit. 1. to
Thess. 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, ἀνάγκη κρατεῖν, *to rule imperiously, or by human Force and Compulsion*. ³ And <481> 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*

3. His Words are in his second Book, *De Sacerdotibus*, Μάλιστα μὲν οὖν τοῖς χριστιανοῖς, &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, οὐ γὰρ ἐλκύσαι, &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 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 poenitent.* 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 quae inter qui Filii sint legitimi. *For Kings allow no Superior in Temporals. C. per venerabilem*, as before, *Christ would have Christian Emperors be 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.

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 ^c Chapter concerning Punishments.

^c Chap. 20.
§ 48. & seqq.

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*

XV. *Nor a Desire of accomplishing Prophecies without a Commission from GOD.*

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 *Receptae Sententiae* of PAULUS the Civilian, *Lib. V. Tit. XXI. § 1. Jurisprud. Ante-Justin*, p. 502.

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 <482> 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 divine ¹ 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

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.* Τῶν γὰρ Σιβύλλης, &c. *I think it impossible for any Man to find out the Meaning of the Sibyls Oracles before the Event.* And presently, ταύτη 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' ὥσπερ, &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.

XVI. (1) See PUFENDORF, *B. III. Chap. III. § 4. Of the Law of Nature and Nations.*

belongs to Justice. But when this is wanting, the War on that Account is unjust, as was that of the ² *Romans* against the King of *Cyprus*, for his Ingratitude. For he ³ 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. 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, as ¹ 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*;

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 Arsacem, Frag. Lib. 4. § 3.*

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 observes, it is much better to suffer as the greatest Coward, than to acquire Glory by such an use of Arms: *Satius est cujuslibet inertiae poenas luere, quam illorum armorum gloriam quaerere*. *De Civit. Dei. Lib. III. Cap. XIV.* See the Passage of AGATHIAS cited above, § 3. (*Note 3.*) GROTIUS.

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 *Hist. Lib.* 4.
Cap. 74. n. 7.

^d *Senec. Hipp.*
V. 540, 541.

^e *Contra Faust.*
l. 22. c. 74.

^f *Covar. in C. peccatum*, Part
2. § 9. n. 2.
Cajetan. 2. 2
Quaest. 40.
Art 1. *Sylvest.*
verb. *Bellum*,
n. 2. *Summa*
Ang. verb. Bel-
lum, n. 5.
Summ. Ros. ib.
n. 3. & 8.
Thom. Aquin.
2. 2 *Qu.* 66.
Art. 8.

^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. <483>

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

I. *From whence Causes of doubt in moral Matters proceed.*

I. (1) See the Passage related at large in PUFENDORF, *Law of Nature and Nations*, B. I. Chap. II. § I. and what I have said in the Notes upon that Paragraph.

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 μεταξὺ*, 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. Ephesiorum. 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

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.*

^a Lib. 1. c. 3. p.
10.

II. We are to
do nothing
against our
Conscience,
tho' it be erro-
neous.

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 contemn its Suggestions, our Minds degenerate and become brutish.

^a See Covar.
Tom. 1. De
Matrimon.
Part 2. c. 7.
§ 2. n. 9. &
seqq.

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

than 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, ἕκαστος ἐν τῷ ἰδίῳ νοὶ πληροφορεῖσθω, *Let every Man be fully persuaded in his own Mind*, And μακάριος ὁ μὴ κρίνων 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*, δεῖ οὐ 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 Attic. XXI. p. 71. & seq. Edit. 1642.

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 <484> 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*.

^b *R. Gamaliel*, in *Perke Aboth*, p. 14. Ed. P. Fagii.

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*

III. *That our Resolutions are determined by Reasons drawn from this Thing itself.*

2. *Bene praecipunt, qui vetant quidquam agere, quod dubites, aequum sit an ini- quum*. 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 praeceptum: QUOD DUBITAS NE FECERIS, id ipsum rescribe*, Lib. I. Epist. XVIII.

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 *Quaest. XIV.* GROTIUS.

2. *Οὗτος μὲν πανάριστος, &c.*

The Poet adds, he who wants Understanding himself, and will not follow that of others, is a worthless Wretch:

Ὅς δέ κε μήτ' αὐτὸς νόει, &c.

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,
Relect. 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.

(*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: *Saepe 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 ediscere 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 τὺπαννοί, &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 STOBAEUS, *Serm.* XLVIII. cites it as from EURIPIDES; and others, as from SOPHOCLES, as appears from the *Excerpta ex Trag. & Comoed. Graecis* 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

Σοφοὶ τύραννοι τῶν σοφῶν συνουσίᾳ.

Princes are from their Conversation wise.

³ *Aristides* in his Harangue to the *Rhodians* upon Concord tells them, that, as when <485> 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,

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

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.

4. See the Dissertation of Mr. JENSIUS, *De Fetialibus*, 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.

other, we must
choose the safest
Resolution.

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.*

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, ἔστι 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 *Antiphon*, εἰ δέον, &c. ^a *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.*

^a *Orat.* 14. 15.
p. 133. Edit.
Wech.

VI. Whence it
follows that we
are not in such
a Case to
declare for
War.

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:

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. 1. 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. Ἔτι δὲ ἕκαστος ἡμῶν μάλλον ἢ προέλοιτο τοῦ ἀδικούντος (it should be read so instead of μὴ ἀδικούντος) ἀποψηφίσασθαι ὥς οὐκ ἀδικεῖ, ἢ τοῦ μὴ (it is here the μὴ should be added, which is wrong placed in the preceding Line) ἀδικούντος καταψηφίσασθαι ὥς ἀδικεῖ, &c. *Sect.* XXIX. Num. 13. GROTIUS.

See PUFENDORF, B. I. Chap. III. § 6. Note 3. of the second Edition.

VI. (1) He says,

*Ast Fabius cauta speculator mente futuri,
Nec laetus dubiis, parcusque lacescere Martem.
Punic.* Lib. I. Ver. 679, 680. Edit. Cellar.

*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*, says¹ 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*, <486> *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*,

VII. *For this may be avoided by a Conference.*

^a *Eunuch. Act. 4. Scen. 7. V. 19, 20.*

^b *Argon. l. 3. v. 185.*

Λόγοισι πείσω· εἰ δὲ μὴ βίᾳ δορός;

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.

VII. (1) *Nam, quum sint duo genera decertandi, &c. De Offic. Lib. I. Cap. XI.*

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 ἀληθὲς εὖρον,

Ἀφρονες, &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. GROTIVS.*

*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 Phoenissae*.

*Πᾶν γὰρ ἐξαίρει λόγος
Ὅ καὶ σίδηρος πολέμιων 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: τοῦς χρεῖν, &c. ^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 Embassadors, rather than by the Point of their Swords.*

^c *Lib. 7. cap.*
9. n. 2. Ed.
Gronov.

^d *Antiq. Rom.*
l. 8. c. 8. p.
468. Edit.
Oxon. 487.
Sylb.

^e *Lib. 3. c. 11.*
in fin.

^f *Annal. l. 15.*
c. 2. n. 3.

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

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.

Notice § that *it is then only our Interest to run to Arms, when we cannot otherwise have Justice done us by our Enemies.*

§ Cassiodor.
Var. iii. 1.

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 <487> Arbitration: ἐπὶ τὸν δίκας, &c. says *Thu-*

VIII. Or by
Arbitration;
whereof the
Duty of Chris-

VIII. (1) A Method indeed generally slighted by the more potent. See CON-NESTAGIUS 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 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*, *Critolias*, *Amompharetus*, *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 δίδοντας κατὰ πάτρια, *will- ing, 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, *Gotthic. III.* the *Gepidae* say to the *Lombards*, δίκη γὰρ 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 *Gotthic. 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 BIZARUS, *Lib. XII.* CRANTZIUS, *Lib. VI. Saxon. 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 tremen- tibus eum, [Antoninum Pium] atque amantibus cunctis Regibus, Nationibusque, & Po- pulis, ut Parentem, seu Patronum, magis quam Dominum, Imperatoremve reputarent:*

tian Kings in
respect of the
Parties at War.

^a *Lib. 4. c. 67.*

^b *Plutarch in
Solon. p. 83.
Tom. I. Edit.
Wech.*

^c *Lib. I. c. 28.*

cydides, 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 *Coryceans* 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 *δίκη*, &c. *he offered to refer himself.* And *Isocrates* in his Oration against *Ctesiphon*, reckons this amongst King ⁴ *Philip's* Commenda-

Omnesque uno ore, in coelestium morem, propitium optantes, de controversiis inter se judicem poscerent. Epitom. Cap. XV. Num. 3. See also EUTROPIUS, *Breviar.* Lib. VIII. Cap. IV. SUIDAS, *Lexic. in voc. Ἀντωνίνος*: CAPITOLIN. in *Antonin. Pio.* Cap. IX. with the Note of the learned CASAUBON, upon these Words: *Caussas 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, petiitque 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 Fear 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 AESCHINES: 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, DE-

tions, *That he was ready to refer the Differences which he had with the Athenians to any disinterested and impartial State.* <488>

2. Thus did the *Ardeates* ^d and *Arcinians* formerly, and after them the *Neapolitans* ⁵ and *Nolans*, who submitted all their Matters in Dispute to the Determination of the *Romans*; and the ⁶ *Samnites* in their Variance with the *Romans* appeal to their common Friends. *Cyrus* ^e refers the Point between him and the King of *Assyria* to the *Indian King*. The *Carthaginians* for avoiding War about the Controversies with ⁷ *Masinissa*, appeal to Judgment. And the *Romans* themselves, as to their Differences with the *Samnites*, (according to ⁸ *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

^d *Liv. Lib. 3. c. 71. n. 2.*

^e *Xenophon. Cyrop. l. 2. c. 4. § 7. Edit. Oxon.*

^f *Plutarch, Pomp. p. 637.*

MOSTHENES maintained, there was no such Judge between *Philip* and the *Athenians*: *Εἰ δὲ ἐπιτρέπειν (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*.

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 Ambassador, sent by the *Romans* to the *Samnites*: *Quum Romanus Legatus ad disceptandum eos [Samnites] ad communes socios atque amicos vocaret, &c.* *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.*

their Bounds and Limits. *Plutarch* tells us, ⁹ *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 ¹⁰ *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, ⁸ that the Priests in *Spain* did use to do the same.

⁸ *Lib. II.*
p. 765. Edit.
Amst.

^h *Franc. Victor*
De Jure Belli,
n. 28.

3. But much more are Christian Kings ¹¹ 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. &c.* 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 ¹² *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 another ⁱ Place, are to be taken in a qualified Sense.

ⁱ *B. 1. c. 2. § 8.*
n. 3.

^k *Molina. Disp.*
103. § Quando
inter, &c.
Aegid. Reg. De
Act. Supern.
Disp. 31. Dub.
4. n. 72.

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 ¹³ to oblige the Parties at Variance to accept of a Peace upon fair and reasonable Terms: And that this very

9. PLUTARCH, *Vit. Numae*. p. 68. A. Vol. I. Edit. Wech.

10. *Geograph. Lib. IV. p. 302. A. Edit. Amstel. (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 praelio 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.*

Business¹⁴ was the *Druids* Employment¹⁵ formerly among the *Gauls* is what *Diodorus*¹ and *Strabo*^m inform us. And we read too that the Kings of *France* referred the Division of their Kingdom to their¹⁶ Nobles. ¹ *Lib. 5. C. 31.*
^m *Geogr. l. 4.*
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IX. The third Way to prevent War is to determine Differences¹ by casting Lots: Which Method *Dion Chrysostom* highly approves of in his second Oration *in Fortunam*, and before his Time² *Solomon*, Prov. xviii. 18. *IX. Or by casting of Lots.*

X. 1. Something like this is¹ 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 *X. Whether Duelling may be allowed for preventing War.*

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. (1) See St. AUSTIN, *De Doctrina Christ.* Lib. I. Cap. XXVIII. and THOMAS AQUINAS, *Summ. Theol.* II. 2 *Quaest.* 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 *Phoenissae*, 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, quaerite. —————

(*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.

^a *Herodot.* l. 9.
c. 26.

^b *Plutarch,*
Qu. Graec.
p. 294. *Tom.* 2.

^c *Strabo,*
Geogr. l. 8.
p. 548. *Edit.*
Amst.

^d *Liv.* l. 28.
c. 21.

Matter themselves by the Sword, as *Hyllus* ^a and *Echemus* formerly did about *Peloponnesus*; *Hyperochus* ^b and *Phemius* about a Province near *Inachus*; *Pyraechma*, the *Aetolian*, and *Degmenus* the *Epean* about ^c *Elis*; *Cerbis* and *Orsua* about ^d *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 ³ *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* ⁴ records this as an antient Custom of the *Greeks*, and *Aeneas* ⁵ 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: ⁶ *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 An-*

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 *Pyraechma* and *Degmenus*, of which mention is made a little above, *Lib. VIII. p. 548. B. Edit. Amst. (357. Paris.)*

5. *Aequius huic Turnum fuerat se opponere morti.* *Aen. 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: ἀντικομπάζων, as the cited Historian says.

6. *Lib. I. (Cap. II.)* See the Statute of *Charles the Bald* in *S. Arnulfus*, and the Treaty of *Aix la Chapelle*. The *Lombards* were as equitable. See *PAULUS WARNEFRID*, *Lib. I. Cap. XII. Lib. IV. Cap. XVIII. Lib. V. Cap. XL. GROTIUS*.

imosity, 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. ^a As in all Cases of equal Claim the Possessor has the better Title, ¹ not only by a Civil, but also by a natural Right: The Reason of this has been already ² laid down out of the Problems ascribed to *Aristotle*. And here we must further add, ^b that he, who is satisfied in the Justice of his own Cause, but cannot produce sufficient Evidence, <490> 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.

XI. *That the Person in Possession has the better of it, where the Case is equally doubtful.*

^a Victor. De Jure Belli, n. 27. 30. *Herrera*, Tom. 2. ^b *Lessius*, De Justitia, c. 29. *Dub.* 10. *Molina*, *Disp.* 103. § In secundo vero, &c. *Lorca* ii. 2. *Sect.* 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.

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.

XIII. *Whether a War may be just on both Sides, explained by several Distinctions.*

^a *Covar. in Cap. peccatun. Relect. 2. § 410. n. 6. Alciat. Paradox ii. 21. Falgos. De Just. l. 5. Picolomino. Philos. Civil. Lib. 6. c. 21. Alb. Gent. Lib. 1. c. 6.*

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 Agent. ² 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 ἀδικεῖν, and τὸ ἄδικον παράττειν, *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.

^b See St. *Austin*, De Civit. Dei. Lib. 15. c. 5. Lib. 19. c. 15. and *Covar. ubi supra.*

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. Quaest. 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 [*sic: but*] 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.

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 δεῖ*, *intirely as he ought*, without any Ignorance, or as he judges, *κατὰ τὴν ἑαυτοῦ 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*.

^c See *Suarez. De Legibus, Lib. 3. c. 18.* Alphon. de Castro, *De potest. Leg. paen. Lib. 1. c. 1. and 3.*

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,

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 unjuxta 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.*

which is indeed of <491> 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 ⁸ Effects of Right.

8. That is to say, unjust Effects, which may give some right before Man, but none before the Tribunal of GOD.

*Exhortations not to engage in a War rashly,
tho' for just Reasons.*

I. 1. Tho' 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. 1. § 8. of this Book. See Fr. Victor. De Jure Bell. n. 14. & 33.*

^b *Rhet. ad
Alexandr.
Cap. 3.*

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 Prusaeensis* in an Oration of his about War and Peace, says that this was not the only <492> 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. *Epecially
when that Right
consists in inflict-
ing Punishments.*

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

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, προσετίθει, &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 APIAN, speaking of his Countrymen, Ο οὐδὲ 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. Graec. Wech.* And he adds, that this was occasioned by the powerful Support of the *Actorides*. 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 *λαμπρὸν*, 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.

^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, μηδένα πατέρα, &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, οὐδεὶς πατήρ, &c. *No Father casts off his Son, unless he be notoriously wicked.*

^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. Heins. 1616.*

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.

II. (I) Where he speaks of *Abdication* 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 Caesar* 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* [Caesar 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.* *DIO-DORUS SICULUS*, in *Frag.* Οὐ δὲῖ τοὺς 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, μαθέτωσαν*, *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 remembring this Tenderness and Humanity of yours, shew you a kind and propitious Countenance.* And GRATIANUS, *Caus. XXIII. Quaest. 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*

^d *Epist.* 159. *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, ὃς 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 ἀφιείς, &c. *Must take a greater Delight in forgiving than punishing.*

^f *Molin. De Justit. Tractat. 2. Disp. 103. Lorca, Disp. 153. n. 2. Aegid. Reg. De Act. Supern. Disp. 31. Dub. 7. n. 107.* 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 <493> *States συγχωρεῖν, &c. to resign and give up Matters of indifferent Consequence; and gives this as a Reason ὥσπερ 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*

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. Quaest. 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 Prusaeensis.*

6. It is in the Discourse of *Callias* to the *Lacedemonians: Καὶ σωφρόνων μὲν δῆ, &c. Hist. Graec. Lib. VI. Cap. III. § 4. Edit. Oxon.*

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, ¹ 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 sally 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 Tenderness 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. Caesar, that he was never forgetful of any Thing but Injuries. Livia, in her Discourse to Augustus,*

^a *De Clement. l. 1. c. 20.*

^b *Orat. pro Ligar. c. 12.*

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.*

^c Lib. 55.
p. 643. Edit.
H. Steph.

in ^c *Dion*, speaks thus, *Τοὺς ἀρχοντας, &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, *ὅτι οὐκ, &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.*

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.* <494> 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.

^e *Dried. de*
Libert. Christ.
l. 2. c. 6.

^f *De Clement.*
l. 2. c. 7.

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.

IV. 1. Besides it often happens, that it is ¹ 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.*

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 Aedui, 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.

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

IV. *A Prince is often to decline going to War, both for his own and his Subjects Safety.*

^a *Plut. in Vit. Camill.*

^b *Procop. Vandal. l. 2. c. 5. Goth. l. c. 3.*

^c *Geograph. l. 7. p. 462. Ed. Amst. (301 Ed. Paris.)*

IV. (1) PROCOPIUS, *Goth. Lib. II. Cap. VI.* says, that the *Goths* addressed themselves to *Belisarius* in the following Manner, ὅταν δὲ αὐτὰ, &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. Numae*, 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 Aeduos, &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. Boecl.)* GROTIUS.

Hatred or Disrespect to his Person. And what ⁴ *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 ⁵ *Livy, not only of your own Strength, but of the Power of Fortune, and the common Hazards of War. And* ⁶ *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* <495> *two Sorts, either an Advantage or a Possibility.* Which Comparison has these three ³ following Rules for its Direction.

4. Ὅταν γὰρ ἔλθῃ, &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 *STOBAEUS*, (*Florileg. Tit. L.*) expresses it a little differently from the Terms in the Original.

V. (i) These subordinate Ends may be considered as Means, with Regard to the last End.

2. *Cap. VII. p. 705. D. Vol. I. Edit. Paris.*

3. See an Explanation of these Rules in *PUFENDORF, Law of Nature and Nations*, B. I. Chap. II. § 7.

2. The *first* is, that if the Matter under Consideration appear, morally speaking, to be as much disposed 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 Expression, ⁴ *When the Good hoped for is less than the Evil apprehended, it is better to make Peace.* *Andronicus Rhodius*, in his Character of a Man of Bravery, says, that ^a *He will not expose himself to Danger upon every slight Occasion, but when he has Reasons of the last Importance for it.*

^a *Paraphr. in Ethic. Nicom.*
l. 4. c. 5.
p. 219.

3. The *second* is, that if the Good and the Evil which may possibly result from the Thing in dispute 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 seem disproportionable, and the Disposition of the Affair in Hand to produce the one or the other, no less disproportionable, we may still venture upon it, ⁵ if its Disposition to produce Good, compared with its Disposition to produce Evil, does more considerably exceed that, than the Evil itself, compared with the Good, exceeds the Good; or if the Good compared with the Evil, is more considerable than the Disposition of the Thing to produce Evil, compared with its ⁶ Disposition to produce Good.

5. *Cicero* establishes some Maxims which are not indeed so exact as the Rules we have laid down, but which express the same Thing in a more plain and familiar Way, when he advises us to ⁷ *Take Care not to thrust ourselves into Hazards and Difficulties, where there is no Manner of Occasion for it, there being no greater Folly upon Earth than such a Rashness: And therefore, in Attempts of any Danger, we should imitate the Practice of skilful Physicians, who to their Patients that are but a little indisposed,*

4. [*Orat. I. De pace*, Vol. II. p. 63. B. Edit. P. Steph.]

5. *Narses* makes a very wise Use of this Rule in *PROCOPIUS*, *Gothh.* Lib. II. (Cap. XVIII.) *GROTIUS*.

6. I have observed, in my Notes upon *PUFENDORF*, at the Place referred to *Note*. 3. that in the Original there is *comparata ad malum*, for *comparata efficaciae ad malum*. This Omission had been in the first Edition, and was suffered to pass, amongst other Faults of the like Nature, in all subsequent Revisals and Editions. But I have restored the Text, as the Author's Thought and Intention required.

7. *Sed fugiendum etiam illud, &c.* *De Offic. Lib. I. Cap. XXIV.*

administer very gentle Medicines; but in desperate Cases are forced to have Recourse to desperate Cures. It is Madness to wish for a Storm when we enjoy a Calm; but it is a wise and prudent Part, when a Storm is come, to use all Means to remedy it, especially, if the Good to be obtained by dissipating it is greater than the Evil that results from the Trouble.

6. And in another Place, ⁸ *Where no great Advantage can accrue to us, if we meet with Success, and the least Miscarriage may be fatal, what need we run any Risque at all? Dion Prusaensis, in his second Tarsensis, delivers himself thus, ἔστω δεινόν, &c. Suppose this be an unhandsome and unworthy Treatment of us: We must not however, tho' our Usage be unjust, by our struggling and contentious Humours expose ourselves to farther Inconveniences. And afterwards, ὥσπερ οἶμαι, &c. As we endeavour to shake off those Burdens, the Weight of which is so great that we are not able to bear it; so when we have Shoulders answerable to our Load, and we are loaded with such Things that we must either stand under them, or something more intolerable, we in this Case make ourselves as easy as we can.* ⁹ *When our Fears, says Aristides, are greater than our Hopes, we ought not to expose ourselves to the Danger.*

VI. An Example directing us in our Consultations about Liberty and Peace, when it is to save a State from utter Ruin and Destruction.

VI. 1. Let what ¹ *Tacitus* relates, that the States of *Gaul* consulted about, *Whether they should chuse Liberty or Peace*, be a Precedent for us in this Affair. By Liberty is meant Civil Liberty, that is, a Right of governing themselves by their own Laws; which Right, in a popular State, is full and absolute, but in an Aristocracy is something limited, especially in such a-one where no Citizen is excluded from Offices. But by Peace we are to understand such a-one, as by preventing the <496> War, prevents the utter Ruin of the whole State; that is, as *Cicero* illustrates this Question, in a *Greek* Passage, εὖν, &c. ² *If the State be in Danger of being entirely undone.* As when, suppose, having examined and considered

8. *Ubi enim ἐπίτευγμα, magnum, &c.* Lib. XIII. Epist. ad Attic. XXVII.

9. *Orat. Sic.* II. Vol. II. p. 52. D.

VI. (1) The Passage is recited above *B. I. Chap.* IV. § 19.

2. This Passage from *CICERO*, is quoted in the Place referred to in the foregoing Note.

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 Slav'ry 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.*

3. LUCAN says this,

*Non tamen ignavae, post haec 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 *Caesar*. This is it, with that which precedes,

*Nec pavet hic populus pro libertate subire
Obsessum Paeno gessit quod Marte Saguntum.
Lib. III. ver. 349, 350.*

Yet is it a Conduct very far from deserving any such Commendation, no more than the Means that lead to it.

^c See St. Austin, *De Civit. Dei*, l. 22. c. 6.

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 παραστήμασιν, &c. That* ⁷ *with greater Courage than Prudence they had drawn upon themselves the entire Ruin of their Country.* <497>

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. Graec.* Lib. I. Cap. III. § 12.) *PRO-COPIUS* observes, that Men do not commend those who make Death their Choice, whilst there is any Hope that appears greater than the Danger. *Gotthic.* Lib. IV. (see *Hist. Misc.* Cap. XII. in *Bessas'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 certae 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 for it; no Ways warned by the Fate of the unhappy *Thebans*. (Lib. XVIII. Cap. X.) *GROTIUS.*

4. And *Plutarch*^d pronounces against *Cato* before mentioned, and *Scipio*, who after *Caesar's* Victory at *Pharsalia*, would not submit to him, *Αἰτίαν ἔχουσιν*, &c. that *They were highly to blame for destroying so many brave Men in Africa, without any Occasion for it.*

^d *In vit.*
Othon.

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 overboard.*

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

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 Instit.* tract. 1. c. 102.

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.

Misery for such Reasons. *Livy* ¹ 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.* I.

*Let the Soldier wear
No other Arms than what defensive are.*

VIII. *War not
to be engaged
in but out of
Necessity.*

VIII. The ¹ 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.* Which ⁴ *Aristides* thus explains, *Τότε χρῆ,* &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,* says ⁵ *Tacitus*, to

VII. (i) *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. (i) 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,

*Dî Jovis in tectis iram miserantur inanem
Amborum, & tantos mortalibus esse labores.*

[IRAM MISERANTUR INANEM.] *Generaliter dicit omnem iram bellicam*, &c. In *Aeneid.* 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, & saeviora 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.

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 (as ⁷ Livy speaks) Peace <498> 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. 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. Aemilius Paulus ³ used to say of an Engagement, that We should never fight, ⁴ but in Cases of extream

IX. Or when there is an important Reason, joined with a very favourable Opportunity.

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 the Yoke of the Romans: *Rebelle, 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 Caesar and Pompey, *Depugna, inquis, potius quam servias. Ut quid? Si victus eris, proscribere? 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. *Praelium quidem aut bellum suscipiendum omnino negabat, nisi quum major emolumentum spes, quam damni metus ostenderetur.* Suetonius, in August. Cap. XXV.

2. *Idem [Scipio Africanus] negabat aliter cum hoste configi debere, quam si aut occasio obvenisset, 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. Aemilium Paulum, nimis bonum imperatorem signis collatis non decertare, nisi summa necessitudo, aut summa ei occasio data esset.* Aulus Gellius, Noct. Attic. Lib. VII. Cap. II. Num. 2.

4. PLUTARCH, in his *Gracchus's*, Οὐ γὰρ ἄνευ 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 δεῖν ὅπλα βασιλείᾳ κινεῖν, ἕως εἰρηνεύειν ἑξόν, *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, or of some very favourable Opportunity. What I have said ought especially to be observed, when there is a Prospect of gaining our Point⁵ by the Terror and Rumour of our Preparations, with little or no Hazard on our Side. This was *Dion's* ^a 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 *Diod. Sicul.*
l. 16. c. 17.

X. *The Miseries
of War dis-
played.*

X. 1. 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

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 as 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 victoriae genus) terrore perdomuit* [*Spurinna*] *Lib. II. Epist. VII. Num. 2.*

X. (1) *Vit. Camill.* p. 134. B. Vol. I. *Edit. Wech.*

2. *Quorum malorum*, [quae ex bello nascuntur] &c. *De Civit. Dei, Lib. XIX. Cap. VII.*

3. The *Lacedemonians* say, in an Harangue extant in *DIODORUS SICULUS, Lib. XIII.* Θεωροῦντες 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*, Τὶ οὖν φήσει, &c. *If any one says to me, Has not Rome improved by Wars? He asks me a*

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, < 499 > 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, τῆς τοῦ πολέμου, &c. that Tho' there were no Injustice in a War, yet the very Necessity of it is deplorable. And again, φαίνεται, &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

^a Numb. xxxv.
Deut. xix.

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, Οὐκὼν ὃ 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.

4. Belligerare, malis videtur felicitas, bonis necessitas. De Civit. Dei. Lib. IV. Cap. XV.

5. (Dissert. XIV. p. 146. Edit. Davis.)

6. Quae (Clementia) alieno sanguini, tanquam suo parcat, &c. Epist. LXXXVIII. p. 390. Edit. Gron. maj.

7. AELIAN. Var. Hist. Lib. IV. Cap. XI.

^b 1 Chron.
xxviii. 3.

^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.*

^c Basil. *ad*
Amphil. ii. 13.
Zonar. *Niceph.*
Phoc. vol. 3.

8. Οὐκ ἐπιτρέπει, &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 *Caesar* the Dictator, 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.

*Of the Causes for which War
is to be undertaken on the Account of others.*

I. 1. Above, 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.

I. *War may be justly undertaken by a Prince for the Interest of his Subjects.*

^a B. i. chap. 5.

2. But our main and chiefest Care should be, ¹ for those ^b who are under our <500> 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 hearing that any Roman Citizens had been injured, any Master of a Vessel detained, or any Trader plundered.* The same Ro-

^b *Navar.* l. 24. c. 18.

^c *Joshua* x. 6.

I. (1) See PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VI. § 14.

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 saepe, mercatoribus, &c.* Orat. pro Leg. Manil. Cap. V. *Quot bella majores nostros & quanto, &c.* In Verr. Lib. V. Cap. LVIII.

mans, 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.*

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,

^a Soto, *De Just. & Jure*, l. 5.
qu. 1. art. 7.
^b *Controv.*
Illust. l. 1. c. 13.

4. *Quandoquidem*, inquit [princeps legationis *Campanorum*] *LIVY*, *Lib.* VII. *Cap.* XXXI. *Num.* 3.

5. *Erat foedus cum utrisque*, &c. *Lib.* 1. *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, *Κρεῖσσον εἶναι*, &c. *Judging it much better for a Few, than an immense Multitude to suffer.* (Vol. II. in *Mich. Rangab.*) GROTIUS.

upon their Assurance of Security on *Caesar's* Side, which Act he very justly censures.

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.

^c Ubi supra.

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 <501> 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 *Praxitheia*, in *Euripides's* *Erectheus*, ⁶ designs by saying,

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.

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 Pretexts 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 Mosis*, Lib. I. (p. 652. B.) In the same Place are other Things well worthy of being read. GROTIUS.

Ἐπερ 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.*

^d *Diod. Sicul.*
l. 17. c. 15.

^e See *Apollod.*
Biblioth. l. 3.
c. 14. § 8.

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.*

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

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. *Quae vos rabies, inquit, agitat, &c.* Lib. XLV. Cap. XXVI. Num. 8.

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 <502> 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* ^g 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.

^f *Lessius*, l. 2. c. 9. Dub. 7.

^g *Plutarch*, in ejus vita, p. 749. t. I. Edit. Wech.

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*

IV. *That we may lawfully undertake a War in behalf of our Allies, whether the Alliance be equal or unequal.*

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 DIOGENES 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 in AELIAN, *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.

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.

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 ^a *Romans* for having the *Grecians* Judgment upon their War against *Nabis*. But we may add here that an ⁴ 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.

^a Liv. l. 34.
c. 22.

V. And also for
our Friends.
^a Fr. Victoria,
De Indis, Part
2. n. 17. Cajetan.
2. 2 Q. 4. Art. 1.

V. ¹ A third Reason for War is the Protection of our ^a 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*

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:

Ἀνδρὶ φίλῳ θνήσκοντι παρὸν πέλας οὐκ ἐβοήθεις.
Οὐ θεμιστεύσω περικαλλέος ἔξιθι νηοῦ.

GROTIUS.

This Oracle is in AELIAN, *Var. Hist.* Lib. III. Chap. XLIV.

^b took up Arms in behalf of his Kinsman *Lot*. And the ² *Romans* charged ^b *Gen. xiv.* 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. <503>

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. 1. c. 5.

*The Rocks Protection to the Beasts afford,
The sacred Altars to the trembling Slaves;*

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. *Geograp.* 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. (1) *Homo in adjutorium mutuum generatus est.* De Ira, Lib. I. Cap. V.

2. "Εχει γὰρ καταφυγὴν, &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.

*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. *Yet it may
be let alone
without any
Crime if one's
afraid for him-
self; or that he
must kill the
Aggressor.*

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 *Aegyptian* 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 forsook 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*

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. LXXVII. 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 *Arsaces*, King of *Persia*: *Omnes qui secundis rebus, &c. Lib. IV. Num. 2.*

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 sollicitated to, be a Thing that is just, safe and honourable, or whether it would not be a Disgrace to them to comply.

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. <504>

^a Lessius, l. 2.
c. 4. Dub. 15.

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 *Heraclidae*. ¹

VIII. *Whether that War is just which is made for the Defence of another's Subjects, explained by a Distinction.*

Δίκαιοι δ' ἑσμεν, &c.

*We, who this City do inhabit, can
Ourselves dispense our Justice.*

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. (1) The Herald *Copraeus* demanded on the Part of *Eurystheus* the *Heraclidae* 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.

Nor do the following Verses imply any Thing else:

^a *Ex Euripid.
Frag. Phoenic.
apud Barnes,
v. 19, 20.*

^a *That Sparta beautify which is your Share,
Upon Mycene I my Care shall fix.*

^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 *Aeneid. l. 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. co-
ron. v. 1328. &
seqq.*

^e *The Rule and Custom of the Gods is this:
That none must e'er another's Will oppose.*

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

2. *Qui [Poetae] 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. ἀπάρχουσιν, &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.*

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.

^f *Fr. Victor.*
De Ind. rel.
n. 15.

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 <505> of, the ⁹ Right of human Society shall not be therefore excluded. Thus ^g *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.

^g *Victor.* De
Indis. Rel.
p. 2. n. 13.

^h See another
Instance in the
History of
Pepin, *apud*
Fredegar.
in fin.

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

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. Lips.

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.

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.

ⁱ B. I. c. 4. 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. *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. I. § 10 circa fin.*

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.

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.

Which ¹ *Plato* proves from *Tyrtaeus*. And this is the very Thing that *Philip* ² <506> objected to the *Aetolians*; and *Dionysius Milesius* censured the *Arcadians* for in the following Terms, ³ *Wars become a Trade, the*

IX. (i) *Quod Plato ex Tyrtaeo 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 *TYRTAEUS* 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: Πιστὸς μὲν γὰρ καὶ ὑγιής, &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 διαβάντες, by which, as *HENRY STEPHENS* observes, he alludes to the two following Verses of *TYRTAEUS*, which he explains in Terms not very poetical:

Ἀλλά τις εὖ διαβάς μενέτω ποσὶν ἀμφοτέροισι
Στηρικθεὶς ἐπὶ γῆς, χεῖλος ὁδοῦσι δακύν.

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 *TYRTAEUS* 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 *Aetolians* 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 *Etolians* 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 1. And add here what the late Mr. *BAYLE* says of the *Swiss* in the Article *Bullinger* of his *Diction. 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 κρινομένοις ἐπὶ τῷ μισθοφορεῖν Ἀρκάσιω ἀγορὰ πολέμου, &c. This Omission

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 ἔνεκα τοῦ ζῆν ἐρχετ' ἀποθανοῦμενος,
Who to Support his Life to Death resorts.

sion 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 *Mantineæ,* 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. GROTIVS.

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 Shews of Gladiators:

Nunc caput in mortem vendunt & funus arenae.

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 θανάτον μισθοφόρος ὧ φίλτατε
"Ὅς ἔνεκα, &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 cogitaveris, vitâ parari ea, in quibus vita consumitur.* Quæst. Natur. Lib. V. Cap. XVIII. in fine, Lib. & Cap.

And ⁵ *Dion Prusaeensis* 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.*

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 <507> 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 Livelihood by fighting, that War was Peace to them, and Peace War.*

^c *Bellinus, De re militari, par. 2. f. 2. n. 4.*

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,*

5. *Καὶ τοὶ τί τοῦ 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:

*Aere dato conducta cohors, & bellica miles
Dona sequens, pretiosque suum mutare favorem
Suetus, & accepto pariter cum munere bello,
Hunc habuisse, dator pretii quem jusserit hostem.*

GUNTHER. *Ligurin.* (Lib. VII. p. 389. Edit. Raub.) GROTIUS.

7. STOBÆUS has preserved this Saying in his *Florilegium.* Tit. XLIX.

8. DIOD. SICUL. *Bibl. Hist.* Lib. XVIII. Cap. X. p. 632. Edit. H. Steph.

in St. ⁹ *Austin's Judgment, no Crime, but to bear Arms on the account of Booty is Wickedness with a Witness.*

X. *To bear Arms
for Pay only, or
for the meer
sake of Booty is
a Crime.*

X. 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.

9. This Passage is quoted before as St. AMBROSE's, *B. I. Chap. II. § 10. Num. 5. Note 17.*

*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.*
^a *Aegid. Reg. De Act. Super. Disput. 31. n. 80.*

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

III. *They must not take up Arms, tho' commanded, if*

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 Tyanaeus*, opposed the Edict of *Nero*, to prescribe Philosophy, with this Verse of SOPHOCLES, (*Antigon. Ver.* 456).

Οὐ γάρ τι μοι Ζεὺς ἦν κηρύξας τάδε.

This was not enjoined by Jupiter, (PHILOSTRAT. *Vit. Apollon. Tyan.* Lib. IV. Cap. XXXVIII. *Edit. Olear.*) GROTIUS.

they are per-
suaded that the
Cause is bad.

^a Fr. Vict. De
Jure Belli,
n. 22.

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, δεδιδάγμεθα, &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* ⁴ *in the LORD, <508> 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*

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. Potestat. circa Sacra*, Cap. V. § 5, 10, 11.

4. St. CHRYSOSTOM explains this Passage *in the LORD*, thus, τουτέστιν ἐν οἷς μὴ προσκρουσῇς Θεῷ, *That is in those Things you do not offend GOD by*. And in his Letter *ad Patrem infidelem*, οὐ γὰρ δὴ μικρὸς, &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 Laetum*, and in the fourth Canon of the first Council of *Nice*, according to the *Arabick Translation*. GROTIUS.

5. *Peccatum filiorum est*, Vol. IX. p. 237. C. Edit. Froben.

6. St. CHRYSOSTOM, 1 *Cor. vii. 24*. Καὶ γὰρ εἰσω, &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.

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 Precept⁷ 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. To⁹ Creon in Euripides making this Demand,

^b *De Idol.*
^c 15.

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.

^c *These Words are in Sto-baeus, and are part of a pretty*

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; τὰν τεταλμὲν οὐ δίκαιον ἐκτελεῖν;

ANT. Οὐκ, ἣν πονηρά τ' ἢ κακῶς τ' εἰρημένα.

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 Emperor'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 Mem-*

long Discourse,
in which the
Subject is
treated at large.
Florileg. Tit.
72. The Original is "Ὁσῆς,
&c. p. 458.
Edit. Gesner.
1549.

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.* And¹³ *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 <509> 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

ory. 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. Noct. 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 praestanda, etiam parentibus, &c. Declam. CCCXXXIII.*

14. PLUTARCH. *Vit. Demet.* Vol. I. p. 899, 900. Such was the Bond *Andronicus Comnenus* demanded of *Basilius Camaterus*, ἐκεῖνα ἐν τῷ ἀρχιερατένειν, &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.

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 except¹⁶ those Crimes which are of a very heinous and flagitious Nature, being apparently and in themselves wicked and detestable, as¹⁷ *Tully* speaks; or as¹⁸ *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

^d *Contr. Apion.*
I. 1. p. 1048, 1049.

15. *Horum antequam crimina, &c.* Lib. III. Epist. IX. (Num. 14. Edit. Cellar.) *TERTULLIAN* 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 caeditur, 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, quae 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 poena, 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] praeteritum 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

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 *Thebaean* Legion, which ^c we spoke of before; and in ²⁰ *Julian's* Soldiers, of whom St. *Ambrose* writes thus; *Julian the Emperor, tho' an Apostate, had Christian* <510> *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.

^c B. I. c. 4.
[§] 7. n. 9.
 & seq.

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. Quaest. 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.

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. Caus. XI. Quaest. 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 *Psalms cxxiv.*

5. It will amount to the very same Thing, if a Man is ²² persuaded ^f 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.

^f Victor. De Jure Belli, n. 23.

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.

IV. *What they must do if they are not satisfied, whether the Cause be good or bad.*

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 γοῦν 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 CUJACIUS 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. § I. GROTIUS.

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 τῆς ἀρετῆς ἀποαίρει δούλιον ἡμᾶρ

The Day a Man's a Slave he loses half his Wit.

And this other like it,

Ἡμισυ γάρ τε νόου, &c. <511>

Half understanding Jove allots to those

Whom he appoints to lead a servile Life.

And that which *Philo* uses:

Δοῦλος πέφυκας οὐ μέτεστί σοι λόγου.

⁵ *Thou'rt a Slave: Thou no Reason hast.*

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 γὰρ δοῦλος, ἐμψυχον ὄργανον· τὸ δ' ὄργανον, ἄψυχον δοῦλος, *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.

5. This Verse is in the Treatise of *PHILO Judaeus* intituled, *Every good Man is free*, p. 871. *D. Edit. Paris*. For the others, he has apparently taken the first from *LONGINUS*,

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

who quotes it as *HOMER's*, *Sect. XLIII*. That Rhetorician had a Passage of the *Odyssey* in View, *Lib. XVII. Ver. 322, 323.*

Ἡμῖν γάρ τ' ἀρετῆς ἀποαίνυται εὐρύοπα Ζεὺς
Ἄνέρος, εἶτ' ἂν μιν κατὰ δούλιον ἡμᾶρ ἔλησιν.

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 relictæ 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. Quaest. V. GROTIUS.*

^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. Vict. De Jure Bell. n. 32. Covar. Ad Cap. peccatum, part 2. § 10. n. 6.

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.*

^b *Quaest. Quod. l. 2. See Instances of other Authors, who follow this Opinion, in Lambert. Scaffenburgensis.*

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 alleges, 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 <512> commended, because,

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 *Caesar* and *Pompey*. *Pharsal. Lib. I. Ver. 126, 127*. The Reason he alledges for this Uncertainty is, that the Gods declared for *Caesar*, but wise *Cato* for *Pompey*:

——— *Magno se judice quisque tuetur:
Victrix caussa Diis placuit, sed victa Catoni.*

A Thought which has been censured with Reason, as too bold, and injurious to the Divinity.

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.

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,

^d *Bald.* ii.
Cons. 385.
Sotus, de det.
Secr. Membr.
3. q. 2. in
Resp. ad 1.

*Less criminal indeed Pothinus is
Than Anthony, for what he did he had*

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 pejor, quam causa Pothini:*

Hic facinus domino praestitit, 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 *Caesar*.

*His Master's Order for, but th'other's Fact
Was by his own Instigation done.*

Nor is that which some produce to the contrary of any great Importance; ^c 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.

^c *Victor. de
jure belli.
n. 25.*

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 <513> 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.*

19. But besides that, it may happen, as *BOECLER* observes, (*Diss. 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 Pretends 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.

21. ——— *Quae Danais tanti primordia belli,
Ede: libet justas hinc sumere protinus iras.*
Achilleid. Lib. II. ver. 332, 333.

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 *וַיַּחַרְבֵּהוּ*, *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 shall 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.

22. *Ite, alacres, tantaque, precor, confidite caussae.*

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 coeperit non virtutis magis, quam integritatis, esse victoria*, Cap. VII. Num. 2. Edit. Cellar.

25. Some strain the Word *הִנִּיכִיד*, *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 *Βούλομαι 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.*

^f *Aegid. Reg. de*
Act. supern.
Disp. 31. Dub.
5. n. 85. Ban-
nes ii. 2. qu.
40. Molina,
Tract. 2.
Disp. 113.

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. <514>

V. *That it is an*
Act of Clem-
ency and Good-
ness, in such a
Case, for a
Prince to dis-
pense with the
Service of his
scrupulous Sub-

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

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 *Ahab'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. (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.

in no Fault, if, when pressed with Poverty, and in extreme Want, he borrows Money from a griping 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

*jects, and in
the Lieu of it to
impose upon
them some
extraordinary
Taxes.*

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.

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 <515> 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; (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.

^a See B. iii. ch. 1. § 4.

4. *Contra Celsum*, Lib. VIII. p. 427. *Edit Cantab.*

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.

